AN IMBALANCE OF CONSTITUTIONAL POWER AND HUMAN RIGHTS: THE 2007 FEDERAL INTERVENTION IN THE NORTHERN TERRITORY

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Abstract

In the wake of the *Little Children are Sacred* report to the Northern Territory government, the Commonwealth government declared a 'national emergency' arising from the sexual abuse of Aboriginal children and announced it would introduce the following measures in Aboriginal communities in the Territory:

- A sixth month ban on alcohol on Aboriginal land,
- The compulsory acquisition of Aboriginal townships for five years to improve property and public housing,
- A ban on pornographic videos and an audit of Commonwealth computers to identify pornographic material,
- The quarantining of 50% of welfare payments so it can only be spent on essentials,
- 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,
- Compulsory health checks for Aboriginal children under 16,
- An increase in police numbers on Aboriginal communities,
- Engaging of the army in providing logistical support, and
- Abolishing the entry permit system to Aboriginal reserves for common areas, road corridors, and airstrips.

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This paper will explore the executive and legislative Constitutional power of the Commonwealth to undertake the measures announced, including reference to the territories power[1], the external affairs' power, the power to make laws for the people of a race, and the power to acquire property on just terms. It will evaluate the measures in the light of international law, including the *International Convention on the Elimination of All Forms of Racial Discrimination*,[2] the *International Covenant on Civil and Political Rights,*[3] the *International Covenant on Economic, Social and Cultural Rights*[4]*,* and the *Convention on the Rights of the Child*.[5] Any legislation introduced by the Commonwealth to authorise the measures will be examined according to those Constitutional restraints and international law standards.

I Introduction

On 7 August 2007, the Commonwealth government introduced into the Parliament the following Bills:[6]

a. Northern Territory National Emergency Response Bill 2007,

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

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

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1 The power of the Commonwealth Parliament, pursuant to s 122 of the *Constitution* (Cth), to 'make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth'.

2 GA res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195, *entered into force* Jan 4 1969.

3 GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, *entered into force* Mar 23 1976.

4 GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, *entered into force* Jan 3 1976.

5 GA res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), *entered into force* Sept 2 1990.

6 Those substantive Bills were accompanied by two Bills appropriating funds required to implement the measures: Appropriation (Northern Territory National Emergency Response) Bill (No.1); Appropriation (Northern Territory National Emergency Response) Bill (No.2).

This legislative package was said to be intended to implement a collection of measures announced by the then Prime Minister, John Howard, and the Minister for Families, Community Services and Indigenous Affairs, Mal Brough, on 21 June 2007, in response to the *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'*- authored by Pat Anderson and Rex Wild (Anderson/Wild report)[7] which was handed down on 15 June 2007.[8]

The task identified for that inquiry was principally to '[e]xamine the extent, nature and factors contributing to sexual abuse of Aboriginal children'.[9] The inquiry found that the incidence of child sexual abuse was 'directly related to other breakdowns in society',[10] and that 'the cumulative effects of poor health, alcohol, drug abuse, gambling, pornography, unemployment, poor education and housing, and general disempowerment lead inexorably to family and other violence and then on to sexual abuse of men and women and, finally, of children.'[11]

The Anderson/Wild report recommended that both the Australian and Northern Territory governments 'immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse'.[12] They also advised that it was 'critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities'.[13]

The then Prime Minister Howard, in his announcement on 21 June 2007, declared a 'national emergency' arising from the sexual abuse of Aboriginal children and that the Commonwealth government would introduce the following measures in Aboriginal communities in the Territory:

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

8 *The Weekend Australian*, June 16-17, p 1

9 Anderson, P. and Wild, R., *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* at pp 4 and 41.

10 Ibid.

11 Ibid 6.

12 Ibid 82.

13 Ibid 82.

a. A sixth 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.[14]

A *The Legislation and the Government's Intent*

The then Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs, Mal Brough, introduced the legislative package in his Second Reading Speech for the Northern Territory National Emergency Response Bill 2007, explaining that the legislation related to the announced measures, because the Commonwealth government was 'confronted with a failed society where basic standards of law and order and behaviour have broken down and…clear evidence that the Northern Territory government was not able to protect these children adequately'.[15]

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[14] *The Australian*, Friday June 22, 2007, p 4; Australian Government, 'National emergency response to protect Aboriginal children in the NT' (Press Release, 21 June 2007) <http://www.facsia.gov.au/Internet/Minister3.nsf/content/emergency_21june07.htm> at 22 June 2007.

[15] Mal Brough, Second Reading Speech, National Emergency Response Bill 2007, House of Representatives, 7 August 2007, 10. For commentary on the substantial social dimensions of the federal government's intervention see John Altman and Melinda Hinkson (ed) *Coercive Reconciliation* (2007).

He said that '[u]nemployment and welfare dependency may not cause abuse, but a viable economy and real job prospects make education meaningful and point to a life beyond abuse and despair'[16] and that 'land tenure arrangements work against developing a real economy'.[17] He said that 'in the larger public townships and the road corridors that connect them, permits will no longer be required' because '[c]losed towns mean less public scrutiny' and 'prevent the free flow of visitors and tourists that can help to stimulate economic opportunities and create job opportunities'.[18]

The Minister noted that the authors of the Anderson/ Wild report described alcohol abuse as the 'gravest and fastest-growing threat to the safety of Aboriginal children'[19] and he outlined the following measures contained in the legislation.

1 *Alcohol Regulation*

The Bill enabled a general ban on people having, selling, transporting, and drinking alcohol in prescribed areas.[20] It applied penalties to people supplying or selling alcohol to those in Aboriginal communities and requiring people across the Northern Territory to show photographic identification, have their addresses recorded, and to declare where the alcohol is going to be consumed, if they want to buy in a single transaction a quantity greater than 1,350 ml of takeaway alcohol.[21]

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16 Brough, above n 14.

17 Ibid 11.

18 Ibid 12.

19 Ibid 10.

20 'Prescribed areas' is a term defined in section 4 of the *Northern Territory National Emergency Response Act 2007* (NTNER Act) as comprising '(a) an area covered by paragraph (a) of the definition of *Aboriginal land* in subsection 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976*; and (b) any roads, rivers, streams, estuaries or other areas that; (i) are expressly excluded under Schedule 1 to that Act; or (ii) are excluded from grants under that Act because of subsection 12(3) or (3A) of that Act; and (c) land granted to an association under subsection 46(1A) of the *Lands Acquisition Act* of the Northern Territory (including that land as held by a successor to an association); and (d) each area identified in a declaration under subsection (3)'. Subsection (3) empowers the Commonwealth Minister to 'declare that areas in the Northern Territory known as town camps that are identified in the declaration are *prescribed areas* for the purposes of paragraph (2)(d)'.

21 NTNER Act s 20(2)(a).

The quantity was amended by an amendment Act[22] to a quantity with a purchase price of $100 or exceeding five litres in a single container or two containers of two litres.

2 *Computer Audit*

The Bill included a requirement to undertake regular audits of publicly funded computers and to provide the results to the Australian Crime Commission.

3 *Five-year Leases*

The Bill granted to the Australian government five-year leases over townships on 'Aboriginal land',[23] community living areas, and certain other areas.[24] The Minister's justification for that measure is that '[t]he acquisition of leases is crucial to removing barriers, so that living conditions can be changed for the better in these communities in the shortest possible time frame.'[25]

4 *Town Camps*

The Bill also provided for the Australian government to exercise the powers of the Northern Territory government to forfeit or resume certain leases, known as 'town camps', during the five-year period of the emergency response.

5 *Government Business Managers*

The Bill provided powers to government business managers, who will manage government activities and assets in the selected communities.

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22 *Northern Territory National Emergency Response Amendment (Alcohol) Act 2007* (Cth).

23 'Aboriginal land' is a term defined in the *Aboriginal Land Rights (Northern Territory) Act*, section 3(1) as '(a) land held by a **Land Trust** for an estate in fee simple; or (b) land the subject of a deed of grant held in escrow by a **Land Council**'. 'Land Trust' is defined as 'an **Aboriginal Land** Trust established under this Act' and 'Land Council' is defined as 'an **Aboriginal Land** Council established by or under this Act'.

24 Section 31 of the NTNER Act sets out in detail the land affected.

25 Brough, above n 14.

6 *Bail and Sentencing*

This Bill provided that in relation to bail and sentencing discretion in the Northern Territory no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse.

7 *Community Stores*

The Bill provided that Aboriginal community stores must meet set criteria in relation to food quality and financial integrity in order to be licensed to sell.

In a second Bill, the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007, as the Minister outlined,[26] the following complementary measures were enacted.

8 *Pornography*

The Bill contains measures which ban the possession, control, and or supply of pornographic material in the prescribed areas.

9 *Police*

The Bill ensures that Australian Federal Police members deployed to live and work in communities, or visit regularly, and appointed as special constables of the Northern Territory police service, can exercise all the powers and functions of the local police service.

10 *Government Ownership of Facilities Constructed on Aboriginal Land*

Where Australian government funds are provided for the construction and upgrade of buildings and infrastructure on Aboriginal land in the Northern Territory, the Australian government will retain ownership of the buildings and infrastructure, and obtain an interest in the land on which they are constructed. The Minister justified this shift from the previous practice of conditional grants for such purposes on the basis

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[26] Mal Brough, Second Reading Speech*,* Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007, House of Representatives, 7 August 2007, 17.

that under the past practice 'the government has been unable to protect its investment, and [it] has also led to very poor outcomes for those whom these assets were meant to help'.[27] He made the general policy statement that the Howard government is no longer prepared to invest public money in buildings and infrastructure on private land unless it can have a continuing interest over them.[28]

11 *Access to Aboriginal Land*

Under the Bill, the permit system for people entering Aboriginal land was to be retained, but permits would no longer be needed to access common areas in the main townships and the road corridors, barge landings, and airstrips connected with them.

The Minister justified that measure in the following way.

> The current permit system has not prevented child abuse, violence, or drug and alcohol running. It has helped create closed communities which can, and do, hide problems from public scrutiny.
>
> Improving access to these towns will promote economic activity and help link communities to the wider world.
>
> It will also allow government services to be provided more readily—essential for the recovery of these communities.
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> In the townships and the road corridors where the permit system no longer applies, the Northern Territory government will be given the power to restrict access temporarily, to protect the privacy of a cultural event or to protect public health and safety.[29]

The third piece of legislation in the package, the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007, largely dealt with the management of social security income.[30] Under the legislation, 50 per cent of the welfare payments of all individuals in the affected communities of the Northern Territory will be income-

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27 Ibid 19-20.

28 Ibid 20.

29 Ibid 20.

30 Mal Brough, Second Reading Speech, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007, House of Representatives, Tuesday 7 August 2007, 1.

managed for an initial period of 12 months. State and Territory governments are given the option of notifying the Commonwealth that a person be placed on income management where a child is found to be at risk of neglect, a child is not enrolled at a school, or is not attending school. Under income management, up to 100 per cent of a person's welfare support payments can be set aside and directed to appropriate expenditure.

The Minister also announced that the Community Development Employment Program in the Northern Territory would progressively be replaced with 'real jobs', training, and mainstream employment services.[31]

B *Evolution of the Measures*

A number of changes occurred to the elements of the 'emergency intervention' between its announcement on 21 June 2007 and the implementation of the legislative package following it commencing to operate on 18 August 2007.[32]

A key feature of the elements of the intervention was that they were each to be enforced by law. In relation to one of those elements, the compulsory aspect has been deleted. The government initially announced that health checks would be compulsory and directed towards obtaining evidence of child sex abuse. The health checks which are said to have occurred so far in 29 communities of more than 2000 children have occurred voluntarily and have not included checking for sexual abuse.[33] The head of the government's Northern Territory Emergency Response Taskforce, Dr Sue Gordon, is reported in *The West Australian* newspaper as saying that the government had made the right decision in backing down and that the health checks should not be aimed at uncovering sexual abuse.[34]

The proposed abolition of the permit system for entry to Aboriginal land also underwent a significant change between the June announcement

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31 Ibid 7.

32 NTNER Act s 3.

33 Rhianna King, "D-Day for Aboriginal Crackdown", *The West Australian*, September 15, 2007, p. 12.

34 Ibid.

and the introduction of the legislation. The permit system was to continue to apply to 99.8 per cent of Aboriginal land in the Northern Territory.[35] The amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) effected by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Other Measures Act) was to continue to exempt from the permit system all the categories of persons who were exempt in the original form of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), including Commonwealth and Territory parliamentarians and government officers. It added a category of exemption being a person or category of person specified by the Minister. That allowed the Minister to specify for exemption from the permit system persons performing functions such as assessing community stores for licensing purposes.

The Rudd Labor government on 21 February 2008, introduced a Bill amending the provisions concerning the permit system.[36] Under that Bill the permit system will be re-introduced, with the Minister having power to authorise an exemption for journalists.[37]

As revealed in the legislation introduced in August 2007, there are also some features which had been added to what was initially announced:

- Compulsory acquisition of 'town camp' leases,
- The appointment of government business managers in communities,
- A limitation on bail and sentencing discretion in the Northern Territory with respect to the application of customary law or cultural practice to excuse, justify, authorise, or lessen the seriousness of violence or sexual abuse,
- The licensing and assessment of community stores on Aboriginal land for appropriate financial and retail practices,

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35 Brough, above n 14, 12.

36 http://www.abc.net.au/lateline/content/2007/s2169856.htm accessed 7 April 2008.

37 Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 Schedule 3*;* <http://www.thewest.com.au> 21 February 2008, accessed 7 April 2008.

- The retention by the Commonwealth of ownership of facilities constructed on Aboriginal land, and
- The progressive abolition of the Community Development Employment Programme.

C *Commonwealth Legislative Power in the Territory: The Territories Power*

The power which the Commonwealth government relied upon to authorise the enactment of the two *Northern Territory National Emergency Response Acts* is the power the Parliament to 'make laws for the government of any … territory placed by the Queen under the authority of and accepted by the Commonwealth'.[38]

The Northern Territory is a self-governing territory.[39] However, it is subject to the power of the Commonwealth to override its laws and withdraw its power to make laws.[40] In the event of an inconsistency between a Commonwealth and a Territory law, the Commonwealth law will prevail.[41] The subordinate legislature is not competent to enact laws which are inconsistent with or repugnant to those of the paramount legislature.[42]

The limitations upon the Parliament in legislating under section 51 of the *Constitution* are generally thought not to apply to the power to legislate pursuant to section 122. This is said to arise from the role of section 51 in distinguishing between the legislative powers of the Commonwealth Parliament and the State Parliaments in a federation. The Territories are not part of the federal compact.[43]

In *Teori Tau v Commonwealth*[44], Barwick CJ, speaking for the High Court, said

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38 Constitution s 122.

39 *Northern Territory (Self-Government) Act 1978* (Cth).

40 See, for example, the *Euthanasia Laws Act 1997* (Cth).

41 *Attorney-Genera (Northern Territory) v Hand* (1989) 90 ALR 59; *Northern Territory v GPAO* (1999) 196 CLR 553, 161 ALR 318, [1999] HCA 8 at [43]-[61], [202], [219].

42 *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59, 75 (Lockhart J).

43 See *Attorney-General (Commonwealth) v The Queen (Boilermaker's Case)* [1957] AC 288, 320.

44 (1969) 119 CLR 564.

> [w]hile the Constitution must be read as a whole and as a consequence, s 122 be subject to other appropriate provisions of it as, for example, s 116, we have no doubt whatever that the power to make laws providing for the acquisition of property in the territory of the Commonwealth is not limited to the making of laws which provide just terms.

However, where there is a power other than the territories power to support the law, an exercise of the power must comply with section 51(xxxi).[45] In such circumstances, where the Commonwealth acquires land, it must do so on 'just terms'.[46]

The provisions in the legislative package which relate to acquisition of interests in land are all laws which comprise special laws for the people of a race, whether or not they are also laws for the government of a territory.

Part 4 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act) deals with acquisitions of land by making a statutory grant of five year leases to the Commonwealth, rent free (unless the Minister requests the Valuer-General to determine a rent)[47] and on such terms as the Commonwealth Minister may determine from time to time, in respect of numerous areas of land held for the benefit of Aboriginal people. Section 60 in Part 4 of the NTNER Act and section 134, which applies to other forms of acquisition of property in the NTNER Act, such as the acquisition of the assets of a community store,[48] deals with the issue of compensation for the acquisition in similar terms. Section 134 provides that:

> (1) Subsection 50(2) of the *Northern Territory (Self-Government) Act 1978* and section 128A of the Liquor Act do not apply in relation to any acquisition of property referred to in those provisions that occurs as a result of the operation of this Act (other than Part 4).

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45 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 540-1 (Brennan CJ), 561 (Gaudron J), 560 (Toohey J), 614 (Gummow J), 661-2 (Kirby J), 551-2 (Dawson J), 575-6 (McHugh J), following *Teori Tau v Commonwealth* (1969) 119 CLR 564.

46 *Constitution* (Cth), section 51(xxxi).

47 NTNER Act, ss 35(2), 62.

48 NTNER Act s 112.

> Note: Section 60 deals with acquisitions of property that occur as a result of the operation of Part 4.
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> (2) However, if the operation of this Act (other than Part 4) would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
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> (3) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
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> (4) In subsection (2):
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> *'acquisition of property'* has the same meaning as in paragraph 51(xxxi) of the Constitution.
>
> *'just terms'* has the same meaning as in paragraph 51(xxxi) of the Constitution.

Subsection 50(2) of the Northern Territory (Self-Government) Act 1978 provides that:

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

They both declare that the provisions of the *Northern Territory (Self-Government) Act 1978*, which require that any acquisition of property must be on just terms, do not apply, and contemplate an acquisition of property otherwise than on just terms.

In my view, if the operation of the NTNER Act results in an acquisition of property otherwise than on just terms, it is invalid in so far as it does. The NTNER Act is an Act of the Parliament which has two purposes of (i) making laws for the government of the Northern Territory, but, more particularly, (ii) making special laws for the people of the Aboriginal

race, and it is, therefore, a law enacted pursuant to a power in s 51 and is subject to the limitation in s 51(xxxi) that it be on just terms.[49]

In order for the acquisition to be on just terms the law must amount to 'a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country.'[50]

The procedure for determining the compensation must be fair. As Deane J suggested in the *Tasmanian Dams Case,*[51] a process may not be fair if it requires the claimant to accept what is offered by the Commonwealth or seek and wait for a Court determination. That appears to be the effect of sections 134(3) and 60(3). The provisions therefore arguably fail to accord just terms within the requirement of section 51(xxxi) of the Constitution.

D *Commonwealth Executive Power in the Territory*

The Commonwealth government has proceeded to introduce some of its announced measures by the use of executive power, without any specific legislative authorisation. For example, the Commonwealth Defence Force has, at the direction of the Commonwealth executive, performed organisational and logistical support functions in Aboriginal communities in the Northern Territory.[52] Federal Police officers and State Police officers, also apparently acting under the direction of the Commonwealth Executive, have been, or are proposed to be, deployed to Aboriginal communities in the Northern Territory to carry out policing functions.[53]

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49 See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 568 (Gaudron J). It should be noted that in *Kruger v Commonwealth* (1997) 190 CLR 1 it was found that the *Aborigines Ordinance 1918* (NT) was enacted as an exercise of the territories power and the exercise of that power was not limited by other provisions of or implied freedoms in the Constitution. However, because of the date of that ordinance there was no need to give any consideration to the question which arises in the present circumstances, of whether legislation enacted under the territories power might also have been enacted under the race power.

50 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J).

51 *Commonwealth v Tasmania* (1983) 158 CLR 1,291.

52 Brough, above n 14.

53 Brough, above n 14.

This raises the question as to whether there are any limits upon the executive functions which the Commonwealth government is empowered to perform in the Northern Territory. If the Commonwealth was to attempt to exercise such executive power in a State of the Commonwealth, the general assumption would be that it would be impinging upon the sovereignty of State executive governments. Is the position any different in the Northern Territory?

While accepting that the Commonwealth Parliament has plenary power to legislate in relation to the Territory, the executive power, which may accompany that legislative power, is not unlimited. The exercise of the executive power of the Commonwealth is subject to the direct legislative control of the Commonwealth Parliament pursuant to the *Northern Territory (Self-Government) Act 1978*.[54] Section 51(xxxix) gives the Commonwealth Parliament power to legislate in relation to matters incidental to the exercise of any power vested by the *Constitution* in the Parliament or any power vested in the Commonwealth.

The Commonwealth executive power is not entirely limited to the enumerated heads of power in the Constitution. As Brennan J said in *Davis v Commonwealth*:[55]

> If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power.

However, the Commonwealth Parliament exercised its legislative power in relation to the topic of the exercise of executive power in the Northern Territory when it enacted the *Northern Territory (Self Government) Act 1978* (Cth). That Act vests executive and prerogative powers of the Crown for the Northern Territory in the Administrator of the Northern Territory,[56] as advised by the Executive Council of the Northern Territory.[57] The Parliament has, therefore, vested the executive

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54 *Victoria v Commonwealth* (`1975) 134 CLR 338, 406 (Jacobs J).
55 (1988) 166 CLR 79, 110-111.
56 *Northern Territory (Self Government) Act 1978* (Cth) ss 31, 32.
57 *Northern Territory (Self Government) Act 1978* (Cth) s 33.

power with respect to the Northern Territory in the Northern Territory government and correspondingly limited the executive power of the Commonwealth government.

The Commonwealth may wish to argue that any exercise of executive power in the Northern Territory in respect of what it has been describing as a 'Northern Territory national emergency' brings it within the dictum of Brennan J in *Davis,*[58] quoted above, i.e., that it relates to the 'protection of the nation' or the 'strengthening of the nation'; and that allows it to exercise executive power to deal with the 'national emergency'.

In my view, to the extent that the Commonwealth has taken executive steps, without legislative support, in the Northern Territory in such a rapid response to a report commissioned by the Northern Territory government, it could readily be found to have exceeded the limitation which the *Northern Territory (Self Government) Act 1978* (Cth) places on the Commonwealth's executive power and to have unlawfully usurped the executive power placed in the Northern Territory government by that Act.

The Commonwealth government's description of the issues being addressed as a 'national emergency' does not make what was done a measure protecting or strengthening the nation, in relation to those aspects which are clearly limited to the Northern Territory. If the Commonwealth government could have justified its measures as a response to a national emergency then it could have extended them to the whole nation. That is especially so where the public debate which has been engendered by the Commonwealth's action suggests that relatively similar issues are identifiable in Aboriginal communities in the States, particularly Western Australia and Queensland. However, the Commonwealth, for good reason, did not seek to argue that, and rested its intervention in the Territory on the territories power in section 122 of the Constitution. The Commonwealth, correctly in my view, judged that, if it had sought to apply to the States the raft of measures which it is seeking to apply in the Northern Territory, it would have impacted so significantly upon the legislative and executive power of the States as to disturb the federal balance of power which exists in the Constitution.

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[58] *Davis v Commonwealth* (1988) 166 CLR 79, 110-111.

The issue, in determining whether the Commonwealth has exceeded its power in the Northern Territory, is whether the Commonwealth government is exercising executive power which has the effect of exerting any force upon the citizens of the Northern Territory or exercising power which would ordinarily vest in the government of the Northern Territory.

The *Australian Federal Police Act 1979* section 9(1) is amended by the *Other Measures Act* to add a paragraph providing that 'when performing functions in the Northern Territory' an Australian Federal Police Officer has the 'powers and duties conferred or imposed on a constable or officer of police by or under any law…of the Territory' and 'any powers and duties conferred on the member by virtue of his or her appointment as a Special Constable of the Police Force of the Northern Territory by or under a law of the Territory.'

However, this does not address the question of the authority under which any officer is performing functions in the Northern Territory. If the Northern Territory government agrees to accept under its executive wing police officers offered by the Commonwealth, then the correct balance in the exercise of executive power may be in place. However, the amendment to the *Australian Federal Police Act 1979* suggests that such officers remain under the direction of the Commonwealth government. If they are being deployed to the Territory and operating solely under the direction of the Commonwealth government, then the Commonwealth is exercising executive power which usurps that of the Territory contrary to the *Northern Territory (Self Government) Act 1978* (Cth), regardless of whether that Act applies to the *Other Measures Act*.

The activities of the Australian Defence Force (ADF) in the Northern Territory can only be pursuant to the direction of the Commonwealth government.[59] The Territory government does not have any power to direct them. It may be that the ADF can be directed by the Commonwealth government to enforce Commonwealth legislation.[60] However, the issue arises whether in the present situation the ADF, either before or after the implementation of the package of legislation on 15 September 2007,

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[59] Constitution ss 51(vi), 52(ii), 69, 70, 114, 119.

[60] *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Ravenor Overseas Inc v Redhead* (1998) 152 ALR 416.

has been or will be implementing Commonwealth legislation. It has not been suggested that before 15 September 2007, it was enforcing Commonwealth legislation and there is no indication that its role will change. The question then arises as to the power under which the Commonwealth is directing the ADF to perform functions on its behalf in the Northern Territory.

As suggested in *Li Chia Hsing v Rankin*[61] '[t]here may be serious questions as to how far the defence forces may properly be involved in civil affairs.'[62]

The Commonwealth would have difficulty in putting a convincing argument that the activities of the ADF in the Northern Territory were being carried out in the 'defence of the Commonwealth'.[63] In my view the defence power could not sustain the directions being given by the Commonwealth to the ADF to be engaged in the Northern Territory. If the Commonwealth can give directions to the ADF to assist it in generally exercising its executive power (a matter which is subject to considerable doubt in my view), then one returns to the limitations upon the Commonwealth exercising such power in the face of the *Northern Territory (Self Government) Act 1978* (Cth). The Commonwealth is precluded by that Act from usurping the executive power vested in the Northern Territory government by directing the ADF to engage in executive functions on its behalf in the Territory.

A similar analysis applies to the Commonwealth directing medical officers to conduct medical examinations in Aboriginal communities in the Northern Territory. The Commonwealth does not have any specific power to make laws or exercise executive power in relation to health. To the extent that it is purporting to direct such examinations pursuant to the Territories power, it is purporting to exercise an executive power of the Territory which is vested in the Northern Territory government and, thus, denied the Commonwealth.

The Commonwealth could enact a law pursuant to the power under section 51 (xxvi) of the Constitution (Cth) to make special laws with respect to the people of a race, which authorised the conduct of health checks of Aboriginal children in the Northern Territory. However, in the

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61 (1978) 141 CLR 182.

62 *Li Chia Hsing v Rankin* (1978) 141 CLR 182, [15] (Murphy J).

63 Constitution (Cth) s 51(vi).

absence of such a law, the race power does not enable the exercise of executive power by the Commonwealth without the statutory authority of the Parliament and in conflict with the Parliament's intention, expressed in *Northern Territory (Self Government) Act 1978* (Cth) to vest executive authority in Northern Territory government in relation to the Territory.

This is distinguishable from the provisions under the NTNER Act by which the Parliament has specifically authorised the Commonwealth Minister to:

> (a) make an agreement with an association under subsection 20(2) of the *Crown Lands Act* (NT), as modified by the NTNER Act on behalf of the Northern Territory Minister;[64]
>
> (b) engage in acts of forfeiture of a lease of land, or resumption of land, under the *Special Purposes Leases Act* (NT) or the *Crown Lands Act* (NT), as modified by the NTNER Act on behalf of the Northern Territory Minister or the Administrator of the Northern Territory;[65]
>
> (c) exercise the same powers in relation to an incorporated association, within the meaning of the *Associations Act* (NT), as the Northern Territory Commissioner under Division 2 of Part 9 of that Act.[66]

E *Delegation of Legislative Power*

Section 54 of the NTNER Act delegates to the Commonwealth Minister responsible for the Act the power to:

> by legislative instrument, specify a law, or a provision of a law, of the Commonwealth for the purposes of this section. The specified law or provision has no effect to the extent that it would, apart from this section, regulate, hinder or prevent the doing of an act in relation to:

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64 See NTNER Act, s 41.
65 NTNER Act, ss 44, 46.
66 NTNER Act, s 81.

(a) land covered by a lease granted under section 31, or

(b) land in which a Commonwealth interest exists, or

(c) land resumed or forfeited in accordance with Division 2 of this Part (other than land referred to in paragraph (1)(b)).

This is a delegation to the executive of a power to amend an unspecified and potentially broad range of laws made by the Commonwealth. Such a delegation is open to the characterisation that it is of 'such a width or uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power'.[67]

It is therefore arguably invalid as beyond Constitutional power.

F *Social Security and Community Development Employment Project (CDEP)*

The Commonwealth has the power to make laws relating to 'invalid and old age pensions, maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and other hospital benefits, medical and dental services…[and] benefits to students and family allowances'.[68] That would appear to authorise the laws which tie welfare payments to an income management scheme, which is conditional upon facilitating school attendance by children.

The CDEP is either a law relating to 'unemployment' within section 51(xxiiiA) or is referrable to the Commonwealth's power to make special laws for the people of a race, or both. The proposal to phase out that scheme and provide for transitional payments by statute would apparently be an exercise of powers under those provisions. The Rudd government has announced that it will fund CDEP providers for a further 12 months while it drafts wide-scale reforms to indigenous employment services.[69]

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67 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101 (Dixon J), 121 (Evatt J).

68 Constitution, ss 51(xxiii), 51(xxiiiA).

69 Warren Snowden, *A Partnership to Reform CDEP*, (Press Release 30 April

G *International Human Rights Standards*

The human rights obligations of member states of the United Nations, such as Australia, have become a 'legitimate subject of international concern'.[70]

The Commonwealth of Australia has an obligation as a member of the international community to take steps to implement international conventions. It is thus empowered by the external affairs power in the Constitution (Cth), section 51(xxix), to enact legislation which deals with a subject matter of general international concern.[71]

H *Self-determination and Protection of Children*

International law provisions which are particularly apposite to consider in relation to the Commonwealth's 'emergency response' in the Northern Territory are Articles 1 and 24 of the *International Covenant on Civil and Political Rights*[72] (ICCPR), to which Australia is a party and has adopted the optional protocol to that convention, which allows for an individual in Australia to complain of breaches of rights in the ICCPR to the UN Human Rights Committee, after exhausting all available

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2008), <http://www.warrensnowden.com/media/080430.htm>; Jenny Macklin, *Discussion paper on indigenous employment reforms* (Press Release 19 May 2008), <www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/dis_paper_indig_19may08.htm>, at 29 May 2008; <www.theaustralian.news.com.au/story/0,25> at 29 May 2008.

70 Stephen J in *Koowarta v Bjelke-Petersen*; (1982) 153 CLR 168, 219, quoting Judge de Arechaga in *Recueil des Cours*, vol. 178 (1978), 177. Stephen J also refers to Sir Humphrey Waldock in *Recueil des Cours*, vol. 106 (1962), 200; Lauterpacht, *International Law and Human Rights* (1950), 177- 178; Oppenheim's *International Law*, 8th ed. (1958), vol. 1, 740; Schwelb in 'The International Court of Justice and the Human Rights Clauses of the Charter', *American Journal of Internal Law*, vol. 66 (1972), 337, 338-341, 350; the *Advisory Opinion of the International Court in the Namibia Case* (1971) ICJR, at p 51; Judge Tanaka (diss.) in the South West Africa Case (1966) ICJR 4, 284; majority opinion of the International Court in the Barcelona Traction Case (1970) ICJR 3, 33; and McDougal, Laswell and Chen, *Human Rights and World Public Order* (1980), 599-560.

71 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217 (Stephen J).

72 GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171 (entered into force 23 March1976).

remedies within Australia. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) provides an opportunity in Australia to lodge a complaint of a breach of rights under the ICCPR to that Commission. However, the HREOC Act only allows for complaints of 'unlawful acts, omissions or practices'[73] under a relevant statute, such as the *Racial Discrimination Act 1975* (Cth) (RDA), and so the enactment of the NTNER Act by the Commonwealth Parliament is not a matter about which a complaint can be made pursuant to the HREOC Act. The enactment of legislation by the Parliament in exercise of its constitutional power is not capable of being an unlawful act, omission or practice or a breach of any earlier statute of the Parliament, such as a provision of the RDA. Indeed, to the extent that the NTNER Act may be inconsistent with the RDA it would ordinarily be interpreted as being intended to repeal the earlier RDA to the extent of that inconsistency.[74]

Articles 1 and 24 of the ICCPR provide that all peoples 'have the right of self-determination'[75] and to 'freely determine their political status and freely pursue their economic, social, and cultural development'[76] and every child has the right to protection.[77]

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73 HREOC Act, section 3 definition of 'unlawful act'.

74 See *Western Australia v Ward* (2002) 213 CLR 1, 99 which was dealing with a provision to the opposite effect, where the *Native Title Act 1993* (Cth) s 7 was declared to be intended to be construed subject to the provisions of the RDA.

75 The meaning of the right to self determination is notoriously 'ambiguous and contested': K. Loper, 'The Right of Self-Determination: Recent Developments in International Law and their Relevance for the Tibetan People' (2003) 33 *Hong Kong Law Journal* 167, 171. While the right has been clearly established, its application and scope remain obscure: James Crawford, 'Right to Self-determination in International Law ', in Phillip Alston (ed) *People's Rights* (2001) 10, 38. The content of the right is as described in Article 1 of the ICCPR, i.e., the right of all to 'freely determine their political status and freely pursue their economic, social and cultural development': Simon Taylor, 'Tibet and the Right of Self Determination in International Law' (2008) 35 *Brief* 4.

76 This right to self determination is repeated in Article 1 of the *International Covenant of Economic, Social and Cultural Rights* GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171 (entered into force 23 March 1976).

77 The terms of Article 1 and 24 of the ICCPR are reaffirmed in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) adopted on 14 September 2007, by the United Nations General Assembly

The international community, in the *Convention on the Rights of the Child*[78] (CROC), has recognised the need for special protection of children.[79] Article 17(e) of the CROC supports steps to limit the exposure of children to pornography and Articles 18, 19 and 34 of the CROC juxtapose the obligation of parents and guardians to act in the best interests of children and the obligations of the State to protect children while in the care of parents and guardians and generally.

As noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*,[80] the executive of the Commonwealth of Australia ratified the CROC on 17 December 1990. It entered into force for Australia in 16 January 1991, and on 22 December 1992, the Attorney-General, pursuant to section 47(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), declared the CROC to be an international instrument, and so it is one of the international instruments to which the Commission may turn in exercising its discretion to conduct an inquiry.[81] In addition, the *Geneva Declaration of the Rights of the Child of 1924*[82] (DROC) is reproduced as a schedule to the HREOC Act. However, the provisions of an international treaty do not form part of Australian domestic law unless incorporated into domestic law by a statute of the Parliament.[83] Neither the CROC nor the DROC are the subject of any legislation incorporating them into Australian domestic law[84] or providing an avenue for individual complaints leading to a remedy in Australian domestic law.

(with Australia, the United States, Canada, and New Zealand voting against its adoption), in the preamble and articles 3, 4 and 5. However, the recently elected Rudd Australian federal government has announced that it will ratify this convention.

78 GA res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), (entered into force 2 September 1990).

79 See the CROC Preamble and, particularly, Article 3.

80 (1995) 183 CLR 273, [23] (Mason CJ and Deane J), [6] (McHugh J), referencing Australian Treaty Series 1991 No. 4.

81 HREOC Act, section 14.

82 *Adopted* Sept 26, 1924. League of Nations OJ Spec Supp 12, AT 43 (1924).

83 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, [25] (Mason CJ and Deane J), [32] (Toohey J), [3] (Gaudron J).

84 Such as the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984,* the *Disability Discrimination Act 1992,* and the *Age Discrimination Act 2004,* which have the effect of providing domestic law remedies based on the international treaties to which they relate.

The real issue in the present circumstances is whether any or all of the provisions of the municipal legislation enacted as part of the Commonwealth's 'national emergency' response give effect to Australia's obligations within the international community to enact laws implementing the international treaty and thus comprise an exercise of the external affairs power. [85]

I *Bail and Sentencing*

As one can see from the heavy emphasis on protection of children and more generally the integrity of the individual in international human rights instruments, a proper application by the courts of human rights' standards in bail and sentencing decisions should not properly result in customary law or cultural practice 'excusing, justifying, authorising, requiring, or lessening the alleged criminal behaviour'[86] or 'criminal behaviour'.[87] It is doubtful whether the courts needed to have that prescribed by the Parliament in the NTNER Act in order to understand that.

J Racial Discrimination Act 1975 *(RDA) and the* Convention on the Elimination of All Forms of Racial Discrimination[88] *(CERD)*

There is a legislative prohibition on racial discrimination contained in the RDA, which implements the CERD. However, this package of legislation purports to suspend the operation of the RDA.

The NTNER Act in s 132 purports to both exclude from the operation of the RDA the provisions of that Act, and acts done under it, and declare that the same provisions and acts are special measures, as follows:

> (1) The provisions of this Act, and any acts done under or for the purposes of those provisions, are, for the purposes of the *Racial Discrimination Act 1975*, special measures.

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85 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 221 (Stephen J).

86 NTNER Act, s 90(1)(b)(i).

87 NTNER Act, s 91.

88 GA res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195 (entered into force 4 January 1969).

> (2) The provisions of this Act, and any acts done under or for the purposes of those provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*.

Article 1(4) of CERD, which defines 'special measures' for the purposes of the RDA, provides as follows:

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

In *Gerhardy v Brown*[89] this definition was identified as containing four elements:

a. a special measure must confer a benefit on some or all members of a class,

b. the membership of the class must be based on race, colour, descent, or national or ethnic origin,

c. a special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and freedoms, and

d. the circumstances of the special measure must provide protection to the beneficiaries, which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others.[90]

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89 (1985) 159 CLR 70.

90 *Gerhardy v Brown* (1985) 159 CLR 70, 126 as adapted, and quoted by the Human Rights Commission, http://www.hreoc.gov.au/social_Justice/sj_report/sjreport04/Appendix2RDAandSRAs.html> (at 13 May 2008). and quoted in the Northern Territory National Emergency response Bills 2007—Interim Bills Digest, Bills Digest, No. 18, 2007-08, Parliamentary Library, 7 August 2007.

Brennan J in *Gerhardy v Brown*[91] said:

> the character of a special measure depends *in part* on a political assessment that advancement of a racial group is needed to ensure that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed…The court can go no further than determining whether the political branch acted reasonably in making its assessment (emphasis added).

The purpose of securing adequate advancement for a racial group is not necessarily established by showing that the person who takes the measure does so for the purpose of conferring a benefit, if the group does not seek or wish to have the benefit.[92] In *Gerhardy v Brown*,[93] Brennan J stated that the 'wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement'.[94] Brennan J went on to state:

> The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes.[95]

It can be argued that the NTNER Act provisions do not pass the test of being special measures and a court may find that they are not. However, s 132(2) would appear then to exclude the RDA in any event. It may be arguable that sub-section (1) and (2) are not to be read as disjunctive, but to be read together, and that they are to read as expressing the view that the RDA is not applicable only because and if the NTNER Act

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91 (1985) 159 CLR 70, 138.

92 <http://www.hreoc.gov.au/social_Justice/sj_report/sjreport04/Appendix2RDAandSRAs.html> at 13 May 2008.

93 (1985) 159 CLR 70.

94 *Gerhardy v Brown* (1985) 159 CLR 70, 135.

95 *Gerhardy v Brown* (1985) 159 CLR 70, 135; sourced at <http://www.hreoc.gov.au/social_Justice/sj_report/sjreport04/Appendix2RDAandSRAs.html> at 13 May 2008.

provisions are special measures. That would give section 132(2) no additional work to do, and so that is an unlikely interpretation for a court to adopt.

Further to that: provided the NTNER Act comprises a valid exercise of constitutional power, the Commonwealth Parliament is empowered to enact such legislation despite its inconsistency with the earlier enacted RDA, and any inconsistency between the earlier and the later legislation would ordinarily be interpreted as the Parliament intending to repeal the earlier legislation to the extent of the inconsistency.[96] Section 132 probably only serves to reinforce that intention, which might otherwise be deduced from any inconsistencies between operative provisions of the NTNER Act and the RDA.

K *Arbitrary Deprivation of Property*

Article 17 of the *Universal Declaration of Human Rights*[97] provides that:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

As Brennan, Toohey and Gaudron JJ note: '[t]he word "arbitrarily" has been interpreted to mean not only "illegally" but also "unjustly"'.[98]

A decision is arbitrary if it is not based on some pre-existing criteria which are general in their application and provide an opportunity to comply with those criteria.[99]

In order for a deprivation of property not to be arbitrary, the person whose property is at risk must be given a right to be heard before any deprivation takes place and just compensation must be accorded within a time period which is reasonable in the circumstances.[100] As Deane

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96 *Western Australia v Ward* (2002) 213 CLR 1, 99.

97 GA res 217 A (III), 10 December 1948 at Palais de Challiot, Paris.

98 *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 217.

99 *MacCormick v Commissioner of Taxation* (1984) 158 CLR 622, 639; *Dilatt v MacTiernan* [2002] WASCA 100, [61] (Malcolm CJ).

100 See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284-6 (Rich J); *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 217; *Commonwealth v Tasmania* (1983) 158 CLR 1, 290 (Deane J).

J said in the *Tasmanian Dam case,*[101] there is an 'intrinsic unfairness' about a process which requires a person deprived of property to effectively accept the terms the government is prepared to offer by way of compensation.

A deprivation of property is arbitrary where it occurs by a statutory provision creating a five year lease in favour of the Commonwealth on terms determined by the statute and the Commonwealth Minister[102] with no prior opportunity for the Aboriginal people whose interests are affected to be heard in opposition to the statutory provisions taking effect. Further to that, as discussed above, the procedure for determining compensation pursuant to the NTNER Act may be less than on fair terms and so may contribute to the arbitrariness of the deprivation of property.

L *Implementing and Balancing Human Rights Standards*

The CROC provides a basis for the Commonwealth, in exercise of its power to make laws with respect to external affairs, to enact laws which comprise measures to protect children where they are at risk of harm. It would be an implementation of its international obligations to do so. The links which the Minister in his Second Reading Speeches made between protection of children and the legislative steps introduced which involuntarily acquire property, however, are tenuous at best and in my view do not justify the interference with property rights comprised in the involuntary statutory grant of leases of Aboriginal held land to the Commonwealth. That aspect of the legislation does not comprise a law with respect to the subject matter of 'external affairs', within the terms of the Constitution[103] because the provisions are so removed from any capacity to be characterised as being 'appropriate and adapted'[104] to the implementing the aspiration in the CROC of providing for special protection of children as to not comprise an implementation of the CROC or any other international treaty.

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101 *Commonwealth v Tasmania* (1983) 158 CLR 1, 291.

102 Pursuant to the NTNER Act, section 31.

103 Section 51(xxix).

104 See *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416, 488-9.

Further, the fact that these steps have been taken in a 'top down'[105] manner, without any prior consultation with the Aboriginal people affected,[106] means that they do not comprise measures consistent with the implementation of the ICCPR right to self-determination.

If the government had engaged in a consultation process which sought and obtained agreement by the affected peoples to the measures proposed, it may have been able to marry the dual obligations of protecting children and affording self determination. The Government Task Force has apparently engaged in some meetings with affected communities, but the compulsory nature of the legislative measures is such that the discussions would necessarily have been more in the nature of informing the communities of the government's proposals and gauging what level of resistance or co-operation might be encountered to what the government intended to impose, rather than seeking consent as a pre-requisite to the implementation of the government's intentions.

The government has not demonstrated why it regarded it as necessary to involuntarily acquire Aboriginal property in order to contribute funds to the improvement of infrastructure and housing in Aboriginal communities. The past practice has been to make grants to build houses and create infrastructure on the condition that the grants be properly acquitted for the purpose for which they are made and that, if they are no longer used for that purpose, the property established with the grant is to vest in the Commonwealth. The enforceability of such conditions has always been a matter of some doubt. As a matter of property law, fixtures constructed on land held by others are part of the land and the property of the land owner.[107] In my view a condition on a grant cannot change that. Generally in the past, in the author's experience, a failure to comply with the terms of a grant has been sanctioned by declining to make further grants or challenging the capacity of the responsible management body to continue to manage such property through the appropriate corporate regulator. For example, where an Aboriginal association under the *Aboriginal Councils and Associations Act* (Cth) has significantly mismanaged its affairs, the Registrar of Aboriginal

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[105] Ian Anderson, *Remote Communities Unexplained Differences* <www.apo.org.au/webboard/results.chtml?filename_num=161613> at 17 June 2008.

[106] And, in that regard, inconsistently with the recommendation of the Anderson/Wild report.

[107] *Melluish [Inspector of Taxes] v BMI [No 3] Ltd* [1995] 4 All ER 453; [1996] AC 454.

Corporations has power to appoint an administrator to the corporation or move to wind it up. In my view, any failure to maintain government funded housing or infrastructure is unlikely to be affected by who holds tenure to the land upon which it is constructed. It depends more on the level of government funding applied towards on-going maintenance and to establishing sufficient accommodation to avoid the pressure on the maintenance of housing which is caused by overcrowding of housing.

However, as *The Australian* has reported, the North-East Arnhem Land people on 20 September 2007, like the Tiwi Island community of Nguiu a month earlier, agreed with the Commonwealth government to sign a 99 year lease of Aboriginal land to the Commonwealth.[108] These agreements appear to trigger the operation of section 37(7) of the NTNER Act, which provides that:

> If the Land Trust grants a township lease that covers all of the land, the lease granted under section 31 of that land is terminated by force of this subsection.
>
> A 'township lease' is a lease granted under the 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Under that provision the lease must be for 99 years to an 'approved entity', which is defined as a Commonwealth entity or a Territory entity.

What that means is that those communities have chosen an agreed 99 year lease to the Commonwealth over an imposed five year lease. Galarwuy Yunipingu, leader of the North-East Arnhem Land people and former chairman of the Northern Land Council, wrote in *The Australian*:

> Today, I have signed a memorandum of understanding that satisfies my concerns about the land leasing issues and will ensure that the changes to the permit system will be workable and will not undermine land rights. I believe this new model will empower traditional owners to control the development of towns and living areas, and to participate fully in all aspects of economic development on their land.[109]

[108] *The Australian* (Sydney) 20 September 2007, 1.
[109] Galarwuy Yunipingu, *The Australian* (Sydney) 21 September 2007, 14.

The implementation of the substitution of the leases requires a direction from the Northern Land Council (NLC); which it must not give unless it is satisfied that:

> (a) the traditional Aboriginal owners understand the nature and purpose of the lease and consent to it,
>
> (b) any Aboriginal community or group affected has been consulted, and
>
> (c) the terms and conditions are reasonable.[110]

Present indications are that the NLC will not consent to the substitution proposed in Arnhem Land.[111] One can readily understand why the NLC might adopt the view that there is no benefit to traditional owners in agreeing to grant the Commonwealth a 99 year lease in return for the Commonwealth performing functions which it has a public duty to perform, providing funding for health, housing, education, and infrastructure.

The Rudd government has announced that it will investigate the 'effectiveness' of the 99 year lease scheme and its link to 'shared responsibilities agreements', which make the provision of funding and services to Aboriginal communities subject to pre-conditions, such as that parents send children to school.[112] Warren Mundine, Chairman of the New South Wales Aboriginal Land Council and a former ALP National President, supports the 99 year lease scheme as providing an opportunity for individual Aboriginals to obtain 99 year leases from the Commonwealth to establish businesses.[113] It may have been overlooked in the course of the national debate that since 1976 the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 19(2) and (7) have provided that a Land Trust may grant a lease to an Aboriginal person for residential purposes or for the conduct of a business for 10 years or such other period as the Minister may consent to. Subsequent amendments to that section have increased the period for which a lease can be granted

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110 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 19A(2)

111 Pers. Comm. Ron Levy, Principal Legal Officer, Northern Land Council, 26 September 2007.

112 *The Australian*, 20 February 2008, 3.

113 *The Australian*, 21 February 2008, 1.

without ministerial approval to 40 years and allowed for the granting of an estate or interest in the land for any purpose with consent of the Minster and at the direction of the Land Council.[114]

No lease of any length will, by itself, create an economic opportunity for Aboriginal people. There is no present capacity for the 99 year lease to be transferred, except to an 'approved entity' with the written approval of the Commonwealth Minister[115] and it may not be used as security for a borrowing.[116] Where an opportunity exists to trade in goods or services, then, in some instances, that may be enhanced by the trader having a secure base, such as a lease of land or premises from which to operate the business. The capacity to mortgage or sell the trading base of that business to another is constrained by the provisions referred to.

The granting of leases for economic or residential purposes could have been achieved on a case by case basis under the previously existing legislative scheme, without the need to adopt the scheme under the NTNER Act.

II Conclusions

The NTNER Act operates to acquire property by the statutory creation of five year leases of land held for the benefit of Aboriginal people in favour of the Commonwealth. That is an acquisition otherwise than on 'just terms', and it is constitutionally invalid. Traditional owners of Maningrida in Western Arnhem Land and the township's Bawinanga Aboriginal Corporation, acting in accordance with this view, have commenced proceedings in the High Court seeking a declaration that the five year lease imposed by the NTNER Act on the Manigrida land is invalid as an acquisition of land contrary to section 51(xxxi) of the Constitution, wrongly suspending the rights of traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and denying protection to Aboriginal sacred sites within the lease area.[117]

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[114] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 19(7) and (4A).

[115] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 19A(8) and (8A).

[116] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 19A(9).

[117] Toohey, P, *Indigenous Community Network*, 7 March 2008 <http://icnn.com.au> at 7 April 2008.

The statutory acquisition is also an arbitrary deprivation of property, contrary to the *Universal Declaration of Human Rights*.[118] In addition, the acquisition of property without prior consultation with the Aboriginal people affected is inconsistent with their right to self determination set out in the ICCPR.

If Australia had a constitutionally entrenched Bill of Rights, which protected rights of property and rights of self determination, then that would provide an avenue for redress in the Australian courts. Without such constitutional provisions in Australia, the only avenue for individual redress is by way of a complaint to the United Nations Human Rights Committee pursuant to the optional protocol applicable to the ICCPR.

The Commonwealth's executive actions of deploying the ADF, the AFP, and medical officers in the Northern Territory without legislative support exceeds the limitation which the *Northern Territory (Self Government) Act 1978* (Cth) places on the Commonwealth's executive power and has unlawfully usurped the executive power placed in the Northern Territory government by that Act. To date there is no suggestion that the Northern Territory government has any appetite to challenge the Commonwealth on this issue, and a co-operative approach seems to be proceeding between the two governments.

[118] GA res 217 A (III), 10 December 1948 at Palais de Challiot, Paris.