THE 'INTERVENTION' LEGISLATION – 'JUST' TERMS OR 'REASONABLE' INJUSTICE? – *WURRIDJAL V COMMONWEALTH OF AUSTRALIA*

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> 'Law and the positivist concept of law ... reflect the cultural values associated with whiteness'.[1]

I Introduction

In this article I will argue that structural racism systematically disadvantages Indigenous peoples in the contemporary politico-legal environment. The present day situation concerning race relations in Australia is shaped by historical injustices towards Indigenous peoples.[2] As Chris Cunneen asserts, '[t]he relationships created between institutions of the nation-state and Indigenous peoples have been forged within the context of a colonial political process and a colonial "mentality".'[3] There is a serious problem with institutional racism in contemporary Australia and this has been substantially critiqued by Indigenous academics.[4] The most recent example of institutional racism is the Commonwealth Intervention which affects Indigenous Australians in the Northern Territory. It is three years since the Howard government instituted the Intervention along with accompanying legislation. Like its colonial forebears, the Intervention legislation was presented as benevolent,[5] but has actually resulted in discriminatory effects in terms of its consequences. Many contemporary politicians are skilled at 'Orwellian language'[6] when it comes to describing the effect of this legislation. 'Orwellian language' is 'language that means the opposite of what it says'.[7] Whilst purporting to benefit Indigenous people in the Northern Territory,[8] this legislation is, as Bob Brown strongly argues, an 'assault on the rights of Indigenous Australians'.[9]

This is the third instance within the space of a decade that the Federal Parliament chose to override the protections afforded under the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[10] It is difficult to see how Indigenous Australians will benefit from legislation that so strongly resonates with its assimilationist forebears. Although some communities have expressed support for government responses to crisis within their communities, there is still concern over the manner of implementation of the Intervention.[11] The lack of consultation resulted in widespread fear within Indigenous communities.[12] In assessing this legislation it is important to consider 'the view from the bottom – not simply what oppressors say but how the oppressed respond to what they say'.[13] In a recent independent consultation with Indigenous communities affected by the Intervention many Indigenous people expressed grave concern over numerous detrimental consequences brought about via the Intervention legislation.[14] These enactments have been presented as acts of benevolence, yet they gloss over detrimental consequences for Indigenous people in terms of disempowerment, the thwarting of self-determination and treatment that is an affront to human dignity.[15]

The legislation enacted in 2007 by the Howard government was allegedly in response to child sexual abuse in Aboriginal communities in the Northern Territory, yet there is no mention of 'children' and 'sexual abuse' within the legislation.[16] There is also no evidence to confirm that child sexual abuse has been redressed as a consequence of this very drastic and draconian legislation.[17] Arguably, the fraught issue of child sexual abuse has been used as an opportunity by the Federal Government to sweep away many rights of Indigenous people, reduce their autonomy and facilitate a demoralising dependence on government.[18]

Some aspects of the Intervention legislation were challenged in the case of *Wurridjal v Commonwealth*.[19] In this case the Indigenous plaintiffs were unsuccessful in their challenge and the 'colonial discourse'[20] of white benevolence was

upheld. Like all institutions, courts 'have their own cultures and powerful processes of normalising and naturalising practices, which can be exclusionary and discriminatory while at the same time appearing neutral and common-sense.'[21] This case reveals the function of Australian courts in sustaining an ongoing colonial paradigm which detrimentally affects the interests of Indigenous Australians. Australian courts have played an important role in producing a colonial narrative.[22] It is significant to consider how the courts function as an explanation and narrative of reality which is 'established as the normative one.'[23] This involves what Gayatri Spivak refers to as 'epistemic violence'.[24] It is a violence which is structured into the very fabric of the Australian legal system.[25] Parry similarly writes of 'imperialism's linguistic aggression'.[26] Derrida also illuminates the manner in which societies engage in 'conserving violence'.[27] Derrida explains that 'there is the distinction between two kinds of violence in law ... the founding violence, the one that institutes and positions law ... and the violence that conserves, the one that maintains, confirms, insures the permanence and enforceability of law.'[28] This 'originary violence'[29] can be seen in the colonial legal system of Australia which established itself through physical acts of aggression and now continues to legitimise such acts through 'conserving violence'.[30] Judy Atkinson asserts that colonisers have been reluctant to 'consider their actions, either morally or under their law, to be violence.'[31] Yet the denial that this is actually violence is yet another type of violence that Indigenous peoples have had to endure.[32] It is 'epistemic violence',[33] 'conserving violence',[34] and 'colonial violence'.[35] This violence perpetuates Australia's racist colonial legacy and ensures that Australia's Indigenous people remain gravely disadvantaged despite Australia's first world status.

II Protecting Children or Enforcing Assimilation? The 2007 Intervention/Invasion of Aboriginal Lands

The ideals of assimilation developed in the 1900s continue to cause problems for Indigenous communities. Although abandoned as official policy under the Hawke and Keating governments there was a resurgence of this type of thinking under the Howard regime.[36] Throughout the term of the Howard government there were numerous laws and policies developed and implemented which gave rise to concern about the direction for race relations in Australia. Howard began to gradually dismantle every progressive element of the previous Labor government, including their approach to remote Aboriginal communities which had more closely resembled self-management (although at times it had been inaccurately described as self-determination).[37] The Howard government wished to re-enliven our inglorious past with its aspirations for an era of 'new paternalism'.[38] 'Mutual obligations' became the catchcry of the Howard government in an effort to camouflage this wholehearted return to an agenda of assimilation.[39] The rhetoric of 'mutual obligations' led to 'a focus on practical measures to alleviate Indigenous disadvantage'[40] which the Howard government saw as a form of '"practical reconciliation"'.[41] These policies include obligations on the part of Aboriginal people to do things like wipe their children's faces in return for basic community services.[42] Inherent in this approach was an attitude that Indigenous disadvantage was largely caused by the failure of Indigenous peoples to assimilate and embrace the capitalist neo-liberal paradigm at work within Australia.[43] The Howard government was determined to shift 'responsibility', as they saw it, to ensure that Indigenous Australians had to comply with numerous responsibilities in order to obtain access to fundamental community services.[44] This shift towards 'mutual obligations' aimed to facilitate greater assimilation of Indigenous Australians into the mainstream.[45] The 'mutual obligations' policy was greeted with concern as it engaged in racist discrimination by subjecting Indigenous Australians to paternalistic obligations in order to get access to basic services that white Australians have access to purely because they are the 'mainstream'.[46] It was part of the colonial agenda to try to force Indigenous peoples to 'dissolve into whiteness'.[47] The rhetoric of 'mutual obligations' indicated a substantial shift backwards into assimilation style paternalism, yet it was just a precursor of worse things to come.

Towards the end of its term the Howard government shifted its focus away from land rights and self determination and chose instead to see the problems facing Indigenous peoples as being caused by violence and alcoholism within Indigenous communities.[48] Nowhere is this more evident than in the government's response to the Northern Territory Report on the problem of sexual abuse of children occurring within Aboriginal communities. In 2007 the Howard government decided that they would respond to the *Little Children are Sacred* report[49] with a military Intervention in the Northern Territory. The Intervention legislation enabled the government to use military personnel to take control of several Aboriginal communities in the Northern Territory.[50] The government used this research to bring about numerous

changes that had nothing to do with the concerns raised by the *Little Children are Sacred* report.[51] Jennifer Martiniello rightly points out that:

> The *Little Children are Sacred* report does not advocate physically and psychologically invasive examinations of Aboriginal children, which could only be carried out anally or vaginally. It does not recommend scrapping the permit system to enter Aboriginal lands, nor does it recommend taking over Aboriginal "towns" by enforced leases.[52]

The Howard government used the release of this report to bring about a variety of sweeping changes in an election year in an instance of blatant 'political opportunism.'[53] It used the emotionally charged issue of child sexual abuse to introduce radical reductions in Indigenous peoples' rights by the backdoor.[54] Despite the rhetoric of 'protecting' children, the action taken by the Federal government has been strongly criticised.[55] Although they did not actually respond to the numerous recommendations of the report,[56] they used the existence of the report as an opportunity to declare a 'national emergency' in order to ram through drastic legislation[57] which fundamentally eroded the rights of Indigenous Australians living in the Northern Territory. Yet, as Irene Watson so accurately points out, the 'emergency' facing Indigenous Australians was created from the first moments of colonialism.[58] The government underplayed their long adopted policy of 'deliberate inaction',[59] conveniently neglecting the fact that the 'national emergency' in relation to child sexual abuse in remote Indigenous communities has been, as Judy Atkinson rightly argues, a well-documented 'emergency' for at least 'twenty years'.[60] These factors were overlooked by the Howard government in drafting and implementing their racist legislative package to take control of Northern Territory lands, and they have continued to be ignored by the current Labor government who have chosen to continue the Intervention. It has been suggested that the action taken by the government had much to do with the desire to privatise Aboriginal lands and abolish community title.[61] Moreover there have been concerns that the Intervention could facilitate increased privileges for the mining industry at the expense of Indigenous peoples and the dumping of nuclear waste on Aboriginal lands.[62] The compulsory acquisition of Aboriginal lands has also paved the way for new infrastructure in the form of a railway from Adelaide to Darwin which provides 'easy access to shipping routes'.[63] These factors benefit non-Indigenous people yet they have not been acknowledged by government as part of the rationale for implementing the Intervention legislation. Instead the legislation has been portrayed as being unequivocally for the benefit of Indigenous people.

The response of the government focused on Indigenous communities as inherently problematic,[64] rather than situating the abuse in the context of colonial oppression since 1788.[65] In determining a course of action the government has divorced present-day violence from Australia's racist colonial legacy. Yet as Irene Watson argues, '[t]o view the contemporary crisis in Aboriginal communities without reference to the violent colonial history of this country is to look too simply at a complex and layered landscape.'[66] She explains:

> By sending in the troops to "clean up" remote Aboriginal communities in the Northern Territory this plan has failed to take account of the colonial conditions which have oppressed Aboriginal peoples for more than two centuries and caused the critical conditions under which many communities continue to struggle. ... The violence in Aboriginal communities has been a fact since early colonial days, a function of frontier violence, massacres, the inherent violence of the *Aborigines Acts* and all the violence that racist paternalistic legislation justified.[67]

Watson maintains:

> The violence in Aboriginal communities is also more a comment on the Australian government's management of the colonial project, than it is about the culture of the perpetrators of violence. As Aboriginal communities across Australia continue to decline, the gaze turns away from the poverty and dispossession of Aboriginal Australia to cultural profiling of the other as barbarian. ... So we return to the same old racial discourse we know so well, the one which provides the ideological basis that underlies the colonial foundations of the Australian state.[68]

Throughout the Intervention the Federal Government downplayed the significant proportion of non-Indigenous male offenders and painted a picture of Aboriginal men as 'drunken, child raping monsters.'[69] The legislative paternalism implemented via the recent Intervention legislation has relied heavily on 'the racist discourse of the primitive barbarian'.[70] Several aspects of this legislation have rightfully been condemned as continuing in the

same paternalistic vein as the assimilation legislation that facilitated the Stolen Generations.[71] It resorts to similar negative racial stereotypes of Indigenous peoples as a group who are incapable of caring for their children. It justifies extreme government action based on paternalistic notions of it being 'For their Own Good'.[72] This resonates strongly with the government rhetoric surrounding the 'welfare' legislation which authorised the destruction of family life for so many Indigenous people.[73]

The Intervention legislation was described by the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) as bringing about 'significant actual and potential negative impacts upon the rights of Indigenous people which are discriminatory'.[74] Like the 'protection' legislation which facilitated the Stolen Generations, the Intervention legislation has been created in a 'discourse of protection and problem-solving [and] is racially framed, directed and applied'.[75] This racist dynamic is not new. There has been a consistent pattern of racism in Australia. Much of this racism has been brought about with stated aims of assisting or protecting Indigenous peoples. As Cowlishaw explains, much racism

> is organically connected to processes which have a stated purpose of achieving social equity. Thus, practices which support racism are more commonly associated with the denial of racist beliefs than with the expression of racial hostility because essentialising racial categories are invoked and reproduced in various bureaucratic and institutional forums, even when the stated intention is to ameliorate racial inequality.[76]

This has frequently taken place with legislation affecting Indigenous Australians, for example, all of the 'welfare' legislation was of this vein. The Intervention legislation repeats this familiar colonial pattern of essentialising Indigenous Australians according to unfavourable stereotypes.[77]

The Intervention legislation has been couched in the language of national emergency. The language of national emergency can permit all kinds of evils if those evils can be defined by government as 'lesser evils'.[78] However, in carrying out these so-called 'lesser evils' our very humanity is at stake – the integrity and dignity of the oppressors is damaged as well as that of the oppressed,[79] and at some point in this process it becomes difficult to distinguish between the so-called evil of the targeted 'other' and the evil of government action taken to address it.

Since colonisation, federal and state governments have intervened in the lives of Indigenous Australians. This intervention has been disastrous on so many levels, initially causing and then exacerbating the trauma experienced by Indigenous peoples.[80] Judy Atkinson explains that '[g]overnment interventions into Aboriginal lives have been multiple, protracted and many-layered, and at various levels have acted as traumatising agents, compounding the agony of already traumatised individuals and groups.'[81] She wrote this before the Federal Government's 2007 Intervention which has involved the placement of Federal police and army personnel on Aboriginal lands, acts which have been referred to as the 'Invasion' by several Indigenous leaders.[82] Tragically little appears to have been learnt in terms of the devastation that colonial intervention brings to the lives of Indigenous Australians.

When it comes to issues confronting Indigenous peoples, Australian governments have engaged in high levels of scrutiny. It has been assumed that increasing surveillance would remedy the problems faced by Indigenous peoples. This has not proven to be the case. Indeed it is arguable that such high levels of scrutiny have contributed to more, rather than less, problems within Indigenous communities.[83] Such scrutiny would certainly raise the ire of non-Indigenous Australians were they subjected to similar government interference. The Intervention increases surveillance of Indigenous Australians.[84] Kelada explains that '[t]o put the laws into action require[s] instruments of surveillance which ensure Indigenous subjects are rendered constantly visible. The effect of such surveillance is an erosion of liberty, esteem and self-empowerment.'[85] This form of surveillance is a form of violence against Indigenous Australians.[86]

Part of this surveillance has involved quarantining welfare payments for Aboriginal people living in remote communities. Despite the Federal government recently maintaining that this aspect of the Intervention will be continued because it allegedly 'benefits' Indigenous people,[87] income management has provoked outrage and disgust by many of those adversely affected.[88] For example, in June 2009 the Prescribed Area People's Alliance, a collective of Indigenous communities affected by the Intervention, called for 'basic rights not Basic Cards'.[89] Those affected by the Intervention report the 'shame and humiliation' associated

with using Basic Cards.[90] The quarantine has affected all Indigenous people in prescribed communities regardless of whether they needed such 'assistance', regardless of whether the communities were dry communities, and regardless of whether the Indigenous people had children in their care.[91] Some Indigenous people adversely affected by this racist legislation[92] and policy described the situation as reverting back to the mission days of 'rations'.[93] They have been given a 'Basics Card' with a pin number which has four categories of permitted expenditure - 'clothes', 'food', 'health items' and 'hygiene products'.[94] These cards have been described as 'like dog tags'.[95] In some places there is only one shop which the government has liaised with to accept the cards, which has effectively dismantled competition and forced up the price of goods.[96] Those adversely affected by the legislation state that although the government claimed to be 'protecting' children, in practice the laws have been about controlling income and compulsory acquisition of land, effectively bringing back 'the mission days'.[97] They argue it has more to do with assimilation than 'protection'.[98] Yet a 2009 government report about the Intervention, *Closing the Gap in the Northern Territory*, refers to '[f]inancial management support services' being provided to Aboriginal 'customers whose income is managed',[99] with more illusory Orwellian language.[100] The report states that Northern Territory communities have benefited from income management.[101] Interestingly, the report relies on evidence provided by *stores* to maintain that Indigenous people are in favour of this new system of income management.[102] These stores have a vested interest in the operation of the income management system. By constructing this report into the effectiveness of this aspect of the Intervention, it is unfortunate that the government was influenced by hearsay rather than thoroughly consulting with Indigenous people adversely affected by the scheme. Indeed it is most lamentable that the government considered thorough consultation with those adversely affected by the legislation to be an unnecessary and undesirable cost in making its assessment.[103]

The Intervention legislation has been roundly criticised as paternalistic due to the lack of consultation with Indigenous communities.[104] It was rushed through Parliament with no allowance for consultation or collaboration with Indigenous Australians,[105] and 'Indigenous leaders from the NT condemned the rushed legislation'.[106] This legislation has been described as facilitating further genocide against Indigenous peoples.[107] The paternalistic character of this legislation ensures that no viable solution may be found to solve the problem of violence within some Indigenous communities. As Kelada astutely observes:

> A crisis or state of emergency which calls for a paternalist response is a crisis which self-perpetuates, bites its own tail and creates the destruction it supposedly responds to so diligently. This meets the criteria of fantasy as the solutions put forth are inevitably illusory – illusions of cleaning up, restoring order, containing chaos. To appreciate the complexity of fantasy is to become aware that fantasy needs this chaos to exist. It thrives upon representations of disorder and crisis to ensure its own survival as it is through the stimulus of fear and alarm that its own existence is validated as necessary and access to control and capital as the domain of the white paternalist figure remains protected.[108]

Kelada rightly argues that '[t]he need to wake up before continuing the cycle of harm is the real national emergency.'[109] The 'real national emergency'[110] is the continued government actions which perpetuate Australia's racist colonial legacy even as they do so in the name of 'protection'. Yet the Labor government has chosen to continue the Intervention,[111] regardless of the harm caused to Indigenous Australians by doing so,[112] and despite the fact that it has done little to address Indigenous disadvantage or prevent the abuse of children.[113] Indeed, government reports indicate that there has been an overall increase in substance abuse and several forms of violence since the Intervention commenced.[114] Bringing in the army has clearly not been the silver bullet solution the Howard government heralded it to be.

Curiously the Labor government has suggested that aspects of the Intervention can be retained as a 'special measure' under the *Racial Discrimination Act 1975* (Cth).[115] Yet, as Alison Vivian and Ben Schokman have argued so compellingly, the Intervention cannot be viewed as a 'special measure' because it is not proportionate, legitimate or necessary for the objectives of addressing child sexual assault.[116] They maintain that as far as the Intervention is concerned, 'a balancing of detrimental effect against attempted beneficial purpose demonstrates a net negative impact.'[117] As such the Intervention legislation cannot accurately be described as being for the benefit of Indigenous Australians. Special measures must be 'positive measures, implemented to advance the subject group and undertaken with their consent.'[118] Furthermore there is an inconsistency between the Intervention and the comments regarding special measures set out in *Gerhardy v Brown* where the High Court held that such policies must involve a

preliminary inquiry into the nature of what may legitimately be classed as measures for the 'advancement' of the particular group.[119] 'Prior consultation' with those affected is critical to the classification of action as a special measure.[120] Evidently this element is absent from the Intervention. Any consultation subsequently carried out with those from the affected communities cannot retrospectively transform the government's Intervention into 'special measures'.[121]

III *Wurridjal v Commonwealth of Australia*

On 2 Februrary 2009 the High Court handed down its judgment in response to the challenge to the constitutionality of certain aspects of the Intervention legislation, the *Northern Territory National Emergency Response Act 2007* (Cth) ('NER Act') and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('FaCSIA Act').[122] The Commonwealth had argued that this legislation was supported by s 122 of the Constitution and s 51(xxvi), which gives the Commonwealth power 'to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.'[123] In this decision, *Wurridjal v Commonwealth*,[124] the legislation was held by the majority to be constitutionally valid. The particular aspect of the Intervention that was under challenge in this case was government control over Aboriginal lands via the imposition of compulsory five year leases. The case did not deal with the compulsory quarantine of income, which is certainly one of the most oppressive and contentious aspects of the Intervention.

The challenge to the legislation had been based upon s 51(xxxi) of the Constitution; the argument was that the legislation amounted to an 'acquisition' of 'property' which had not been made on 'just terms'.[125] The first and second plaintiffs were Indigenous persons with a 'spiritual affiliation to sites on affected land in the township of Maningrida'[126] and the third plaintiff was an Indigenous corporation.[127] Of particular concern to the plaintiffs was s 31(1) of the NER Act, which granted a lease of land to the Commonwealth for five years of land amounting to 10.456 square kilometres, including several towns, such as Maningrida.[128] They were also concerned about s 35, which gives the Commonwealth the right to 'sublease, license, part with possession of, or otherwise deal with, its interest in the lease'.[129] Section 35(2) provides that the Commonwealth does not have to pay rent in relation to the leased land under s 31.[130] The plaintiffs argued that the government action amounted to an interference with the fee simple estate of the Land Trust, because the Land Trust lost possession of the land and income from the land throughout the five-year period of compulsory acquisition.[131]

The Commonwealth responded to the plaintiff's claims with a demurrer.[132] 'A demurrer is "the formal mode in pleading of disputing the sufficiency in law of the pleading of the other side"'.[133] The grounds relied upon by the Commonwealth in support of the demurrer were as follows:

> (a) The NER and FaCSIA Acts [were] not ... subject to the just terms requirement ...
>
> (b) Even if the Acts [were] subject to the just terms requirement, they provide for compensation constituting just terms ...
>
> (c) The property relied upon by the plaintiffs as having been acquired [was] not property within the meaning of s 51(xxxi) and alternatively [was] not property capable of being acquired or which [had] been acquired by the challenged Acts within the meaning of s 51(xxxi) of the Constitution.[134]

The demurrer was allowed. One element of the defence of the Commonwealth was that the legislation was supported by s 122 of the Constitution, the Territories power, and therefore did not need to comply with s 51(xxxi) relating to just terms compensation. An older authority, *Teori Tau v Commonwealth*,[135] had supported this proposition. However a majority of four overturned this aspect of *Teori Tau*, finding that s 122 was indeed subject to the s 51(xxxi) limitation.[136]

A The Majority Judgement

A majority held that the Intervention legislation did not infringe the 'just terms' compensation proviso.[137] This finding was somewhat inconsistent with the previous 'liberal construction' of s 51(xxxi).[138] French CJ commented that '[a]lthough broadly interpreted, acquisition is to be distinguished from mere extinguishment or termination of rights.'[139] 'Where a statutory right is inherently susceptible of variation, the mere fact that a particular variation reduces an entitlement does not make that variation an acquisition of property'.[140] French CJ concluded the Commonwealth lease 'was an acquisition of property' even though it can also be said to have a 'regulatory or other public purpose'.[141] Yet

French CJ held the NER Act did provide 'just terms' for any acquisition of property obtained by the Commonwealth.[142]

Gummow and Hayne JJ concluded the five-year lease acquired by the Commonwealth did not fetter 'the continued exercise of the entitlements of the first and second plaintiffs'.[143] They found it significant to highlight that the 'Emergency Response Act makes provision in s 62 for the determination of "a reasonable amount of rent" to be paid by the Commonwealth to a party such as the Land Trust'.[144] Gummow and Hayne JJ held that the terms under the legislation providing for 'reasonable compensation' meant that 'just terms' were provided,[145] stating:

> The operation of Pt 4 of the Emergency Response Act has resulted in an acquisition of the property of the Land Trust to which s 51(xxxi) of the Constitution applies. Section 60(2) thus renders the Commonwealth "liable to pay a reasonable amount of compensation" to the Land Trust. If the parties do not agree on the amount of compensation ... the Land Trust is empowered by s 60(3) to "institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines". ...
>
> The plaintiffs stigmatise s 60 as creating what are but "contingent" rights. That is not so. The section is in the well-recognised and preferable form whereby if the necessary constitutional fact exists (the operation of s 51(xxxi)) a liability is imposed by s 60(2) and jurisdiction is conferred by s 60(3). Section 60 is an example of prudent anticipation by the Parliament that its law may be held to attract the operation of s 51(xxxi) and of the inclusion of provision for compensation in that event, thereby avoiding the pitfall of invalidity. Moreover, the right to compensation is absolute if it transpires that s 51(xxxi) is engaged.
>
> The provision for payment of "reasonable compensation" ... satisfies the requirement of "just terms" with respect to the Maningrida Five Year Lease.[146]

They dismissed the concerns of the plaintiffs as raising 'false alarm'.[147] However, it is questionable whether 'reasonable compensation' truly amounts to 'just terms' or merely constitutes 'reasonable' injustice. Australian governments do not have a good record when it comes to determining what is 'reasonable' for Indigenous people. What colonists deemed 'reasonable' in their exchange of an entire continent for religion and some blankets was certainly unjust from an Indigenous perspective.[148] Thus the Indigenous people adversely affected by this legislation are understandably concerned about what level of compensation may be offered.[149] They have good cause to be concerned given what has been deemed 'reasonable' throughout Australia's racist colonial history. What has been considered reasonable has been associated with what Margaret Thornton describes as the 'Benchmark Man',[150] one who is 'white, Anglo-Celtic, male, heterosexual and within the bounds of what is considered to be physically and intellectually normal'.[151] These factors were deemed irrelevant by the majority judges. Indeed Gummow and Hayne JJ were at pains to emphasise that '[n]o different or special principle is to be applied to the determination of the demurrer to the plaintiffs' pleading of invalidity of provisions of the Emergency Response Act and the FCSIA Act because the plaintiffs are Aboriginals.'[152] They even went so far as to suggest that the adoption of such an approach would promote inequality,[153] conveniently ignoring the reality of grave inequality that led to the enactment and implementation of such racist legislation in the first place.

As is often the case with highly politicised litigation there were several concerns of the plaintiffs which were not given judicial consideration.[154] The plaintiffs argued, unsuccessfully, that the process providing for the Commonwealth's alleged 'reasonable compensation' was 'onerous, costly and time consuming ... without aid or protection'.[155] The plaintiffs were also concerned that the Commonwealth's provision under the Intervention legislation for 'reasonable compensation' was not 'just' because it did not take into consideration non-monetary 'terms'.[156] As noted by Heydon J:

> The plaintiffs submitted that "just terms" could require more than the provision of monetary compensation. An appeal was made to "the equitable maxim that one who suffers a wrong shall not be without a remedy, which applies where damages would be an inadequate remedy", and to cases recognising a right to the specific performance of contracts. The plaintiffs submitted that a particular example of the extension of "just terms" beyond monetary compensation might arise where the acquisition of traditional Aboriginal rights and interests in land was under consideration, in view of their "*sui generis* nature". ... The plaintiffs also submitted that the acquisition of sacred sites by the Commonwealth was not on just terms because it had failed to consider the consequences of interfering in the rights of the Aboriginal

> peoples concerned with sacred sites in circumstances where the interference may have been unnecessary for the Commonwealth's purposes.[157]

Heydon J stated '[t]he present case does not afford an occasion on which it is appropriate to consider these issues raised by the plaintiffs.'[158] It remains to be seen whether this interesting argument relating to a more expansive interpretation of the 'just terms' requirement is taken up by the High Court at some future point. The point raised by the Indigenous plaintiff about unnecessary interference with sacred sites during the Intervention was significant. An example of a situation where interference with a sacred site was certainly unnecessary for the Commonwealth's purposes occurred during the Intervention when 'workers built a toilet on a sacred site after failing to consult with the traditional owners.'[159] This is tragically metaphorical of the level of disrespect shown to Indigenous Australians throughout the Intervention.

Justice Crennan maintained that the case did 'not present an occasion on which it is necessary to determine the relationship between s 122 and s 51(xxxi) of the Constitution.'[160] She mentioned that s 51(xxxi) is a section which must be 'construed widely',[161] but is also subject to various limitations.[162] Interestingly, Crennan J had a subheading in her judgement titled 'History and context of the challenged provisions'.[163] Initially the author had hoped this might mean some engagement with the actual context of the legislation in terms of its somewhat controversial and politically opportunistic underpinnings.[164] Although Crennan J had indicated an interest in 'context', disappointingly, the context she chose to examine was the colonial narrative of benevolent whites assisting needy Aborigines. In short Crennan J privileged a Eurocentric version of events and accepted the government rhetoric disseminated in the Minister's Second Reading speech as an accurate indication of the legislation's purpose without further exploration of the events which led to its introduction.[165] She ignored the underlying racism which led to the introduction of this oppressive legislation. She did not examine the speech in terms of why it was written or what purpose it was written to serve.[166] Naturally, a government will claim to be enacting legislation because they see it as necessary or desirable. However, by refraining from undertaking a deeper analysis Crennan J ensured that fundamental issues which concerned the plaintiffs remained unaddressed. She went on to examine the Explanatory memorandum and the object section of the Emergency Response legislation, and as expected these conformed to the rhetoric of the Howard government claiming that this legislation was actually about child sexual abuse in Aboriginal communities.[167] Crennan J concluded that 'the possession and control of the Land Trust under its fee simple has been *adjusted temporarily* by the Commonwealth's lease under s 31(1) in relation to certain areas and in respect of certain dealings with the land under the Land Rights Act'.[168] Thus by Crennan J's reasoning there was no 'acquisition' of property as such, just a *temporary adjustment* of proprietary interests.[169]

Crennan J endorsed the paternalism set out in the Second Reading speech by concluding that the provisions were for the benefit of the plaintiffs because they were directed to addressing problems in the Aboriginal community:

> The challenged provisions (and the limited impairment of the fee simple which they entail) are directed to tackling the present problems by achieving conditions in which the current generation of traditional Aboriginal owners of the land can live and thrive. They are not directed to benefiting the Commonwealth or to acquiring property for the Commonwealth, as those terms are usually understood, nor are they directed to depriving traditional Aboriginal owners of any prior rights or interests, which are expressly preserved. The purposes of the challenged provisions are to support the current generation of traditional Aboriginal owners by improving living conditions quickly.[170]

In the course of her judgment Crennan J stated that the legislative intent of the Northern Territory *Land Rights Act* had been to allow Aboriginal owners of the land to 'live and thrive' and that '[c]learly, communities subject to the present problems cannot properly support traditional Aboriginal owners living in them or enable them to thrive.'[171] In doing so she was pointing out that the purpose of the *Land Rights Act* was not being carried out effectively. However, this is a poor rationale for upholding the validity of the Intervention legislation. There is a wealth of evidence to suggest that the Intervention legislation has no prospect of assisting Aboriginal communities to 'live and thrive'.[172] Chris Cunneen has long engaged in research indicating that increased government surveillance of Indigenous communities enhances rather than reduces problems.[173] Similarly Kelada has argued that increasing surveillance is simply part of the colonial monitoring of Indigenous peoples that continues a process of marginalisation and disempowerment.[174]

Kiefel J concluded that the NER Act did result in an acquisition of property. However, like French CJ,[175] she considered that the legislation contained provisions to satisfy the requirement of acquisition on just terms.[176] She agreed with the orders made by Gummow and Hayne JJ, including that the plaintiffs pay the costs of the Commonwealth.[177] Justice Kiefel also focused on the fact that the legislation had as its declared object the improvement of 'the well-being of certain communities in the Northern Territory'.[178] Ironically this ignored the fact that endorsing the paternalism underlying the legislation is hardly conducive to Indigenous peoples' well-being.

The *Wurridjal* decision has highlighted the ongoing racial tension that exists in Australia and the manner in which racially discriminatory laws continue to be both enacted by parliaments and upheld in the Courts when such legislation is challenged by Indigenous plaintiffs who are rightfully dissatisfied with the status quo.[179] The case also occasioned some tension on the bench, with French CJ commenting:

> The conclusion at which I have arrived does not depend upon any opinion about the merits of the policy behind the challenged legislation. Nor, contrary to the gratuitous suggestion in the judgment of Kirby J, is the outcome of this case based on an approach less favourable to the plaintiffs because of their Aboriginality.[180]

B The Dissenting Judgment of Kirby J

Kirby J had been at pains to consider the legislation in its political and historical context, as was his wont. He commenced his dissenting judgement by stating:

> The claimants in these proceedings are, and represent, Aboriginal Australians. They live substantially according to their ancient traditions. This is not now a reason to diminish their legal rights. Given the history of the deprivation of such rights in Australia, their identity is now recognised as a ground for heightened vigilance and strict scrutiny of any alleged diminution.[181]

He was alone in considering that the history of colonial deprivation warranted special scrutiny in the circumstances of this case. Nevertheless, he stated:

> History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion. The history of Australian law, including earlier decisions of this Court, stands as a warning about how such matters should be decided. ... This Court should be specially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.[182]

In Kirby J's estimation it was significant that the Intervention legislation required the express removal of the protections under the *RDA*, which amounted to a clear violation of Australia's international human rights obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.[183] He reasoned:

> If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no "property" had been "acquired". Or that "just terms" had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected.[184]

Justice Kirby emphasised the history of the High Court where there had been 'an expansive view of each of the critical expressions in s 51(xxxi) of the Constitution ... "acquisition", "property" and the requirement of "just terms".'[185] He even went so far as to say that in his view '"just terms" arguably imports a notion wider than the provision of monetary compensation, which is the most that the challenged laws offer for the disturbance of the Aboriginal property'.[186] Justice Kirby stated:

> The notion that the National Emergency Response legislation does not warrant scrutiny by a court at trial is counter-intuitive. This is particularly so given the timing and conceivable purpose of its enactment; its deliberately intrusive character; its unique and controversial features; its imposition upon property owners of unconsensual five-year leases that are intended to (and will) significantly affect the enjoyment of their legal rights; and the coincidental

> authorisation of other federal intrusions into the lives and activities of the Aboriginal peoples concerned.
>
> In its approach to the legal entitlements of the claimants in these proceedings, this Court must examine what has been done by the laws that they challenge. It must do so against the standards that it has previously applied, both in peace and in war, to non-Aboriginal Australians. Those standards appear to attract strong protections for property interests.[187]

In his view the demurrer should have been overruled so that the matter could proceed to trial.[188]

Kirby J, like some of the majority judges, referred to the *Little Children are Sacred* report, however unlike the majority judges who simply accepted that the legislation was a valid response to the report because the government Minister proposing the legislation claimed that it was, Kirby J noted that the government had failed to abide by the recommendations of the report regarding consultation with Indigenous communities.[189] He stressed that the Intervention legislation was 'a unilateral initiative of the federal government'[190] and emphasised that the matters addressed by the Intervention legislation were extensive.[191] Kirby J went on to stress that a 'vigilant approach' was required in response to the plaintiff's concerns.[192]

Kirby J pointed out that the declared motive of benevolence behind the legislation, which seemed to influence the decision-making of several in the majority, was no reason to diminish the rights of the plaintiffs.[193] Unlike other members of the Court who sought guidance from the Minister's second reading speech regarding the validity of the legislation,[194] Kirby J considered that it was quite irrelevant in making the determination.[195] He concluded the government 'authorised a remarkable ... intrusion' into the lives of Indigenous Australians because of their race and had engaged in a 'deliberate impingement upon their legal interests'. [196] Consequently, he held the plaintiff's had an arguable case on the issue of interference with their property, which warranted a trial.[197]

Kirby J was critical of the way in which the members of the majority chose to see the interests of the plaintiffs as a lessor form of entitlement, as 'no more than a statutory "right, title or other interest in land".'[198] He also pointed out that the approach being taken by the majority was contrary to the

> general principle that legislation that *could* be read as diminishing basic civil rights *will* ordinarily be read restrictively and protectively by the courts of this country. Legislation designed to protect such rights is ordinarily read beneficially. This is especially so where the legislation might otherwise be construed to diminish, or extinguish, the legal interests of [I]ndigenous peoples which, in earlier times, our law failed to protect adequately or at all.[199]

However this principle is classed as a secondary guide to legislative interpretation, and can be overridden by the purpose approach required by s 15AA of the *Acts Interpretation Act 1901* (Cth).[200] This allows Parliament's discriminatory purpose to be upheld. Even so, Kirby J stressed the importance of judicial scrutiny of legislation which detrimentally affects Indigenous people.[201] He argued that '[l]aws that appear to deprive or diminish the pre-existing property rights of Indigenous peoples must be strictly interpreted. This is especially so where such laws were not made with the effective participation of Indigenous peoples themselves.'[202]

C Critique of the *Wurridjal* Decision

Barbara Flagg has commented upon the reliance 'on primarily white referents in formulating the norms and expectations that become the criteria used by white decision-makers.'[203] Such criteria are then 'mistakenly identif[ied] as race-neutral' when they 'are in fact closely associated with whiteness.'[204] Relating this to the *Wurridjal* decision, white referents were used by the predominantly non-Indigenous parliament in deciding what could be deemed 'just' by way of diminishing the property rights of Indigenous Australians living in the Northern Territory. These norms and expectations then became the basis for the majority judges deciding that the Intervention legislation provided just terms for deprivation of Indigenous lands. Flagg explains that often 'unconscious discrimination ... takes the form of transparently white-specific criteria'.[205] This occurred in the judicial decision making of the majority judges in *Wurridjal*, who found that the terms of any acquisition by the Commonwealth in relation to the Intervention legislation were 'just'. The question must be asked though: according to whom and by what criteria? A myriad of factors were ignored in this declaration of just terms, such as the unjust and discriminatory processes by which this racist legislation was implemented, the fact that it only disadvantaged Indigenous Australians, and the Eurocentric notions of land valuation underpinning the

decision which are ignorant of the spiritual and emotional value of Indigenous lands to Indigenous peoples. Such Eurocentric notions of land assume that a monetary figure can justly compensate for loss of spiritual connection. Are 'just terms' purely to be based upon financial considerations inherent in a western accountancy model or is something more substantial required? I argue that the model applied to determine whether the terms of the acquisition were 'just' was culturally inappropriate. Adoption of a Eurocentric approach to just terms caused the Indigenous plaintiffs to experience substantive injustice and perpetuates Australia's racist colonial legacy.

Gayatri Spivak elaborates on the violence which is inherent in imperial processes and claims that colonial forces 'are at their worst when they are most benevolent'.[206] This is seen in the majority judgments where they refer to the benevolent and beneficial purpose of the legislation discerned from the Ministerial Second Reading Speech. The second reading speech functions as a colonial narrative which is repeated verbatim by many of the majority judges.[207] This occurred despite the well known controversy over the legislation. The majority judges quarantined from their analysis the contentious matter of 'benefit'[208] and chose instead to continue propagating the fiction that these laws were about benevolence rather than colonial control. They therefore contributed to the ongoing colonial narrative about benevolent colonisers and refused to see the colonial violence inherent in the Intervention legislation. The operation and implementation of the Intervention laws required critique. Instead the majority judges accepted the government proclamations of benevolence and such critique was an irrelevant consideration within the formalist framework of adjudication. Justice Kirby was the only member of the judiciary who actually referred to the *context* of the legislation in anything resembling a thorough manner, and substantive justice requires a contextualised approach to judicial decision-making.[209] Substantive justice requires sensitivity 'to the facts and context of the individual case, taking it as socially and culturally situated rather than as potentially reducible to some legally recognised norm.'[210] Although some of the majority judges do refer to context inasmuch as they state that the legislation has come into being in response to the *Little Children are Sacred* report,[211] they only refer to what the government *claimed* to be doing in enacting that legislation. They did not consider the 'the view from the bottom',[212] as advocated by critical race theorists, but rather endorsed the 'top down' approach of the Federal Government. In the act of adjudication the judges are engaged in 'the bestowing of legitimacy on one story rather than another'.[213] In *Wurridjal* the story of colonial benevolence is privileged over that of those detrimentally affected by the legislation. The majority judges did not examine the controversial aspects of the legislation. They accepted the Minister's word regarding the purpose of the legislation, endorsing the government claims. Instead of subjecting the challenged provisions to rigorous scrutiny they effectively endorsed Australia's ongoing racist colonial legacy. This decision reflects what Peter Fitzpatrick has written about law as 'a form of ... white mythology.'[214] The majority judges endorsed Australia's racist colonial mythology of benevolent whites rescuing colonised people from their barbarianism.[215] This case highlights how '[l]aw is created by value-laden subjects'[216] and shows how law is used to privilege the colonial narrative of benevolence at the expense of Indigenous perspectives about the detrimental consequences of the government's legislation and invasion of Indigenous communities.[217]

The *Wurridjal* case highlights the lack of effective constitutional protection for Indigenous peoples in the realm of property interests, community life, and rights of prior consultation. The outcome of the case is also contrary to article 32(2) of the *United Nations Declaration on the Rights of Indigenous Peoples* which stresses the importance of 'free and informed consent prior to the approval of any project affecting [the] lands or territories and other resources' of Indigenous peoples.[218]

D Post – *Wurridjal*

The response to the *Wurridjal* desicison was protest and entry into the High Court by a number of Indigenous people and their supporters.[219] Although the unsuccessful outcome was not entirely unexpected,[220] it is disappointing nonetheless to have yet another discriminatory exercise of Parliamentary power endorsed by the majority of the High Court.[221] The plaintiffs have now taken the matter before the United Nations to see if they can attain justice via the UN Committee on the Elimination of Racial Discrimination ('CERD').[222] The United Nations sent letters to the Australian government on 13 March 2009 and 28 September 2009 indicating their concern over the government's suspension of the RDA[223] and the incompatibility of the NTER with the requirements under the *International Convention on the Elimination of Racial Discrimination*.[224] The 2007 Intervention legislation is in clear breach of Australia's obligations under international

law, which prohibit racially discriminatory laws.[225] This has been confirmed by the Special Rapporteur on the rights of Indigenous peoples who recently visited Australia.[226] However in Australia's recent report to the Committee on the Elimination of Racial Discrimination the government claimed that 'the NTER and related legislation are "special measures" for the purposes of the RDA'.[227] The response of CERD to this claim is as follows:

> The Committee expresses its concern that the package of legislation under the Northern Territory Emergency Response (NTER) continues to discriminate on the basis of race as well as the use of so-called "special measures" by the State party. The Committee regrets the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies. (arts 1, 2, and 5).
>
> The Committee urges the State party to fully reinstate the Racial Discrimination Act, including the use of the Act to challenge and provide remedies for racially discriminatory NTER measures. It also urges the State party to ensure that all special measures in Australian law, in particular those regarding the NTER, are in accordance with the Committee's general recommendation No. 32 on Special Measures (2009).[228]

The CERD urged Australia to 'reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership.'[229] This determination by the UN, although not legally enforceable in Australia, may exert some political and moral pressure on the Federal government.[230]

The response of the Labor government to the *Wurridjal* decision was to seek a valuation of what would be a reasonable rent for the compulsory five-year leases.[231] The Federal government has started paying rent to 48 out of 64 Indigenous communities whose land has been compulsorily acquired under the Intervention.[232] Negotiations are underway in relation to those communities who are yet to receive rental payments.[233] This is interesting given that the Labor Party 'in opposition, supported, without any amendment, Howard's Intervention in the Northern Territory including the aspects that repealed the *Racial Discrimination Act*, the abolition of the permit system and the compulsory quarantining of all welfare payments.'[234] This reflects a reactive rather than a proactive stance to the issue. In some Indigenous communities the Labor government has taken an even more draconian stance than the Howard government, insisting that landowners give the Government lengthy leases of forty years in order to receive new housing.[235] The response of the Labor government to the Intervention legislation could have been more proactive. They could have, upon obtaining election, repealed the Intervention legislation and developed a program of assistance to remote Indigenous communities in the Northern Territory in genuine consultation with members of the affected communities. At the least they could have repealed the aspects of the legislation that clearly have nothing to do with protection of children and everything to do with consolidating colonial power.

Current amendments to the Intervention legislation developed by the Labor government[236] have been substantially criticised as failing to fully reinstate the *Racial Discrimination Act 1975* (Cth).[237] Proposed in November of 2009, the legislation extends the operation of the Northern Territory Emergency Response.[238] Although the government believes its new legislation reinstates the RDA,[239] others dispute this.[240] The Senate Community Affairs Legislation Committee has claimed that the legislation will reinstate the RDA and furthermore that such measures are 'special measures'.[241] Yet the Committee is simply echoing the Government's assertions about this.[242] As stated above, there are many issues regarding the Government's definition of 'special measures' that are yet to be satisfactorily addressed.[243] The amendments are likely to draw increased criticism. Challenges to the Intervention legislation under the RDA are likely to occur under the amendments.[244] One of the concerns with the amendments is that they may not cause the RDA to prevail where there is conflict between the RDA and the discriminatory measures under the amendments to the Intervention legislation.[245] The notion that the measures relating to land can be 'special measures' is particularly problematic given that s 10(3) of the RDA excludes land.[246] It is also concerning that the government intends to continue mandatory income management for Indigenous Australians in the Northern Territory for a further twelve months from July 2010.[247] The new scheme commenced in July 2010.[248] The government claims that the new legislation introduces a 'non-discriminatory income management scheme'.[249] The new scheme expands income management 'to people across urban, regional and remote areas'.[250] Under the new legislation Indigenous people still will be predominantly affected by the mandatory income management scheme

which suggests that the new legislation may amount to indirect discrimination.[251] The new legislation continues income management for the categories of 'disengaged youth', 'long-term welfare recipients', 'persons assessed as vulnerable', situations where there is 'referral by child protection authorities' and also allows for 'voluntary income management'.[252] It is expected that this will expand the income management scheme from 15,000 people to 20,000 people.[253] People may be 'exempted' from income management if they demonstrate what is considered to be 'socially responsible behaviour'.[254] Exemptions are also available to those 'full-time students, people with a sustained history of workplace participation, and parents who can demonstrate [what is considered by authorities to be] proper care and education of their children.'[255] The income management scheme raises obvious concerns given Australia's history of controlling and indeed confiscating the income of Indigenous Australians.[256] The income management scheme is estimated to cost around '$400 million over five years,'[257] money that arguably could be used more effectively to address disadvantage experienced by Indigenous children and families.[258] Whilst the legislation may well create more employment for those administering the scheme, it is questionable whether it will achieve the government's stated policy goals of securing advantage for Indigenous Australians. There is a dearth of credible evidence to support the government's contention that income management is effective in terms of addressing disadvantage and financial management capacity on the part of its recipients.[259] Thus far, no independent study has been undertaken which supports the government's claims. The Senate Community Affairs Legislation Committee has recommended that such an independent study be undertaken.[260] The proposed amendments to the Intervention legislation still leave many concerns that Indigenous people have unaddressed. The inadequacy of the response of the Labor government in relation to this critical issue has been disappointing and it remains to be seen whether they will effectively address or merely perpetuate Australia's racist colonial legacy.

IV Conclusion

Girogio Agamben has observed that 'a legal institution's truest character is always defined by the exception and the extreme situation.'[261] The Intervention was presented as an extreme situation requiring a national emergency response, yet the real emergency is the perpetuation of Australia's racist colonial legacy which permits such racist discriminatory legislation. If Australia's colonial legacy ought to have taught non-Indigenous Australians anything, it is that racist law *facilitates* trauma.[262] Racist laws also effectively *endorse* trauma. Law has a powerful legitimating role in society.[263] As Geoffrey Leane suggests, 'law determines as well as describes society'.[264] Likewise, Barbara Flagg claims 'legal doctrines do carry normative messages'.[265] The normative message being conveyed through the Intervention legislation is that it is perfectly acceptable to discriminate against Indigenous Australians and enact legislation to this effect. The normative message of the majority judgments in the *Wurridjal* decision is equivalent. Yet it truly is time for a 'new chapter' in Australian history, one that begins in earnest.[266] It is unacceptable for a government to perpetuate racial discrimination even if it does so in the name of 'protection'.[267] This is not to suggest that measures should not be taken to assist those Indigenous communities in the Northern Territory who are experiencing crisis. However such measures need to be taken *after* genuine and thorough consultation with those communities. Despite the government expressing a commitment to 'real consultation' with those affected by the Intervention,[268] many Indigenous people within the prescribed areas have expressed their dismay at the lack of adequate consultation.[269] The retrospective consultation of the Labor government has been described as 'nothing more than going through the motions in order to achieve a predetermined end.'[270] Nothing positive will be achieved without genuine collaboration. The government needs to address concerns of those actually living within these communities.[271] Calls for the government to modify the Intervention so that it genuinely complies with the *Racial Discrimination Act 1975* (Cth) have been protracted and numerous.[272] This would require more substantial amendments than what the Federal government has enacted or complete repeal of the Intervention legislation.

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1 Margaret Davies, *Asking the Law Question* (Law Book, 3rd ed, 2008) 298.

2 David Hollinsworth, *Race and Racism in Australia* (Thomson/ Social Science Press, 3rd ed, 2006) 47; Paul Coe in Colin Tatz (ed),

Black Viewpoints – The Aboriginal Experience (Australia and New Zealand Book Company, 1975) 108.

3 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001) 3.

4 For example (and this is by no means an exhaustive list) see Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253; Irene Watson, 'De-Colonisation and Aboriginal Peoples: Past and Future Strategies' (2007) 26 *The Australian Feminist Law Journal* 111; Irene Watson, 'From a Hard Place: Negotiating a Softer Terrain' (2004) 7(2) *Flinders Journal of Law Reform* 205; Irene Watson, 'Illusionists and Hunters: Being Aboriginal in this occupied space' (2005) 22 *Australian Feminist Law Journal* 15; Irene Watson, 'Indigenous Peoples' Law Ways: Survival Against the Colonial State' (1997) (8) *Australian Feminist Law Journal* 39; Irene Watson, 'Law and Indigenous Peoples: the Impact of Colonialism on Indigenous Cultures' (1996) 14(1) *Law in Context* 107; Irene Watson, 'Nungas in the Nineties', in Greta Bird, Gary Martin and Jennifer Nielsen, *Majah – Indigenous Peoples and the Law* (The Federation Press, 1996); Irene Watson, 'Power of the Muldarbi, the Road to its Demise' (1998) 11 *Australian Feminist Law Journal* 28; Irene Watson, 'Settled and Unsettled Spaces' (2005) 1(1) *Australian Critical Race and Whiteness Studies Association Journal* 40; Irene Watson, 'The Aboriginal State of Emergency Arrived with Cook and the First Fleet' (2007) 26 *Australian Feminist Law Journal* 3; Aileen Moreton-Robinson, 'The House that Jack Built: Britishness and White Possession' (2005) 1 *Australian Critical Race and Whiteness Studies Association Journal* 21; Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (2004); Aileen Moreton-Robinson (ed), *Sovereign Subjects – Indigenous Sovereignty Matters* (2007); Larissa Behrendt, *Achieving social justice: Indigenous rights and Australia's future* (2003).

5 The legislation enacted in 2007 by the Howard government allegedly in response to child sexual abuse in Aboriginal communities in the Northern Territory – the *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). While purporting to address a serious problem in Indigenous communities, the Howard government also used this legislation as an opportunity to sweep away rights for Indigenous peoples and quarantine part of their welfare payments. The aforementioned legislation applied this punitive approach to all Indigenous people within these communities, discriminating against *all* Indigenous people regardless of how responsible they were with finances, and regardless of whether they actually had child-care responsibilities; see SBS, 'Are They Safer', *Insight*, 18 March 2008. Several Indigenous people who appeared on this program said they were concerned over the lack of consultation in the Intervention process. Tom Calma (then Aboriginal and Torres Strait Islander Social Justice Commissioner) argued that it was a race based approach to child abuse being targeted only at Indigenous people – not the broader community as a whole where child abuse also takes place. He asserted that the suspension of the *Racial Discrimination Act 1975* (Cth) was very problematic and stated that the Intervention is a racist imposition on Indigenous peoples.

6 George Lakoff, *Don't Think of an Elephant – know your values and frame the debate* (Scribe, 2005) 22.

7 Ibid.

8 Commonwealth, *Parliamentary Debates,* Senate, 13 August 2007, 85 (Barnaby Joyce).

9 Commonwealth, *Parliamentary Debates,* Senate, 13 August 2007, 86 (Bob Brown, Tasmanian Leader of the Australian Greens). Some highlight that the reactions of Indigenous Australians to the Intervention legislation have been mixed, as identified by Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78, 85, however the author finds the arguments presented by those adversely affected by this legislative package particularly compelling, such as Barbara Shaw and Valerie Martin, who live in affected communities. Barbara Shaw and Valerie Martin, 'Talking up the Territory' (Speech delivered at Gnibi, Southern Cross University, 19 March 2009); see also the independent consultation by The Hon Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, *Will They be Heard? A Response to the NTER Consultations - June to August 2009*, November 2009, <http://www.childjustice.org/index.php?searchword=Will+They+be+Heard%3F&ordering=&searchphrase=all&Itemid=1&option=com_search>.

10 Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 333. Other instances include the *Native Title Amendment Act 1998* (Cth) and the *Hindmarsh Island Bridge Act 1997* (Cth).

11 Irene Watson, 'In the Northern Territory Intervention what is Saved or Rescued and at what Cost?' (2009) 15(2) *Cultural Studies Review* 45, 54; Rollback the Intervention, 'Statements/Reports', <http://rollbacktheintervention.wordpress.com/statements/>; Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9.

12 Alison Vivian and Ben Schokman, above n 9, 80.

13 Anthony Cook, 'Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, JR' in Kimberlé Crenshaw,

Neil Gotanda, Gary Peller, and Kendall Thomas, *Critical Race Theory – The Key Writings that Formed the Movement* (New Press, 1995) 90. The idea of considering the perspective of those most disadvantaged is likely to provide an appropriate safeguard to try to protect them from oppression by the majority.

14 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9.

15 Barbara Shaw and Valerie Martin, above n 9; Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9, 5.

16 Alison Vivian and Ben Schokman, above n 9, 80.

17 Irene Watson, above n 11, 52.

18 Barbara Shaw and Valerie Martin, above n 9.

19 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2.

20 Homi K. Bhabha, 'The "Other" Question', in Antony Easthope and Kate McGowan, *A Critical and Cultural Theory Reader* (University of Toronto Press, 2nd ed, 2004) 62.

21 David Hollinsworth, above n 2, 50.

22 Consider, for example, *Davis v The Commonwealth* (1986) 61 ALJR 32; *Williams v Minister, Aboriginal Land Rights Act 1983 (No 1)* (1994) 35 NSWLR 497; *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)* (1999) 25 Fam LR 86; *Williams v Minister, Aboriginal Land Rights Act 1983 (No 3)* (2000) Aust Torts Reports ¶81-578; *Cubillo v Commonwealth* (1999) 89 FCR 528; *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1; *Cubillo v Commonwealth* (2001) 112 FCR 455; *Kruger v Commonwealth* (1997) 190 CLR 1; *Kartinyeri v Commonwealth* (1998) 195 CLR 337; *Nulyarimma v Thompson* (1999) 165 ALR 621; *Members of the Yorta Yorta Aboriginal Community v Victoria* (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606; *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (2001) 180 ALR 655; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58.

23 Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post Colonial Studies Reader* (Routledge, 1st ed, 1995) 25.

24 Gayatri Chakravorty Spivak, 'Three Women's Texts and a Critique of Imperialism' (1985) 12(1) *Critical Inquiry* 243, 251 and 254; Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason* (Harvard University Press, 1999) 205; Gayatri Chakravorty Spivak, above n 23, 25.

25 Sheila Duncan, 'Law as Literature: Deconstructing the Legal Text' (1994) 5(1) *Law and Critique* 3, 3.

26 Benita Parry, 'Problems in Current Theories of Colonial Discourse' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post Colonial Studies Reader* (Routledge, 1st ed, 1995) 39.

27 Jacques Derrida, 'Force of Law: The 'Mystical Foundation of Authority', in Drucilla Cornell, Michel Rosenfeld and David Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 55.

28 Ibid 31.

29 Ibid 6.

30 Ibid 55.

31 Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002) 11.

32 Irene Watson, above n 11, 46.

33 Gayatri Chakravorty Spivak, above n 23, 25.

34 Jacques Derrida, above n 27, 55.

35 Irene Watson, above n 11, 48.

36 Gary Foley, 'The Australian Labor Party and the Native Title Act' in Aileen Moreton-Robinson (ed), *Sovereign Subjects – Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 139.

37 Sarah Maddison, *Black Politics – Inside the Complexity of Aboriginal Political Culture* (Allen & Unwin, 2009) 25 and 241.

38 Mark Metherell, 'No thank you, greets Abbott's call for new paternalism', *Sydney Morning Herald*, 22 June 2006, 3.

39 Aileen Moreton-Robinson, *Sovereign Subjects*, above n 4, 5.

40 Ibid.

41 Ibid.

42 Steve Pennells, 'Rules Unfair, say proud Mulan people', *The Age* (online), 10 December 2004 <http://www.theage.com.au/news/National/Rules-unfair-say-proud-Mulan-people/2004/12/09/1102182430767.html>; Sarah Maddison, above n 37, 9.

43 However, as Aileen Moreton-Robinson points out, 'there is no history of the government engaging in sustained economic development for Indigenous people; instead, there has been a history of exploiting Indigenous people's labour for the economic development of the nation.' Aileen Moreton-Robinson, *Sovereign Subjects*, above n 4, 11 and 6.

44 These have been brought about via Shared Responsibility Agreements. See Irene Watson, 'Legitimising white supremacy', *On Line Opinion – Australia's e-journal of social and political debate* (28 August 2007) <http://www.onlineopinion.com.au/view.asp?article=6277> 2.

45 Ibid 2.

46 Aileen Moreton-Robinson, *Sovereign Subjects*, above n 4, 5; Irene Watson, above n 44, 2; Steve Pennells, above n 42; Jane Robbins, 'Life after ATSIC: Indigenous Citizenship in an Era of Mutual Obligation' (Paper presented at APSA Conference, University of Otago, New Zealand, 2005) 10-11.

47 Irene Watson, above n 44, 2.

48 Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (Insight Publications, 2005) 24.

49 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Mere Mekarle – 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

50 Jennifer Martiniello, 'Howard's New Tampa – Aboriginal Children Overboard' (2007) 26 *The Australian Feminist Law Journal* 123, 126.

51 *'Little Children are Sacred'* Report, above n 49. The authors of this report were outraged by the response of the Howard government - see Rex Wild, 'An unfinished business', *The Age*, 11 September 2008, <http://www.theage.com.au/opinion/an-unfinished-business-20080910-4dsh.html>.

52 Jennifer Martiniello, above n 50, 123.

53 Ibid 123-124.

54 Ibid 123.

55 Irene Watson, 'The Aboriginal State of Emergency Arrived with Cook and the First Fleet', above n 4, 7-8; Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' (2007) 26 *Australian Feminist Law Journal* 95, 97 and 104; Odette Kelada, 'White Nation Fantasy and the Northern Territory "Intervention"' (2008) 4(1) *The Australian Critical Race and Whiteness Studies* ejournal 1, 1-9 <http://www.acrawsa.org.au/ejournalFiles/Volume%204,%20Number%201,%202008/Odette%20Kelada.pdf >; Goldie Osuri, 'War in the Language of Peace, and an Australian Geo/Politics of White Possession' (2008) 4(1) *The Australian Critical Race and Whiteness Studies* ejournal 1, 1-2 and 7-8, <http://www.acrawsa.org.au/ejournalFiles/Volume%204,%20Number%201,%202008/GoldieOsuri.pdf>; Barbara Shaw and Valerie Martin, above n 9; Geoffrey Robertson, *The Statute of Liberty – How Australians Can Take Back Their Rights* Vintage Books, 2009) 65; Irene Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) *Borderlands e-journal*, 3, <http:/www.borderlands.net.au/vol8no1_2009/iwatson_aboriginality.htm>; Richard Mohr, 'Response and Responsibility' (2009) 7(11) *Indigenous Law Bulletin* 15, 15-18; Nicole Watson, 'Of course it wouldn't be done in Dickson! Why Howard's Battlers Disengaged from the Northern Territory Emergency Response' (2009) 8(1) *Borderlands e-journal,* <http://www.borderlands.net.au/vol8no1_2009/nwatson_dickson.htm>; Raelene Webb, 'The Intervention – A Message from the Northern Territory' (2008) 7(9) *Indigenous Law Bulletin* 18; Peta MacGillvray, 'Aboriginal People the United Nations and Racial Discrimination: The Request for Urgent Action in the Northern Territory' (2009) 7(10) *Indigenous Law Bulletin* 6; Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9; 'NT Intervention "Creating Misery": Yunupingu', *ABC News*, 12 August 2009, <http://www.abc.net.au/news/stories/2009/08/12/2653839.htm>; Maria Giannacopoulos, 'The Nomos of Apologia' (2009) 18(2) *Griffith Law Review* 331, 345; Irene Watson, above n 11, 47.

56 Odette Kelada, above n 55, 7; Jennifer Martiniello, above n 50, 124.

57 The *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).

58 Irene Watson, 'The Aboriginal State of Emergency Arrived with Cook and the First Fleet', above n 4, 3.

59 Jennifer Martiniello, above n 50, 124.

60 Judy Atkinson, 'Remote Communities – What I would do', *Australian Policy Online*, 25 June 2007, <http://www.apo.org.au/commentary/what-i-would-do>, 1.

61 Irene Watson, 'Aboriginal Women's Laws and Lives', above n 55, 97; Irene Watson, 'Aboriginality and the Violence of Colonialism', above n 55, 3.

62 Jennifer Martiniello, above n 50, 123; Irene Watson, above n 11, 46.

63 Irene Watson, above n 11, 46.

64 Jennifer Martiniello, above n 50, 124; Irene Watson, 'De-Colonisation and Aboriginal Peoples', above n 4, 118. Cowlishaw also writes that non-Aboriginal Australians tend to focus on Aboriginal peoples as a 'problem population'. She explains how 'national attention' is directed towards 'the Indigenous population as an ever-present national problem.' Gillian Cowlishaw, *Blackfellas, Whitefellas and the Hidden Injuries of Race* (Blackwell, 2004) 246. I believe this pattern has grown into an almost religious national practice. Rather than acknowledging that the kinds of problems faced by Aboriginal communities are 'a consequence of destructive colonial struggles' (at 246) the problems facing these communities are generally considered to result from some deficiency or inferiority in Aboriginal peoples. However, she states that '[t]he "problem" population appears unwilling to accept the nation's diagnosis. Rejecting the proffered treatment of their ills could be seen as a way in which Indigenous people assert their autonomy from the state's suffocating solicitude.' (at 245-246)

65 Irene Watson, 'De-Colonisation and Aboriginal Peoples', above n 4, 118; Sue Stanton, 'Letter from Darwin' (2009) 8(1) *Borderlands e-journal*, <http://www.borderlands.net.au/vol8no1_2009/stanton_letter.htm> 5.

66 Irene Watson, 'Aboriginal Women's Laws and Lives', above n 55, 97.

67 Irene Watson, 'The Aboriginal State of Emergency Arrived with Cook and the First Fleet', above n 4, 7-8.

68 Irene Watson, 'Aboriginal Women's Laws and Lives', above n 4, 104.

69 Jennifer Martiniello, above n 50, 125. See also Sarah Maddison, above n 37, 198.

70 Irene Watson, 'Aboriginal Women's Laws and Lives', above n 55, 107.

71 Odette Kelada, above n 55, 4-6; Goldie Osuri, above n 55, 2.

72 Odette Kelada, above n 55, 7.

73 Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). See, eg, *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1897* (Qld); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1901* (Qld); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1927* (Qld); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1928* (Qld); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934* (Qld); *Aboriginals Preservation and Protection Acts 1939 to 1946* (Qld); *Aborigines and Torres Strait Island Affairs Act 1965* (Qld); *Aborigines Affairs Act 1967* (Qld); *Aborigines Act 1971* (Qld).

74 Human Rights and Equal Opportunity Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007) <http://www.aph.gov.au/Senate/Committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sublist.htm> [6].

75 Goldie Osuri, above n 55, 2.

76 Cowlishaw (1997) 177, cited in David Hollinsworth, above n 2, 63.

77 Irene Watson, 'Aboriginal Women's Laws and Lives', above n 55, 107.

78 George Lakoff, above n 6, 67-68.

79 Marilyn Lake, 'The White Man under Siege: New Histories of Race in the Nineteenth Century and the Advent of White Australia' (2004) 58(1) *History Workshop Journal* 41, 54.

80 Judy Atkinson, above n 31, 80-81.

81 Ibid 68.

82 Patricia Karvelas, '"Invasion" must end, say indigenous leaders', *The Australian* (online), 5 December 2007 <http://www.theaustralian.news.com.au/story/0,25197,22872208-5013172,00.html>; Peter Robson, 'Northern Territory Intervention: myths and facts', *Green Left Online*, 14 June 2008 <http://www.greenleft.org.au/2008/755/39009> 1.

83 Chris Cunneen, above n 3, 85-86.

84 Odette Kelada, above n 55, 4-5.

85 Ibid 5.

86 Ibid.

87 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory - January 2009 to June 2009 - Whole of Government Monitoring Report - Part One - Overview of Measures* (2009) 34-36.

88 Barbara Shaw and Valerie Martin, above n 9; Peta MacGillvray, above n 55, 8.

89 Prescribed Area People's Alliance Statement 18-19 June 2009, cited in Rollback the Intervention, above n 11, 12.

90 Senate Community Affairs Legislation Committee, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions], Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions] and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009*, 10 March 2010, <http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm> 51; Rollback the Intervention, above n 11, 26.

91 Barbara Shaw and Valerie Martin, above n 9; SBS, 'Are They Safer', *Insight*, 18 March 2008; Raelene Webb, above n 55, 18.

92 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

93 Barbara Shaw and Valerie Martin, above n 9.

94 Ibid. I saw one of these cards during this speech and their condescending icons showing government approved expenditure.

95 Ibid.

96 Ibid.

97 Ibid.

98 Ibid. See also Interview with Gary Foley by Crystal McKinnon, 'Duplicity and Deceit: Rudd's Apology to the Stolen Generations', *The Koori History Website*, December 2008 <http://www.kooriweb.org/foley/essays/essay_28.html>.

99 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 34.

100 George Lakoff, above n 6, 22. This Orwellian language is continued in the 2010 report: Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: Monitoring Report: January – June 2010 Part One*, 6 and 13.

101 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 34.

102 Ibid 35.

103 Chris Graham, 'Special NIT Investigation: Leaked advice reveals

Rudd government's deceit on NT intervention consultations and Alice Springs town camps land grab', *National Indigenous Times* (online), 25 June 2009 <http://www.nit.com.au/story.aspx?id=18137>.

104 Odette Kelada, above n 55, 5.

105 Ibid.

106 Ibid.

107 Ibid.

108 Ibid 6.

109 Ibid 9.

110 Ibid.

111 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 4.

112 Peta MacGillvray, above n 55, 8; Rollback the Intervention, above n 11; Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9.

113 Sarah Maddison, above n 37, 16; David Curry, 'Intervention a "$1b disgrace"', *The Canberra Times* (online), 8 November 2009 <http://www.canberratimes.com.au/news/local/news/general/intervention-a-1b-disgrace/1670991.aspx>; Yuko Narushima, 'NT intervention failing to make a difference: report', *Sydney Morning Herald* (online), 31 October 2009 <http://www.smh.com.au/national/nt-intervention-failing-to-make-a-difference-report-20091030-hpr8.html>. Indeed, based on recent national reports, a greater percentage of non-Aboriginal children are at risk of abuse than children in remote Aboriginal communities. Yet, the army is not dealing with this mainstream crisis and non-Aboriginal people are not having their income managed and their property rights removed. See Don Watson, 'The lives sent down the drain', *The Age* (online), 5 July 2008, 3 <http://www.theage.com.au/national/the-lives-sent-down-the-drain-20080704-31xy.html>.

114 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 12-13 and 31-32; Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: Monitoring Report: January – June 2010 Part Two*, 58-62.

115 Sarah Burnside, 'Macklin's Special Treatment', *New Matilda*, 4 November 2009 <http://newmatilda.com/2009/11/04/macklins-special-treatment>; Alison Vivian and Ben Schokman, above n 9, 78.

116 Alison Vivian and Ben Schokman, above n 9, 97. They base their argument on General Recommendation 32 of the *Committee on the Elimination of Racial Discrimination*, Seventy-fifth session, August 2009.

117 Alison Vivian and Ben Schokman, above n 9, 88.

118 Ibid 183.

119 *Gerhardy v Brown* (1985) 159 CLR 70; see Alison Vivian and Ben Schokman, above n 9, 86; Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 45.

120 General Recommendation 32 of the *Committee on the Elimination of Racial Discrimination*, Seventy-fifth session, August 2009, reproduced as Annexure A in Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9, 41.

121 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9, 36.

122 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [8]. Note the legislation which facilitated the quarantining of welfare payments was not part of the challenge.

123 Ibid [345] per Crennan J.

124 Ibid.

125 Ibid [9]-[11] per French CJ, [346] per Crennan J.

126 Ibid [8].

127 Ibid [9].

128 Ibid [27]-[29].

129 Ibid [32].

130 Ibid [32].

131 Ibid [402].

132 Ibid [12].

133 Ibid per Kirby J at [276].

134 Ibid [12].

135 *Teori Tau v Commonwealth* [1969] HCA 62; (1969) 119 CLR 564.

136 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [81]-[84] (French CJ) [189] (Gummow and Hayne JJ) and in this respect Kirby J agreed with the majority, see [287]. Crennan J considered that the case did not warrant judicial decision on the issue of the relationship of s 51(xxxi) to s 122 of the Constitution, see [355].

137 *Wurridjal v Commonwealth of Australia* [2009] HCA 2 at [104] per French CJ, at [202] per Gummow and Hayne JJ, at [448] per Kiefel J.

138 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [87].

139 Ibid [90].

140 Ibid [93].

141 Ibid [103].

142 Ibid [104].

143 Ibid [162].

144 Ibid [193].

145 Ibid [202].

146 Ibid [195]-[197].

147 Ibid [197].

148 David Hollinsworth, above n 2, 112.

149 A range of Aboriginal people who are negatively affected by the

Intervention legislation have formed the *Prescribed Area People's Alliance* to petition the UN regarding the Intervention laws; see Leo Shanahan and Andra Jackson, 'Kirby's last dissent: my fellow judges racially biased', *The Age* (online), 3 February 2009 <http://www.theage.com.au/national/kirbys-last-dissent-my-fellow-judges-racially-biased-20090202-7vr7.html>; Peta MacGillvray, above n 55, 6. The *Prescribed Area People's Alliance* is arguing that the Intervention does not constitute special measures under the *Racial Discrimination Act 1975* (Cth) because it is not necessary, not temporary and does not have as its sole purpose the advancement of the interests of Indigenous Australians.

150 Margaret Thornton, 'Neo-liberalism, Discrimination and the Politics of *Ressentiment*' (1999) 17(2) *Law in Context* 8, 8.

151 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 20; Margaret Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the "New Corporatism"' (1999) 23(3) *Melbourne University Law Review* 749, 765; Margaret Thornton, above n 150, 8. See also Margaret Davies, above n 1, 91.

152 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [122].

153 Ibid.

154 Ibid [338]-[339].

155 Ibid [324].

156 Ibid [338].

157 Ibid [338].

158 Ibid [339], see [341].

159 Sarah Maddison, above n 37, 78-79. Note that now under s 5 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) regard must be had to Indigenous 'traditions, observances, customs and beliefs' whilst the leases are being administered.

160 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [355].

161 Ibid [356].

162 Ibid [357].

163 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, above para [371].

164 Jennifer Martiniello, above n 50, 123-124.

165 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [373]-[374] and [378].

166 This is often the approach taken when historians analyse a document. See Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption – History, Law and Indigenous People* (University of New South Wales Press, 2008) 91.

167 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [375]-[376].

168 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [427]. (Emphasis added).

169 Ibid [445]-[446].

170 Ibid [445].

171 Ibid [385].

172 Sarah Maddison, above n 37, 16; Yuko Narushima, above n 113; Barbara Shaw and Valerie Martin, above n 9; Jane Vadiveloo, 'With respect, Aborigines can find solutions', *The Age* (online), 30 June 2008 <http://www.theage.com.au/opinion/with-respect-aborigines-can-find-solutions-20080629-2ytm.html>. The positive measures listed in the *Closing the Gap in the Northern Territory* report relating to funding basic community services certainly do not require the presence of army personnel or the draconian Intervention legislation. Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 16-18.

173 Chris Cunneen, above n 3, 85-86. The increase in substance abuse and reports of violence since the Intervention commenced adds weight to this argument. Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 12-13.

174 Odette Kelada, above n 55, 5.

175 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [104].

176 Ibid [448].

177 Ibid [470].

178 Ibid [451].

179 There were at least three instances of racially discriminatory legislation enacted during the Howard regime where the *Racial Discrimination Act 1975* (Cth) was suspended and each enactment led to litigation where Aboriginal plaintiffs were unsuccessful. The *Native Title Amendment Act 1998* (Cth) led to *Nulyarimma v Thompson* (1999) 165 ALR 621, the *Hindmarsh Island Bridge Act 1997* (Cth) was challenged in *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, and aspects of the Intervention legislation were disputed by plaintiffs in *Wurridjal v Commonwealth of Australia* [2009] HCA 2.

180 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [14].

181 Ibid [204].

182 Ibid [210].

183 Ibid [213].

184 Ibid [214].

185 Ibid [207].

186 Ibid.

187 Ibid [207]-[208].

188 Ibid [212].

189 Ibid [227]-[230], [234].

190 Ibid [229].

191 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [232]. These are:

a. A [six] month ban on alcohol on Aboriginal land,

b. The compulsory acquisition of Aboriginal townships for five years to improve property and public housing,
c. A ban on pornographic videos and an audit of Commonwealth computers to identify pornographic material,
d. The quarantining of 50% of welfare payments so it can only be spent on essentials,
e. Linking of income support and family assistance to school attendance and providing meals to children at school, which are to be paid for by parents,
f. Compulsory health checks for Aboriginal children under 16,
g. An increase in police numbers on Aboriginal communities,
h. Engaging of the army in providing logistical support,
i. Abolishing the entry permit system to Aboriginal reserves for common areas, road corridors and airstrips.

192 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [234].
193 Ibid [236].
194 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [3]-[7] (French CJ) [134] (Gummow and Hayne JJ) [373]-[374], [378] (Crennan J).
195 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [243].
196 Ibid.
197 Ibid.
198 Ibid [248].
199 Ibid.
200 Kath Hall and Claire Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 2nd ed, 2009) 83, 88, 91.
201 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [273].
202 Ibid [273].
203 Barbara Flagg, *Was Blind, But Now I See – White Race Consciousness and the Law* (New York University Press, 1998) 4.
204 Ibid.
205 Ibid 52.
206 Gayatri Chakravorty Spivak, (ed Sarah Harasym), The New Historicism: Political Commitment and the Post-Modern Critic' *The Post-Colonial Critic – Interviews, Strategies, Dialogues* (Routledge, 1990) 160.
207 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [3]-[7] (French CJ) [134] (Gummow and Hayne JJ) [373]-[374], [378] (Crennan J).
208 Kirby J pointed out that there was a benefit for the Commonwealth in acquisition of Aboriginal lands because it meant the government was free to deal with those lands without risk of 'interference or restriction of activities' by traditional owners - *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [298].
209 Geoffrey Leane, 'Testing some theories about law: can we find substantive justice within law's rules?' (1994) 19(4) *Melbourne University Law Review* 924, 926; Stepahnie Wildman with Adrienne Davis, 'Making Systems of Privilege Visible' in Richard Delgado and Jean Stefancic, *Critical White Studies – Looking Behind the Mirror* (Temple University Press, 1997) 318.
210 Geoffrey Leane, above n 209, 926.
211 *Wurridjal v Commonwealth of Australia* [2009] HCA 2, [3] per French CJ and [372] per Crennan J.
212 Anthony Cook, above n 13, 90.
213 Desmond Manderson, 'Apocryphal Jurisprudence' (2001) 23 *Studies in Law, Politics and Society* 81, 86.
214 Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) x.
215 Irene Watson, 'Aboriginal Women's Laws and Lives', above n 55, 107.
216 Ben Mathews, 'Why Deconstruction is Beneficial' (2000) 4 *Flinders Journal of Law Reform* 105, 108.
217 A number of Aboriginal people who are negatively affected by the Intervention legislation have formed the *Prescribed Area People's Alliance* to petition the UN regarding the Intervention laws; Leo Shanahan and Andra Jackson, above n 149.
218 *United Nations Declaration on the Rights of Indigenous Peoples*, Article 32(2).
219 'Protestors storm High Court building', *The West Australian* (online), 2 February 2009 <http://www.thewest.com.au/default.aspx?MenuID=28&ContentID=122521>; Louis Andrews and Sally Pryor, *The Canberra Times* (online), 'High Court Intervention: Aborigines dissent' 3 February 2009 <http://www.canberratimes.com.au/news/local/news/general/high-court-Intervention-aborigines-dissent/1422901.aspx>.
220 Louis Andrews and Sally Pryor, above n 219.
221 *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 was another such example. In this case the High Court upheld the validity of the *Hindmarsh Island Bridge Act 1997* (Cth) regardless of the detrimental consequences for Indigenous people; Tom Trevorrow, 'Hindmarsh Island: the Ngarrindjeri People petition the United Nations' (2001) 26 (2) *Alternative Law Journal* 89, 89; Irene Watson, above n 11, 50.
222 'Intervention to go to UN', *Brisbane Times* (online) 3 February 2009 <http://www.brisbanetimes.com.au/news/national/Intervention-case-to-go-to-united-nations/2009/02/02/1233423130347.html#>; Leo Shanahan and Andra Jackson, above n 149; Peta MacGillvray, above n 55, 6.
223 Letter from Fatimata-Binta Victoire Dah, Chairperson of the Committee for the Elimination of Racial Discrimination, United Nations High Commissioner for Human Rights to Caroline Millar, Australian Ambassador to the United Nations, 13 March 2009 <http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf>.
224 Letter from Fatimata-Binta Victoire Dah, Chairperson of the

Committee for the Elimination of Racial Discrimination, United Nations High Commissioner for Human Rights to Caroline Millar, Australian Ambassador to the United Nations, 28 September 2009 <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf>.

225 Such as those contained under the *International Convention on the Elimination of Racial Discrimination*; Raelene Webb, above n 55, 19; Alison Vivian and Ben Schokman, above n 9, 86-87.

226 United Nations letter to the Australian Government, 28 September 2009, above n 224.

227 Committee on the Elimination of Racial Discrimination, *Reports submitted by State parties under article 9 of the Convention – Combined fifteenth, sixteenth and seventeenth periodic reports of States parties due in 2008 – Australia (7 January 2010)(CERD/C/AUS/15-17)*, Seventy-seventh session, 2–27 August 2010, 27.

228 Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention - Concluding observations of the Committee on the Elimination of Racial Discrimination*, Seventy-seventh session, 2–27 August 2010, 4.

229 Ibid.

230 Bill Barker, *Getting Government to Listen – A Guide to the International Human Rights System for Indigenous Australians* (1997) 12; Peta MacGillvray, above n 55, 9.

231 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2009), above n 87, 15-16; Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2010), above n 100, 14.

232 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2010), above n 100, 14.

233 Ibid.

234 Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 10, 333.

235 Lindsay Murdoch and Joel Gibson, 'Rudd's indigenous homes plan for just 26 communities', *Sydney Morning Herald* (online), 25 March 2009 <http://www.smh.com.au/national/rudds-indigenous-homes-plan-for-just-26-communities-20090324-98wx.html>. Note however that under s 6 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) the Commonwealth is now obliged to 'engage in negotiations in good faith' when negotiating the terms of another lease.

236 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Act 2010* (Cth).

237 Senate Community Affairs Legislation Committee, above n 90, 77-78, 94.

238 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act, and Strengthening of the Northern Territory Emergency Response*, 25 November 2009 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.asp> 3.

239 Ibid.

240 Senate Community Affairs Legislation Committee, above n 90, 77-78, 94.

241 Senate Community Affairs Legislation Committee, above n 90, 24.

242 Commonwealth, *Parliamentary Debates,* House of Representatives, 25 November 2009, 12785. (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs)

243 Alison Vivian and Ben Schokman, above n 9, 97; Jonathon Hunyor, above n 119, 62-63.

244 Senate Community Affairs Legislation Committee, above n 90, 70-71, 82.

245 Ibid 17.

246 Ibid 23.

247 Ibid 4.

248 Ibid.

249 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2010), above n 100, 5.

250 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2010) Part 2, above n 114, 37.

251 There were several submissions to this effect, though this view was not adopted by the Committee; Senate Community Affairs Legislation Committee, above n 90, 25.

252 Ibid 35-37. See s 25 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth). The categories of 'vulnerable welfare payment recipients', 'disengaged youth', and 'long term welfare payment recipients' are defined in s 36 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth).

253 Senate Community Affairs Legislation Committee, above n 90, 57.

254 Ibid 37.

255 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory* (2010) Part 2, above n 114, 37. See s 37 of the *Social Security*

and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth).

256 Rosalind Kidd, *The Way We Civilise – Aboriginal Affairs – the untold story* (1997) 130; Rosalind Kidd, *Trustees on Trial – Recovering the Stolen Wages* (2006) 89.

257 Senate Community Affairs Legislation Committee, above n 90, 55.

258 Ibid 56.

259 Ibid 45 and 88-91.

260 Ibid 47.

261 Giorgio Agamben, *State of Exception,* Kevin Attell trans, (University of Chicago Press, 2005) 79.

262 Judy Atkinson, above n 31, 67; Human Rights and Equal Opportunity Commission, above n 73, Chapter 11; Human Rights and Equal Opportunity Commission, *Us Taken-Away Kids – 'Commemorating the 10th Anniversary of the Bringing them home report'* (2007).

263 Sandra Berns, *To Speak as a Judge: Difference, Voice and Power* (Ashgate, 1999) 105-106.

264 Geoffrey Leane, above n 209, 931.

265 Barbara Flagg, above n 203, 51.

266 In his Sorry Speech Prime Minister Rudd claimed to be opening a 'new chapter' in Australian history. See Prime Minister Kevin Rudd, 'Apology to Australia's Indigenous Peoples' (13 February 2008) <www.aph.gov.au/house/rudd_speech.pdf>. However, there has since been critique questioning whether his rhetoric has been matched by substantial improvements in the living conditions of Indigenous Australians. See Maria Giannacopoulos, above n 55, 342-347; Paul Muldoon, 'Past Injustices and Future Protections: On the Politics of Promising' (2009) 13(2) *Australian Indigenous Law Review* 2, 2-3; Shelley Bielefeld, 'The Good White Nation Once More Made Good? Apology for Atrocities to the Stolen Generations' (2009-2010) 13 *Southern Cross University Law Review* 87, 100-105.

267 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9, 7.

268 Department of Families, Housing, Community Services and Indigenous Affairs, 'Future Directions for the Northern Territory Emergency Response' (Discussion Paper 2009) 3.

269 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9, 3-4.

270 Ibid 4.

271 Barbara Shaw and Valerie Martin, above n 9; 'NT Intervention "Creating Misery": Yunupingu', above n 55; Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9; Sue Stanton, above n 65, 5.

272 See generally, Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson, and Michele Harris, above n 9, 17; Renata Grossi, 'The Northern Territory Intervention and the *Racial Discrimination Act*' (2009) 21(3) *Legaldate* 11, 12; Letter from the Human Rights Law Resource Centre letter to the Australian Government, 10 November 2009 <http://www.hrlrc.org.au/files/Letter-Reinstatement-of-the-RDA1.pdf>; Letter from Fatimata-Binta Victoire Dah, 28 September 2009, above n 224; Rollback the Intervention, above n 11.