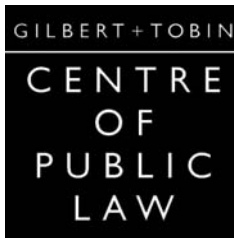

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SENIOR LECTURER

22 August 2008

Northern Territory Emergency Response (NTER) Review Board
c/o NTER Review Board Secretariat
GPO Box 7576
Canberra Business Centre
ACT 2610

Dear Mr Yu, Ms Ella Duncan and Mr Gray

Submission to NTER Review

The Gilbert + Tobin Centre of Public Law is pleased to have the opportunity to contribute to the review of the Northern Territory Emergency Response ('the Intervention').

Basis of submission

The reality of the Intervention is occurring on the ground in dozens of Aboriginal communities across the Northern Territory (NT). The primary material upon which the Review Board can determine the strengths and weaknesses of the Intervention is the input it is able to gather from affected Aboriginal individuals, communities and organisations in the Northern Territory.

The Intervention is also one of the most significant and wide-ranging uses of law, policy and resources to achieve government objectives in recent Australian history. The elected representatives of the Australian people have invoked the legislative authority of Parliament and used taxpayers' money to intrude upon the daily lives of Aboriginal people in the Northern Territory in a variety of ways. Parts of the Intervention have provided a template for government action now being taken elsewhere in Australia. For these reasons it is incumbent upon the broader Australian community also to educate itself about the Intervention to the extent that is possible and to contribute to the public debate over its future course.

The Gilbert + Tobin Centre of Public Law is not resourced to conduct on-the-ground consultations with affected communities and looks forward to those voices (in all their

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diversity) being heard by the Review Board and reflected in its published findings. The Centre has, however, devoted time to two main tasks in seeking to contribute to the national debate over the Intervention:

1. disaggregating the Intervention into constituent elements, in order to gain a more nuanced understanding of this sprawling enterprise
2. assembling information on the implementation of these specific measures, accepting the constraints that come with a desktop approach to that task.

The research conducted and the information assembled by the Centre is also being posted to its website at www.gtcentre.unsw.edu.au/Resources/irlg/commonwealthGovernmentIntervention.asp. Research on the first front is being published as fact sheets, while a second set of evaluation documents contain the information on implementation and also various sectoral responses. To date, we have looked at several but not all of the elements involved in the Intervention and we will continue to post documents to the website as they reach publishable form.

This research provides the basis for the Centre's submission to the Review Board. The primary sources of information we have relied on are:

- Acts, delegated legislation, explanatory memoranda and second reading speeches
- government documents and websites
- submissions to parliamentary committees by individuals, organisations and governments
- Senate Estimates committee hearings and Answers to Questions on Notice
- documents from non-government organisations
- media reportage and discussion.

Standpoint

Apart from clarifying the information base from which this submission is made, it is appropriate also to refer explicitly to the question of standpoint. The Centre makes its submission in the belief that non-Indigenous engagement with the national debate over the past implementation and future course of the Intervention is important – not to displace the primacy of first-hand Aboriginal experience, but to complement it, in our case, with information and perspectives that draw on the Centre's capacity for research and synthesis of documentary material.

We observe that, from the outset, the Intervention drew a variety of opinions from Indigenous Australians. Some see the Intervention as inherently and fatally flawed. We respect but do not share that position. In saying that, we recognise that the subjective experience of Indigenous Australians at the hands of government over more than 200 years is unique to those communities and individuals and not shared by non-Indigenous Australians. That ongoing experience of the damaging effects of bad policy, poor implementation and/or discriminatory laws undoubtedly exerts a powerful and legitimate influence on many people's opinions of the Intervention and we understand that some see the Intervention as part of a continuum.

Accepting that, we can only make explicit our starting point for commenting on the Intervention: that decisive government action on a broad range of policy fronts was essential, not least because it had been the persistent demand of many, many Aboriginal people striving to keep their families and communities functioning in conditions of extreme stress. In commenting on the Intervention as a response to an undoubted set of urgent needs, we draw a distinction between *approach* and *content*, to which we return later.

In recent years there has been a great deal of attention paid to child abuse, welfare dependency and alcohol problems in Indigenous communities. Some of that attention is animated by the best of motives, some of it appears to be part of a broader and highly ideological attack on remote community living and communal land ownership. We reject the latter ideology but nevertheless accept that in public policy there is no inherent virtue in the status quo, whether that is prevailing social security practices or anything else where government plays a significant role in shaping community life. The status quo was allowing too much damage to occur in the lives of too many people for it to continue.

The question is who should take hold of responsibility for putting families and communities on a path to a healthier future and in what ways should that power to change things be exercised. The notions of ‘shared responsibility’ and ‘partnership’ carry the baggage of some poor policy execution in recent times. Nonetheless it encapsulates a critical idea that forms the basis for our answer to the question. Relief and recovery from the sometimes deep trouble that communities find themselves in will only come when enough people within demonstrate shared commitment to achieving a better future (and we do not underestimate that that is already going on in many places). But it is absurd to expect that to happen in any given set of conditions. Poor execution by governments of *their* responsibilities or simple neglect of those responsibilities will seriously impede the achievement of sustained improvement in people’s daily lives.

Important though that operating principle of genuinely shared responsibility is, it does not provide a complete answer in complex situations. Realistically, opinion over controversial issues such as alcohol controls, child welfare measures and restrictions on social security payments can be sharply divided within communities. For some people within a community these laws bring welcome relief and support for their own efforts at improving social conditions. Simultaneously for others they represent unacceptable government coercion. In those situations there is no reliable guide for those of us living outside that community in consensus Aboriginal opinion – it does not exist, nor should we be simplistic enough to assume that it should. In such circumstances, evaluating the Intervention means falling back on our own versions of principle and pragmatic common sense, while paying all possible attention to what is being said by those affected and accepting that, importantly, it is not our own lives and futures being discussed.

The essence of the Centre’s overall position can be summarised in two propositions. First, in terms of **content,** the Intervention is a mixed bag – some elements appear to us essential (such as better policing and enforcement of alcohol restrictions), others seem very questionable (such as compulsory five year leases over townships) and a third category of measures falls in a grey area. We acknowledge the grey area because in our view when an existing policy paradigm is broken to the extent it is in at least some

remote Aboriginal communities, the pathways out to a better future are not necessarily obvious. There is an uncomfortable possibility in such situations. In allying itself with some in an Aboriginal community who seek particular outcomes, when others hold sharply differing opinions, government may pursue ends one might agree with but use power in ways that confront our sense of what is just and right. This is the difficult reality we face in Australia as those Aboriginal and Torres Strait Islander people who live in remote communities seek to define their futures as both first peoples and as Australian citizens, from a general starting position of deep socio-economic disadvantage.

Secondly, in terms of **approach**, the Intervention suffered from grievous flaws. There is a degree of validity attaching to the claim that the originating Minister, Mr Brough, showed determination and decisiveness in acting on a broad front, with a substantial commitment of political capital and Commonwealth resources. On the other hand, it appeared that for Mr Brough his own personal conviction that the policy he pursued was right and would be good for Aboriginal people was sufficient justification for the full array of measures introduced and the way they were implemented. Only an extraordinary disregard for the history of well-intentioned top-down government action in Indigenous affairs would allow a Commonwealth Minister to satisfy himself with such a slender justification. These observations are not intended to be political or gratuitous in nature. There is no question that both sides of politics and we members of the broader Australian public are complicit in policy failure in Indigenous affairs. Instead these comments are sincere reflections on what is surely essential to the success of any substantial government engagement with remote Aboriginal communities, that is, *how* things are done.

A critical failure in the approach taken to the Intervention in our view was to disregard the notion of genuinely shared responsibility. Even if the judgment of government is that some increased resort to law is necessary, there is no good policy reason for bypassing the opportunity for greater success in achieving outcomes that lies in community engagement.

There is every reason to expect that a top-down exercise, designated as a moral necessity by a powerful non-Indigenous government figure, will have less prospects of achieving sustained improvements in quality of life than one which, from the outset, harnesses the energy, knowledge and capacity of Aboriginal people willing to embrace beneficial change. This sentiment is so obvious, so well accepted not just by ‘bleeding hearts’ but by hard-headed economic rationalists like the Secretary of the Treasury and the Productivity Commission, that it is extraordinary that in 2007 a Government would insist on such a diametrically opposed approach to fundamental social change. It was insulting to treat Aboriginal people in a sweeping and indiscriminate fashion, regardless of their personal and family circumstances, their achievements and their community contribution. And it squandered the potential for much greater community support for decisive government action.

Another inexcusable aspect of the approach taken to the Intervention was its hasty implementation. There is a difference between acting with intelligent urgency and sheer heedlessness. Decisive government action is not the same as complete unilateralism. If governments could plead ignorance of the serious problems of child sexual abuse and the whole network of related socio-economic issues, then an emergency response to the

Little Children are Sacred report that paid little attention to vital aspects of planning and implementation might have some degree of defensibility. That scenario had no application to Australia in mid-2007. It is clear that in areas such as income management more thought should have been devoted to the practical implementation of such a sweeping and coercive use of law. It is little wonder that the Intervention attracted a negative or cynical response from many people when it was inflicted without some of the basic and necessary architecture in place – for example a debit card that worked well from the start and did not generate a whole set of new problems of its own. For months individual Aboriginal people, already-stretched community organisations and public servants bore the brunt of this top-down approach. It is a very poor reflection on political leaders when measures that are already controversial and unprecedented are implemented in a way that loses sight of the humanity of the people affected.

In this sense the Review is a tremendous opportunity to re-shape the Commonwealth's approach to improving the quality of life for Aboriginal children and their families in remote NT communities. We see that from the beginning the Intervention was not a tightly focused attack on the problem of child sexual abuse. It had a broader socio-economic agenda. That in itself is not a bad thing. Indeed whenever Aboriginal communities are asked by government for their solutions to problems within the community, their answers are usually broad-ranging and holistic. But while the Intervention was initiated on a broad front, it was not carefully planned and implemented, in close collaboration with the affected communities. Nor did it at some particular point in time define itself as a clearly drawn set of objectives matched to a suite of measures whose success could be carefully evaluated.

At a general level we believe that the Review Board should recommend the maintenance of the Commonwealth's commitment of personnel, resources and urgency evident from the beginning of the Intervention. It should recommend the maintenance of a 'broad front' (though better-integrated) strategy. But it should urge an approach that is qualitatively different in important respects. Government can more successfully maintain a firm if largely untested new direction in addressing urgent problems, if it can show those within Aboriginal communities also striving for a better quality of life that:

- the extra money and political commitment are there for the long term
- government will not implicitly treat and depict them all as irresponsible, neglectful or abusive
- their own successes in devising local solutions to problems will be listened to, acknowledged and embraced
- their basic individual humanity is respected, in planning, administration and the political discourse that surrounds the Intervention
- that the entire enterprise is not dominated by stern negative measures but links positively to ideas for economic development, education and other aspirations that can benefit from greater government investment.

In terms of addressing the specific content of the Intervention in our submission to the the Review, we have concentrated on three policy areas: alcohol restrictions, income management and compulsory five year leases.

Alcohol

Summary

The Intervention rightly identified alcohol as a priority area for decisive government action and the Commonwealth moved on several fronts at once. Apart from introducing specific alcohol laws in Part 2 of the NTNER Act, the Commonwealth boosted police resources needed to enforce bans on grog-running and income management was designed to reduce expenditure on substance abuse. The measures were intended to provide a 'breathing space' for communities and the Review and associated empirical evaluations will discover how much that is so – anecdotal accounts so far suggest some kind of impact of that sort.

However the approach to alcohol suffered from the shortcomings of the Intervention, particularly haste, unilateralism and a selective focus. The 12 month review is an excellent opportunity to maintain the urgency but re-shape the attack on this debilitating problem. We suggest the following improvements be considered by the Review Board as it makes its recommendations to the Government regarding alcohol regulation:

- **better integration across the Commonwealth-Territory divide**
- **a broader policy mix to achieve long-term inroads on alcohol consumption**
- **in particular Commonwealth leadership on stronger supply-side law and policy, including volumetric measures that eradicate low cost sales of high alcohol drinks, reduced takeaway trading hours and fewer outlets**
- **the incorporation of strong supply-side measures into the regional alcohol management plans due to be developed in the near term in six locations**
- **much better resources for the effective delivery of youth programs and diversionary strategies of the kind detailed in numerous submissions and reports to government**
- **hypothecation of alcohol taxation revenue to provide greater support for such programs and other strategies to reduce consumption and alcohol-related harm in Indigenous communities**
- **close monitoring and effective measures to avoid drug substitution**
- **a review of whether the kind of data collection initiated under the Intervention or required by the NT Government is the data most needed to make deep inroads on the problem**
- **an ongoing and resourced capacity for review and change.**

We are aware that 66 additional police were budgeted by the previous Government for 2008-09, amongst other things to improve enforcement of alcohol laws, and that in 2008 the new Commonwealth Government has boosted expenditure on treatment, support and rehabilitation services by $50M over five years. It will be important for the Review to assess whether additional staff and resources in these critical areas continue to be priority needs. We understand that improved policing and better enforcement of anti-grog laws has made a positive impact, through the Intervention and also through changes that preceded it, such as those associated with the Alice Springs Liquor Supply Plan.

Introduction

The consequences of alcohol abuse in remote Aboriginal communities for children and families, for education, for culture and for the quality of daily life are spelt out in the *Little Children are Sacred* report and many other accounts from Aboriginal people. Statistics reinforce the message about these destructive effects.[1] They demand decisive action and the debate we have in Australia cannot from flinch that reality. Neither should it proceed in a fog of hypocrisy.

Governments are well placed to play several roles, supporting the work of communities trying to wrestle this giant problem to its knees. Because the destructiveness of alcohol abuse in Aboriginal communities is so well-documented, governments are entitled to, and should, set their policies with a 'bias to dry', that is doing as much as reasonably possible in the circumstances to reduce the flow of alcohol to communities.

But a potentially coercive and selective policy is troubling. What could make a confronting means for tackling a terrible problem acceptable, and significantly improve its chances of success, is for government to make itself a conspicuous ally of the many people within Aboriginal communities who want to get on top of the grog problem in their midst. A key to both **effectiveness** and **legitimacy** is greater community engagement.

The fact is that virtually all of the remote communities named in the Intervention and brought under the new alcohol regime in Part 2 of the NTNER Act already had their own settings turned all the way to 'dry' before 2007. Over 100 communities had General Restricted Area status under the NT *Liquor Act* and most of them imposed total bans rather than limited restrictions on alcohol.[2] Researchers in the area say that strong community backing is essential to reducing alcohol consumption in Aboriginal Australia[3] and the prior dry status of those many communities suggests that, everywhere in the remote NT, government has community people it can work with and support.

The reality is, of course, that anti-drinking measures will also encounter resistance and anger from community people who oppose them. That is difficult at the day-to-day human level for those people in conflict,[4] but it also shows that government has no choice but to walk a tightrope. On the one hand policies must have sufficient community traction and support to work. On the other hand unanimity is very unlikely and almost inevitably government must risk a degree of legal control if it is to back the efforts of local people and help them to be effective. There is likely no alternative to careful road-testing and adjustment, trial and error, in the way governments deploy law

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[1] SCRGSP (Steering Committee for the Review of Government Service Provision) (2007), *Overcoming Indigenous Disadvantage: Key Indicators 2007* (Productivity Commission, Canberra) at sub-chapter 8.1.

[2] National Drug Research Institute (2007). *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes* (National Drug Research Institute, Curtin University of Technology, Perth) at 96.

[3] See, for example, ibid at 210-211 and also the evaluation report produced for the NT Department of Justice: Conigrave, Proude and d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System* (2007) at 62 <www.nt.gov.au/justice/licenreg/documents/reports/Groote%20Eylandt%20Alcohol%20Management%20Evaluation%20Report.pdf>.

[4] See for example Conigrave, Proude and d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System* (2007) <www.nt.gov.au/justice/licenreg/documents/reports/Groote%20Eylandt%20Alcohol%20Management%20Evaluation%20Report.pdf>

and policy, as they work intensively with individual communites, to support their fight against grog problems.

Through that difficult period, laws and policies will much better withstand legal and political scrutiny if they are the by-product of that intensive support for the efforts of community people themselves to drive down the problem of alcohol.[5]

Such laws and policies will also achieve greater effectiveness and legitimacy if they avoid selectiveness and hypocrisy. With the additional measures accompanying the Intervention, it is hard to imagine a more highly regulated situation regarding individual drinkers. Yet other, major factors in the alcohol equation seem favoured by light touch regulation. A genuine emergency requires adjustments everywhere, including by governments and the wider Australian community. None of us are *unconnected* to the issue, because many contributory factors such as alcohol pricing, advertising and availability laws are always matters of policy choice and reflect the permissiveness of the wider social climate. We are all beneficiaries of government tax revenue from the sale of alcohol, which runs into billions of dollars.

In short, we recommend that the Review preserve and build on the following elements of the Intervention:

- *urgency*
- *policing* and *enforcement* of restrictions
- the legal *bias to 'dry'* in remote communities (that indeed preceded the Intervention)

but at the same time transcend its shortcomings:

- *unilateralism*: the Commonwealth's leadership role should mesh with the best of the efforts already made under NT administration of the *Liquor Act*; community engagement is also essential for the above reasons and also because, as the Central Australian Youth Link Up Service (CAYLUS) said, 'there are cultural and historic factors that make this region a minefield for people who do not have the experience to work within these circumstances' and 'there are also opportunities that inexperienced players will not realise'.[6]
- *selectiveness of focus*: a more vigorous approach to macro supply issues is needed.

Commonwealth-Territory Integration

The Intervention, sensibly, did not ignore alcohol as it moved to tackle a range of socio-economic problems at once. But, with its hasty, top-down execution, it paid little attention to existing local alcohol regulation. The Commonwealth did not differentiate, for example, in policy terms between poor levels of enforcement and successful inroads on alcohol consumption made in particular communities in the years immediately prior to 2007. The 'rivers of grog' were named, the laws and penalties for drinking and transporting alcohol were ramped up by over-riding Commonwealth legislation applied

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[5] This includes the issue of compatibility with racial discrimination legislation.

[6] Central Australian Youth Link Up Service (CAYLUS), *Submission to Senate Select Committee on Regional and Remote Indigenous Communities* (2008) at 3 <www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub26.pdf>.

across the board to communities that were mostly declared dry already and police numbers were increased.

Effective, long-term inroads on per capita alcohol consumption will need clarity and coherence. The Commonwealth should remain on the scene providing resources, taxation measures and political leadership including the more challenging supply-side issues. A Commonwealth Government early in its political life cycle, with unambiguous constitutional authority, a fundamental tax review in progress and ultimate power over the purse strings, is in a strong position to show leadership and to act on these critical aspects of alcohol policy. But, with a newly elected government from the same political party at the Territory level, it should also strive for the most seamless pursuit of policy and service delivery possible. The Review should scrutinise the strength of existing structures for inter-governmental co-operation on alcohol policy.

Broader Policy Mix

We understand that successfully loosening the grip on affected communities requires a policy mix[7] with a particular focus on sustained reductions in supply and demand, rather than simply shifting problems to another geographical location.

In that mix it is essential for long-term success that alcohol measures have 'a solid basis of support within the relevant population'.[8] **Community attitudes**, including tolerance levels for alcohol abuse, willingness to make regulation or prohibition work and attitudes to where money goes and in what proportions all seem important. Government support for community-driven regulation of the problem is vital. There is much that government itself can constructively do as well. **Effective policing and enforcement** is essential and requires adequate resources.[9] **Treatment, support and rehabilitation services** must be boosted so as not to squander the potential gains of regulation or prohibition and more importantly to ensure that individual people with drinking problems have a decent chance of responding positively to regulatory change and improving their life and well-being. The gathering and intelligent use of **data**, for example on purchasing patterns and the impact of different commercial practices and regulatory measures, is vital to keeping the community ahead of the problem, able to adapt as people's behaviour adapts.

Again, the execution of the Intervention was simply too hasty to achieve this kind of broad-front approach. For example, the Government's own Senators who supported the Intervention laws when they were the subject of a rushed committee inquiry in August 2007 recommended that the Commonwealth closely examine the need for expanded alcohol and drug rehabilitation services. This 'direct support to individuals who are overcoming drug and alcohol addictions' was necessary they said to consolidate the new

[7] Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred* (2007) at 164; National Drug Research Institute (2007). *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes* (National Drug Research Institute, Curtin University of Technology, Perth); Maggie Brady, 'Out from the Shadow of Prohibition' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation. Stabilise, Normalise, Exit Aboriginal Australia* (2007).

[8] Maggie Brady, 'Out from the Shadow of Prohibition' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation. Stabilise, Normalise, Exit Aboriginal Australia* (2007) at 187.

[9] National Drug Research Institute (2007). *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes* (National Drug Research Institute, Curtin University of Technology, Perth) at 206-207.

restrictive alcohol regime.[10] Yet the Government Response to the Senate Inquiry by then Minister Brough said simply that the Department of Health of Ageing 'will examine the need for additional rehabilitation capacity' and referred to funding made available to the NT in 2006.[11] On the one hand the Commonwealth insisted higher penalities and more regulation would reduce heavy drinking and stop the 'rivers of grog'. On the other hand the laws were launched without catering to the obvious corollary, that many new people would need urgent treatment and other services.

One area where the approach of the Intervention seems most selective is on the question of commercial supply.

Government Leadership on Politically Tough Supply-Side Questions
Limiting the ready supply of alcohol is an essential part of the policy mix. At the very least this entails the law and policy that governments are prepared to enforce regarding:

- the number of licensed premises per head of population
- advertising of alcohol
- selling practices (including beverage type, packaging, opening hours and availability of takeaways)
- pricing and taxation (particularly volumetric taxation based on pure alcohol content which we understand from the literature has a strong role to play).[12]

How then does the Intervention look, when examined against these criteria? There is only one very modest step in this regulatory direction: licensees must ask for ID and an intended destination when someone purchases more the $100 worth of takeaway alcohol. They must keep the records for three years. Hopefully the Review can report on the effectiveness of this requirement. What seems obvious, however, is that the Commonwealth has abstained from resorting to a much wider range of measures, including legal ones, that are likely to reduce availability and consumption.

This seems to accord with the longer-range experience of Aboriginal organisation in the NT which have sought to change commercial practices and lobbied for taxation reform.[13] The question of alcohol restrictions often descends to a debate between the 'right to drink' and the 'right of a child' to grow up in a safe environment. At the level of law and policy it rarely seems to tangle with the (overwhelmingly non-Indigenous) 'right to sell alcohol'.[14]

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[10] Senate Standing Committee on Legal and Constitutional Affairs, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response* (2007) at para 3.7.

[11] The Hon Mal Brough, *Government Response to the Senate Standing Committee on Legal and Constitutional Affairs, Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency Response* (2007) – see recommendation 6.

[12] National Drug Research Institute (2007). *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes* (National Drug Research Institute, Curtin University of Technology, Perth) at xii; Maggie Brady, 'Out from the Shadow of Prohibition' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation. Stabilise, Normalise, Exit Aboriginal Australia* (2007) at 191.

[13] See for example Hogan, Boffa, Rosewarne, Bell and Ah Chee, 'What price do we pay to prevent alcohol-related harms in Aboriginal communities? The Alice Springs trial of liquor licensing restrictions.' *Drug and Alcohol Review* (May 2006), 25, 207-212.

[14] See Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred* (2007) at 165.

For example, the sheer number of outlets in Alice Springs making money by selling takeaway alcohol, including from supermarkets, is surely an issue that warrants examination as part of an emergency response. The *Little Children are Sacred* report said that reducing takeaway sales was essential to combating the social problems associated with child sexual abuse.[15] A Select Committee of the NT Legislative Assembly (NT Select Committee) recently reported that the NT has a much higher percentage of alcohol (85%) purchased from takeaway outlets than other parts of the country.[16] The Review should seriously consider a Commonwealth buy-back of takeaway licences in the NT.

More generally, in the aftermath of the National Competition Policy, with its generally de-regulatory approach to business trading hours and a permissive attitude to the introduction of new businesses to a given market, it seems appropriate to review whether the policy pendulum has swung too far in Australia in favour of commercial outlets seeking to maximise profits from the sale of alcohol, particularly takeaways.[17] In a situation where laws that are highly intrusive on the lives of *all* the people in named Aboriginal communities have been imposed as an emergency response and in the face of evidence that the ready supply of alcohol is a contributor to a whole range of inter-connected social problems, the Commonwealth and the NT appear to be running a highly selective set of policies.

Trial changes to selling practices have run in places such as Tennant Creek, Alice Springs and Katherine but it appears that while there were some positive impacts, such measures have a perilous political existence. In fact the authors of a comprehensive review of restrictions on the sale and supply of alcohol around Australia published in 2007 came up with the following disturbing conclusion about liquor regulation in the NT:

> Whether or not it is intended, in its decisions the NTLC (NT Licensing Commission) appears to have given greater weight to the interests of the liquor industry than to community opinion. It has resisted both the demands of a majority of community members in various locations for the strengthening of restrictions on availability and calls (dating back to the time of the Royal Commission into Aboriginal Deaths in Custody) for a reduction in the number of licensed facilities (particularly in Alice Springs).[18]

The Review of the Intervention is an opportunity to break this pattern of lop-sided regulation. The Commonwealth and the NT have the revenue from alcohol taxes to support licence buy-backs, trials and evaluations in a much more ambitious way than

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[15] Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred* (2007) at 166-167.

[16] Legislative Assembly of the Northern Territory Select Committee on Substance Abuse in the Community, *Substance Abuse in Remote Communities: Confronting the Confusion and Disconnection* (2007) at 32.

[17] See for example the observations on National Competition Policy, the density of alcohol outlets in a given area and its relationship to alcohol-related disturbance in Neil Donnelly, Suzanne Poynton, Don Weatherburn, Errol Bamford & Justin Nottage, 'Liquor outlet concentrations and alcohol-related neighbourhood problems' *Alcohol Studies Bulletin*, No 8, April 2006.

[18] National Drug Research Institute (2007). *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes* (National Drug Research Institute, Curtin University of Technology, Perth) at 134.

has been ventured to date. They have the legal and policy control over licensing, taxation, retail trading hours, competition policy and advertising that are all central in combating alcohol abuse from the supply side. If the Intervention is to morph into a more successful and sustainable approach to social problems in the NT then it needs greater effectiveness and greater legitimacy amongst the Aboriginal people to whom it is addressed. Governments that show a willingness to get tough on more than just the individual drinker, and confront some of the non-Indigenous vested interests complicit in the problem, are likely to make gains on both those fronts.

We are aware, for example, of a Liquor Supply Plan for Alice Springs that emerged from the NT Licensing Commission in September 2006.[19] It followed sustained campaigning by many Aboriginal people and organisations and their supporters. It contains trading hours restrictions that are a partial implementation of volumetric-based pricing policies. Those problem drinkers most likely to access takeaway sales during daytime hours cannot buy cask or fortified wine because such products can only be sold after 6pm. We understand there will be a full evaluation but that indications are the changes have been successful in reducing alcohol-related harm in Alice Springs.[20]

We urge the Review Board, the Commonwealth and the NT to consult their experts and work with the affected Aboriginal communities on the key supply-side restrictions to be given priority support and funding for the next five to ten years. We believe the experience and the answers are there ready to be tapped. Early in the terms of both governments, it is a prime opportunity to act. If necessary, legislation can be used (including in the area of taxation where, for example, the tax-treatment of low-priced wine is anomalous on volumetric grounds), but a range of strategies including licensing conditions and Commonwealth-Territory funding agreements are also available to do much more on this front than has been done to date.

Accelerated Program for Alcohol Management Plans including Supply-Side Measures

In reviewing alcohol policy in the NT during 2007, the NT Select Committee reported that the progressive introduction of regional Alcohol Management Plans (AMPs) was a new feature on the horizon. These AMPs are negotiated in an area amongst stakeholders and then ratified by the Licensing Commission. An AMP on Groote Eylandt was positively evaluated in a report to the NT Department of Justice dated July 2007. The evaluation reported universal agreement amongst residents that 'there was a marked improvement in community harmony and reduction in fighting and other alcohol-related harms'.[21] The Groote Eylandt plan was also referred to by the Productivity Commission in its 2007 report on overcoming Indigenous disadvantage under the heading of 'things that work'.[22] The July 2007 evaluation included 'recommendations to assist other communities considering introduction of an alcohol management system' because

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[19] NT Licensing Commission, *Hearing Sought Under Section 33(2) of the Liquor Act to Vary Certain Conditions to the Liquor Licences in Accordance with the Alice Springs Liquor Supply Plan*, 7 September 2006 <www.nt.gov.au/justice/commission/decisions/060907_Alice_Springs_Liquor_Supply_Plan.pdf>

[20] ABC Radio National, Interview with John Boffa, *The National Interest*, 30 May 2008.

[21] Conigrave, Proude and d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System* (2007) at 56 <www.nt.gov.au/justice/licenreg/documents/reports/Groote%20Eylandt%20Alcohol%20Management%20Evaluation%20Report.pdf>.

[22] SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007) at Box 8.1.2.

Groote Eylandt is a distinct geographical and demographic situation.[23] It also made clear that, at a micro level, government support and money could have made the Groote Eylandt scheme work better and that ongoing support will be necessary to maintain success.

In short, it appears that a vehicle has emerged that is compliant with the NT Liquor Act, that empowers community members who want to tackle alcohol problems and that can be tailored to local conditions. It seems particularly suited to regional towns with mixed populations outside but near enough to dry Aboriginal communities. The NT Government's Generational Plan of Action response to the *Little Children are Sacred* report says that $2.5M over five years will be spent in six locations on developing regional AMPs.[24] This seems a very modest allocation of resources, compared to Intervention expenditure overall. We suggest that the Review look closely at two issues: whether this program needs more funding and what extra supply-side measures beyond those to be incorporated in legislation could be included to give an AMP real effectiveness in reducing alcohol-related harm.

Again this will be potentially unpopular with some and needs high-level political support to back the efforts of those working at a local and regional level. Queensland has had recent experience with community-level alcohol management strategies which the Review Board may draw on. The Queensland Government is persevering with the approach in Aboriginal local government areas, despite disappointing progress in the first few years and controversy over whether its past approach embodies partnership or unilateralism. This year the Premier herself met with the mayors of discrete Aboriginal communities. She communicated there was a clear 'bias to dry' in the government's policy but offered Aboriginal councils the opportunity to make submissions for funding and other support.

Whatever the merits of the political controversy in Queensland, that kind of top-level political engagement sets a good example. It lends authority and credibility to such an enterprise and puts more pressure on government officials to perform their side of the bargain. Governments can give mixed regional communities the opportunity and the responsibility to come up with AMPs in a timely fashion and to submit their priority bids for community funding and other support. It offers an extra avenue for bedding down supply-side measures that can reduce the availability of takeaway alcohol in particular.

Resources for Youth Development Programs

The Commonwealth announced $9.5M over five years in the 2008 Budget for alcohol diversionary activities for young people between 12 and 18 years, offering healthy alternatives to drinking and other substance abuse.[25] This is welcome but when one considers that the Intervention involves spending money in dozens of Aboriginal communities, this seems a very modest increase for long-term prevention and diversion.

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[23] Conigrave, Proude and d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System* (2007) at 62-63. <www.nt.gov.au/justice/licenreg/documents/reports/Groote%20Eylandt%20Alcohol%20Management%20Evaluation%20Report.pdf>.

[24] Northern Territory Government, *Safety - Alcohol and Drugs*, Factsheet <www.action.nt.gov.au/fact_sheets/docs/safety-alcohol_drugs.pdf>.

[25] Jenny Macklin MP, '$1.2 billion for Closing the Gap for Indigenous Australians', Media Release, 13 May 2008.

We draw the Review Board's attention to the submission from CAYLUS to an earlier inquiry into the Intervention. It quantifies the possibilities when Intervention spending is notionally re-directed towards youth workers and youth development programs. CAYLUS estimates that for 1% of the total expenditure on the Intervention the Commonwealth could meet the outstanding youth program infrastructure needs for the whole of Central Australia for the next three years.[26]

Hypothecation of tax revenue for effective community-level programs

One of the perennial frustrations for small community-controlled organisations at the coalface of dealing with challenging areas like community development, youth work and substance abuse is the short-term, piecemeal and discontinuous nature of program funding. This is a problem identified not just by those organisations but by one of the Commonwealth's own top-level economic advisory bodies, the Commonwealth Grants Commission in its 2001 *Report on Indigenous Funding*.[27] Estimates of government revenue from alcohol taxation are generally in the range of $6 billion to $8 billion, with a significant further increase in view if excise changes on 'ready-to-drink' alcohol pass the Senate. The Senate inquiry into that excise measure heard from many organisations that the Commonwealth should hypothecate a larger amount from that income for addressing prevention, diversion and alcohol-related harm.[28] This is an expenditure issue and need not wait for the finalisation of the current Henry Inquiry into taxation. The Review should considers the merits of recommending the hypothecation of alcohol taxation revenue, to establish a larger fund for the community strategies and programs necessary to reduce consumption and create more positive living environments in remote Aboriginal communities.

Monitoring and Avoiding Substitution

Focused attention on the availability and supply of alcohol is important. But, as a recent research paper indicates, 'proponents of supply-side law enforcement must be mindful of unintended, adverse consequences that might flow from disrupting the market for a particular substance'. The main finding is that 'restrictions in the availability of alcohol and petrol have led to increased use of marijuana with serious social and community consequences'.[29]

This is not an argument against restricting the availability of the first two substances. It reinforces the need to take a holistic approach to combating substance abuse and the wisdom of fully investing in diversion and the youth development programs discussed above. It also provides another reason why maintaining close community engagement is essential – so that government can rapidly find out what is going on and assist communities to adjust their strategies, as people's behaviour adapts to new conditions.

Data

As mentioned earlier, there is a compulsory collection aspect to Part 2 of the NTNER Act. Section 21 requires the collection and storage of identification and destination data where more than $100 worth of alcohol is purchased from a takeaway outlet.

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[26] CAYLUS), *Submission to Senate Select Committee on Regional and Remote Indigenous Communities* (2008) at 9 <www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub26.pdf>.

[27] Commonwealth Grants Commission, *Report on Indigenous Funding 2001* (2001) at 68.

[28] Senate Standing Committee on Community Affairs, *Ready-to-drink alcohol beverages* (2008) at 51-52.

[29] Senior and Chenhall, 'Lukumbat marawana: A changing pattern of drug use by youth in a remote Aboriginal community', *Australian Journal of Rural Health* (2008) 16, 75-79 at 75.

Hopefully the Review will be able to ascertain whether it is having any deterrent effect or assisting enforcement in the ways that were apparently intended. It does seem a little one-dimensional and not particularly tailored to what government might need to achieve comprehensive long-term inroads on the problem.

Necessary data is likely to include information on the effectiveness of changes to laws, licensing conditions, policing and AMPs. The July 2007 Groote Eylandt evaluation suggested 'periodic detailed evaluation (eg every five years) including interviews of community members, to allow for early detection of any incipient problems'.[30] The *Little Children are Sacred* report called for improved collection of alcohol-related data by health clinics, hospitals and the police with readier access to that data for the Licensing Commission.

[30] Conigrave, Proude and d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System* (2007) at 64 <www.nt.gov.au/justice/licenreg/documents/reports/Groote%20Eylandt%20Alcohol%20Management%20Evaluation%20Report.pdf>

Income Management

Summary

Income management is an untested approach to social policy in Australia but many other past policies have failed. There are early signs that a constituency of support within Aboriginal communities exists for what is, after all, an intrusive law that has been applied in a top down way almost exclusively to Aboriginal people. These two factors put a very high onus on those who would entirely abandon income management, to show a viable and effective alternative. On the other hand, its exceptional and intrusive character put a very high onus on those who seek to justify the continued blanket application of income management to remote Aboriginal communities.

In assessing the future of income management, the Review Board faces one of its most important decisions. We believe strong consideration should be given to a system of selective rather than blanket application in the Northern Territory. 'Opt-in' or 'stay-in' mechanisms for voluntary income management might address the problem of 'humbugging' for older and more vulnerable community members. The restoration of appeal rights, a structured role for Aboriginal influence in the operation of the scheme and greater promotion of supportive and not just punitve measures (such as training in money-management skills) would all improve legitimacy, proportionality and effectiveness.

The lack of thought given to technical implementation questions during the hasty introduction of the Intervention was inexcusable, given the coercive and sweeping nature of the laws. It must have greatly increased the unpopularity of the measure and shows the importance of government working much more closely with Aboriginal people through every stage of public policy development and implementation.

It seems that, whether intended or not, income management is a lynchpin of the Intervention. It is also an emerging feature of selective government action in Aboriginal communities interstate. Indeed, without much publicity at the time, the Intervention package inserted *national* changes to social security law entirely distinct from income management laws directed at remote Aboriginal communities in the Northern Territory. These remain available to the Commonwealth to be activated and applied to any or all recipients of defined Centrelink benefits.

There were two clearly stated objectives for income management from the previous Federal Government:[31]

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[31] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2008 at 6 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).

> Welfare reforms…will help to stem the flow of cash going towards substance abuse and gambling and ensure that funds meant to be for children's welfare are used for that purpose.

This statement of aims compares favourably with other apects of the Intervention in certain respects. It draws a direct and readily understood link between the measure introduced and elements of the crisis situation identified in the *Little Children are Sacred* report: child welfare, gambling and substance abuse. It is also a link that lends itself to empirical assessment of the measure's effectiveness. The primary focus of the Review Board is rightly on the contemporary question of whether income management should be maintained and, if so, in what form. That is the focus of our comments below. But the initial implementation of income management warrants some comment, if only to illustrate the need to avoid such flawed decision-making in future.

Initial Implementation

The haste of the previous Commonwealth Government in imposing such a radical and intrusive new set of laws on Aboriginal people living in remote NT communities was evident on several fronts. We understand from Estimates hearings that a debit card that operates in a fashion similar to an EFTPOS card, but according to restrictions agreed with each merchant including no cash withdrawals, will be available from September 2008.

This is a basic technical component of the scheme that the government should have straightened out before it launched the system. Instead Aboriginal people were forced to make do with second-best solutions that were inflexible, inefficient and disruptive. Stored value cards generated a whole set of new problems in the lives of many Aboriginal people suddenly subjected to income management. They could only be redeemed at a small number of stores. It was not clear that they could be augmented with cash, nor that an unused balance could be spent on later occasions. New cards had to be constantly obtained in order that basic necessities could be bought. Small business operators lost custom to large stores or in remote areas faced enormous record-keeping and other demands as they were compelled to make the government's policy work. Centrelink staff were diverted into unnecessary and repetitious tasks and community organisations were likewise saddled with a major new problem-solving workload. No doubt the Review Board will receive many first hand accounts of these difficult first months. A government mindful of its responsibilities to the human beings affected by its policies would not take such a high-handed approach to the introduction of a major change to the social security system.

It is also clear that the Commonwealth prioritised negative and punitive ideas over positive and supportive ones. It is evident, for example, from the Commonwealth's *One Year On* report that financial literacy programs were an ad hoc development well into 2008, once it was 'revealed' that there was 'a need for training in money management and family budgeting'. This again reveals a poor level of policy forethought at the highest levels in Canberra.

The Future

It appears to us that two vital issues confront the Review Board:

1. Is income management an effective and proportionate policy for reducing substance abuse and gambling and for ensuring that an appropriate level of family social security payments goes towards children's needs?
2. If so, is the blanket geographical application of income management to NT Aboriginal communities defensible?

Effective and Proportionate

We cannot offer the kind of empirical analysis necessary (but not sufficient) to answer the first question. We expect that a full evaluation may take some time but that hopefully the Review will be able to obtain early statistical indications of whether the legal measures taken to quarantine social security income have led to observable improvements in these vital aspects of daily community life. It would be another unfortunate indication of hasty implementation at the political level if the variation from a baseline cannot be reliably measured. Empirical conclusions on *effectiveness* will then need to be assessed against other important considerations, in order to reach a conclusion about the *proportionality* of the measure. We set out below some of the considerations we believe are relevant in coming to a conclusion about proportionality.

1. A crisis exists

Income management is a response to problems that long ago reached crisis level. The *Little Children are Sacred* report was just the most recent confirmation of that, prior to the Intervention being launched.

2. These are exceptional laws

Involuntary income management is unusual in Commonwealth welfare legislation.[32] The normal appeal rights available to Australian recipients of Commonwealth social security payments were overridden by the laws that Parliament passed in August 2007.[33] We note that during 2008 there has been a very limited extension of income management laws, to select trial communities in Western Australia.

3. These are coercive laws that have an intrusive impact on people's daily decision-making

In a modern capitalist society, even in remote areas, discretionary control over the expenditure of money is an attribute of individual autonomy exercised at least weekly but often daily.

4. These laws have been imposed from above with no consultation and generally applied, to date, in a way that is racially selective

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[32] Generally Commonwealth welfare payments are inalienable. This means that once a person is eligible for a payment it must be made to them and cannot be withheld or paid to someone else. There are limited exceptions. Centrelink must, for example, make a compulsory deduction from a person's welfare payment if he or she has a tax debt or child support obligation, and may do so for an overpayment. Centrepay, by contrast, was a pre-existing voluntary scheme.

[33] Generally a person receiving a welfare payment can appeal against a decision made by Centrelink to the Social Security Appeals Tribunal (SSAT), which is independent of Centrelink, and from the SSAT to the Administrative Appeals Tribunal (AAT). An appeal to the SSAT is free. However, unlike other persons to whom income management is applied, a person subject to the Northern Territory regime cannot appeal a Centrelink decision made under Part 3B of the Commonwealth *Social Security (Administration) Act* 1999 which contains the new income management provisions to the SSAT or AAT. He or she can only seek review of the decision through Centrelink's internal review procedure or appeal to the Federal Court.

The questions of discrimination, special measures, proportionality and reasonableness are complex ones. But if it is your subjective experience of the law, as a member of a minority Indigenous population that historically has experienced discrimination and racism, that you are singled out for the imposition of intrusive new laws there is every chance you will regard that as significant.

5. From a taxpayers' point of view income management is very expensive.
If it ultimately proves to be sound policy then the investment may be worthwhile, but there are of course alternative uses to which the money spent on maintaining a system of income management could be put.

We suggest below some ideas about how the legitimacy, effectiveness and proportionality of the existing system of income management could be improved:

- greater attention to supportive and not just punitive measures (eg skills training in financial management) – the Review Board should assess whether the 2008 Budget measures are adequate to this task
- a structured role for Aboriginal infuence in the operation of the scheme: the Commonwealth could establish and resource a group drawn from across the Territory that would provide ideas for refinements and local alternatives, valuable criticisms and feedback about ongoing implementation
- the restoration of appeal rights that were over-ridden in the original 2007 legislation.

Blanket Application
If the Review Board concludes that the answer to the first question about effectiveness and proportionality is Yes, it seems to us essential that it move to consider the second issue: selective versus blanket application of income management in NT Aboriginal communities. We are aware of a basic dichotomy in this debate.

On the one hand, critics say that on top of human rights concerns, in a pragmatic sense, the blanket application of income management undermines the implicit long-term objective: responsible expenditure decisions by individual social security recipients who have responsibilities towards family and the local community. An Aboriginal mother and father caring for their children and ensuring they attend school, eat well and have a healthy home environment are treated with implicit condemnation by a measure that sweeps them into the same category as the most reckless dissipater of welfare income. As well as patronising, indiscriminate and disempowering, the policy is poorly targeted and expensive.

On the other hand, the Howard Government insisted that 'this approach is essential to minimise the practice known as 'humbugging' in the Northern Territory, where people are intimidated into handing over their money to others for inappropriate needs, often for alcohol, drugs and gambling'.[34]

The first of these two arguments, when added to the exceptional, intrusive and unilateral nature of the income management laws and so far, their mostly selective application to

[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2008 at 6 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).

Aboriginal communities, carries great weight. The decision of the Review Board on income management is one of its most important and requires a full appreciation of factors, some of which are beyond our own knowledge. But we believe that these weighty considerations put a very high onus on those who would maintain income management in the NT in an unchanged state. Serious consideration should be given to a transition to selective application of income management, with an easily accessed 'stay in' or 'opt in' facility.

The NT scheme compares unfavourably to the trial in four Cape York communities also made possible by amendments to the *Social Security (Administration) Act 1999 (Cth)* in August 2007. There, income management is much more carefully targeted to individual behaviour – poor school attendance of a child (or non-enrolment), concerns about child safety, conviction for an offence and breach of a tenancy agreement. A Family Responsibilities Commission works at a local level, with Aboriginal membership, commences with a conference focused on achieving agreed outcomes and has an array of options available to it that include referral to support services and not just the imposition of time-limited income management.

By amending social security legislation in mid-2008, the Rudd Government has facilitated voluntary income management by agreement. This expands the existing capacity to use the voluntary scheme available under Centrepay. The Minister, Ms Macklin, indicated to Parliament on 5 June that escaping 'humbug' may be one situation where people sought voluntary coverage. We suggest the Review Board investigate the accessibility of these methods particularly for aged or frail people seeking to 'opt in' to income management. If the Review Board recommends a transition to selective not blanket income management in the NT, it should be relatively easy to arrange a 'stay in' provision for those who prefer it. We recommend the Review Board canvass community opinion on whether such an arrangement would largely address the 'humbugging' concern, should selective income management be adopted.

As a final point, we note that the Commonwealth recently announced a new trial linking school enrolment and attendance with social security payments. It is being trialled in a predominantly non-Indigenous urban community in Cannington, Western Australia as well as in six Aboriginal communities in the NT. It does not rely on the school attendance provisions introduced with the Intervention legislation in August 2007 – in fact it is not an income management measure. It goes further than removing discretionary control over the expenditure of social security benefits and suspends payment of the benefit altogether. For these reasons we are not sure if the Review Board will be examining these social security measures in the six NT communities. We make two brief observations about those trials:

1. In assessing the proportionality and effectiveness of these measures, one would need to take into account the more draconian nature of depriving a recipient (and potentially therefore their family) of income support payments.

2. If income management had been applied in a selective rather than blanket fashion in the NT, the Commonwealth would have had a more flexible range of options available to it in responding to non-enrolment and non-attendance. At first instance, income management could have preserved the sum available to a family for essentials while seeking to influence parental behaviour through the social security system.

Compulsory Five Year Leases

Summary
Our concern with compulsory five year 'leases' is not that land tenure is entirely unrelated to housing, living conditions and thus the situation of children in Aboriginal communities. It is that, in the absence of a compelling government justification for (temporarily) expropriating control of Aboriginal land, Part 4 of the NTNER Act looks like legislative overkill. Apart from discriminatory inroads on Aboriginal property rights, the measure breeds understandable mistrust amongst the very people with whom the Commonwealth seeks to work. It is likely that the positive objectives of the Commonwealth can be achieved by a set of alternative approaches that do not share the same debilitating unpopularity. Unless the Commonwealth presents the Review Board with a specific and compelling case to the contrary, well-supported by evidence – something it has not put on the public record to date – we submit that the Review Board should recommend replacing five-year leases with better targeted and less unilateral methods of achieving well-defined goals related to the improvement of housing and infrastructure.

A Clear and Persuasive Rationale?
It is difficult to discern precisely why the Commonwealth thought it necessary to compulsorily acquire township land in more than 60 Aboriginal communities across the Northern Territory in two phases (August 2007 and February 2008) as part of the Intervention. The express rationale given to Parliament was to ensure 'unconditional access to land and assets…to facilitate the early repair of buildings and infrastructure'. To this, a fact sheet on the government's Intervention website adds the promotion of 'security of tenure'. The imposition of compulsory five-year township leases also became entangled with a pre-existing public debate over long-term township headleases, promoted by the Commonwealth and NT Governments as a precondition for the investment of new public money in housing and infrastructure. Indeed the fact sheet currently on the government's Intervention website says that the 'leases will assist in establishing reformed tenancy arrangements for better housing'.

The problem with the first, express, rationale is that the Commonwealth does not appear to have provided any evidence that existing arrangements obstructed access by those agents of the Commonwealth seeking to repair houses and community infrastructure.

The problem with the second and third rationales – compulsory five year leases will facilitate tenure security and housing reform – is that they represent a short-term and unprincipled 'fix' incompatible with the apparent long-term objective, that is the consensual negotiation of lengthy township headleases. They are short term because five years does not provide meaningful security for tenants, homeowners, financial institutions or governments investing new housing money. They lack principle, because

they subject Aboriginal property holders to laws that would not be visited on other freeholders.

We surmise it is possible that five year leases were imposed as a bridge or prelude to 99-year township headleases, the preferred one-size-fits-all model of the previous Commonwealth Government introduced by amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) in 2006. The Intervention legislation expressly provides, in section 37, for such a transition. But a protracted, inter-generational surrender of traditional owner control over township land, if it is to bed down as part of an accepted and successful social and economic development strategy, needs to be carefully and respectfully negotiated – whether it be for 20, 40 or 99 years. The new Commonwealth Government liberalised the headlease regime in mid-2008 and that has created more flexibility and scope for mutually beneficial outcomes to be negotiated. But an Intervention measure that unilaterally transfers control of township land from traditional owners to the Commonwealth, for five years while such negotiations proceed, puts traditional owners in a much weaker bargaining position. It interferes with the fair negotiation of arrangements about which traditional owners are right to be careful – the Government itself says they involve a fundamental change to social and economic life in remote communities. By promoting resentment and distrust of government, they reduce people's willingness to negotiate with an open mind and thus the the likelihood of achieving the ultimate policy goal: an agreement that delivers long-term tenure security for housing and infrastructure

If the measure achieves only short-term 'security' and the new government is prepared to work with a more flexible array of alternatives regarding longer-term tenure reform then that might imply that the five year lease laws are now simply redundant and can afford to be ignored. But that view overlooks the exceptional nature of the laws.

Unilateralism and Unfairness

Unsurprisingly for a legal arrangement dictated by the Commonwealth rather than negotiated with the landowners, the terms of compulsory five-year leases are heavily skewed in favour of the Commonwealth and its Minister. The terms and conditions of a lease can be set and later varied at the Minister's discretion. The previous Minister issued additional terms and conditions by way of a Determination the day after Parliament passed the legislation in August 2007. These confirmed the breadth and unilateral nature of the Commonwealth's interest by defining the 'permitted use' of the land as follows: 'to use, and permit the use of, the Land *for any use the Commonwealth considers* is consistent with the fulfilment of the object of the [NT Emergency Response] Act' (emphasis added). The Commonwealth is under no statutory obligation to pay rent for a five year lease and an amount was not budgeted for in 2007.[35] Amendments effective from 1 July 2008 facilitate the negotiation of rent or other payments to traditional owners but do not remove the discretionary basis for payments to be made.[36] While traditional owners cannot terminate or vary a five year lease, the Commonwealth lessee may add or remove land from the lease area, terminate the lease and sublease, license, part with possession of or otherwise deal with its interest (short of

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[35] Senate Legal and Constitutional Affairs Estimates Committee, *Answers to Questions on Notice received from Department of Families, Community Services and Indigenous Affairs (FaCSIA)*, 2007, Question no 4 <www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/additional_info/facsia_answers_qon.pdf>

[36] *Indigenous Affairs Legislation Amendment Act 2008*, Schedule 2, item 10.

a transfer of the lease). A sublease or other dealing by the Commonwealth dispenses with the normal requirement for traditional owner consent under s 19(8) of the Land Rights Act (s 52(7)).

Part 4 leases exemplify the unilateralism of the Intervention, by-passing existing mechanisms for negotiating the presence of Commonwealth officials and agents on township land in pursuit of improved community life. They also reflect a high-handed governmental attitude to Aboriginal freehold property rights, unlikely to be replicated where non-Aboriginal property rights are at stake. And by labelling a temporary but sweeping compulsory acquisition a 'lease' it added to the doublespeak already found in the ALRA as a result of amendments in 2006. Those earlier amendments gave the Commonwealth Minister the power to forcibly transfer the existing functions of an Aboriginal Land Council to a smaller corporation. This was termed 'delegation', though it departed from conventional legal principles attaching to that concept in several basic ways.[37] It is not a semantic objection to draw attention to these distortions of concepts such as 'lease' and 'delegation', used in their conventional sense elsewhere in the Act. Those internal contradictions can sow confusion about important issues when the statute is interpreted, but more fundamentally they show a disdain for the Aboriginal people whose rights are dependent on the statute. The distortion is perpetuated by the government fact sheet, still on the Intervention website, which implies a consensual arrangement: 'A lease is *a legal agreement* which allows someone other than the owner to use and have responsibility for land or property for a set period of time in accordance with the terms of the lease'.[38]

In addition, the compensation provisions available to traditional owners for government incursions on their property rights are unfair and unsatisfactory. A non-Aboriginal freeholder subjected to the same kind of temporary expropriation of control over their land, in pursuit of government policy objectives, would have an unambiguous and upfront *statutory* entitlement to compensation. Importantly, that entitlement does not depend on establishing they have suffered what the Commonwealth Constitution regards as an 'acquisition of property'. For an ordinary freeholder, the Constitution stands in the background as an irreducible minimum, acting as both a safety net and potential source of top-up compensation.

The normal compensation regime available under the *Lands Acquisition Act 1989* (Cth), however, is expressly overridden by the Intervention legislation. Aboriginal traditional owners have to do much more than demonstrate that their property has been acquired by compulsory process (which would require no more than pointing to section 31 of the NTNER Act and its commencement date in the Government Gazette). They must show

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[37] Significant powers and functions may end up being exercised by an external organisation; the transfer of powers may be involuntary and indeed done over the objection of the original repository of power; the original repository is forbidden from exercising the powers or functions while a 'delegation' is in place (and subsection 34AB(d) of the *Acts Interpretation Act* 1901 is expressly 'disapplied'); and control over the variation or revocation of the delegation is exercisable in many cases not by the original repository of the power but sometimes by the Commonwealth Minister and sometimes by the delegate corporation itself: see Sean Brennan, 'Economic Development and Land Council Power: Modernising The Land Rights Act or Same Old Same Old?' (2006) 10 *Australian Indigenous Law Reporter* 1 at 9.

[38] Australian Government, *Five year leases on Aboriginal townships* <www.facsia.gov.au/nter/docs/factsheets/land/factsheet_townships.htm>.

they qualify for just terms compensation under the constitutional definition of an acquisition of property.[39]

There is doubt about whether the constitutional guarantee of just terms applies in the Northern Territory at all. The Commonwealth has argued the contrary position in the High Court. It obtained unanimous support from the High Court in the case of *Teori Tau* in 1969. More recently in 1997 in the *Newcrest* decision, the High Court split 3:3:1 over whether the just terms guarantee applies. Based on the 3+1 majority stitched together to achieve a result in that case, the current law probably leans in favour of the just terms guarantee applying in the Territory. But the composition of the court is significantly different ten years on and the artificial majority in *Newcrest* is a slender and inappropriate basis upon which to pin the compensation entitlements of property owners under the Bill.

Indeed there is an obvious conflict of interest here. The Commonwealth has drafted an Act that displaced a straightforward statutory compensation obligation upon itself and replaced it with a constitutional criterion that is surrounded by legal uncertainty. It has argued several times in the High Court that indeed the just terms guarantee is *not* applicable in the Northern Territory.

The law on section 51(xxxi) is also particularly vague and unpredictable. There are at least five legal objections the Commonwealth could seek to raise in court, to oppose a just terms claim. They are:

- the interest is not ‘property’ – this is usually the objection least likely to succeed
- the loss of property does not amount to an ‘acquisition’ – this depends on a demonstration of what has been termed a ‘benefit’ in the constitutional sense
- the law is appropriately characterised as one with respect to a subject matter other than the acquisition of property – this is the most unpredictable and unsatisfactory area of the law
- the interest at stake is ‘inherently defeasible’ and therefore does not attract the just terms guarantee – the case law in this area is embryonic and lacks a strong guiding set of principles
- the acquisition is ‘other than on just terms’ – in the past half century, there has been little substantial development of the law in this area that has formed the basis for a High Court decision (the *ratio* of a case), as opposed to various observations in passing over the years by individual judges (*obiter dicta* which is of far less precedential value). The Act points those who lose property rights under Part 4 of the NTNER Act towards a legal standard of just terms about which we know very little.

In short, the use of the constitutional standard not as a top-up but as the very basis for compensation entitlement encourages highly complex, adversarial litigation about mainly collateral issues. It puts formidable legal obstacles in the path of Aboriginal property owners that would not exist if the Commonwealth had not overridden the compensation regime applying to other Australians.

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[39] Section 60(2), *Northern Territory National Emergency Response Act 2007* (Cth).

Collectively the unfair treatment accorded to Aboriginal property rights by Part 4 of the Act means that the provisions regarding five-year leases should not simply be left on the statute books, even if the Commonwealth has shifted its position on their utility since 2007.

An instrument for comprehensive government control of Aboriginal township land
There is a fourth and final conjecture as to why five-year leases were introduced. Perhaps they were simply a legal vehicle for 'clearing the decks', eliminating barriers to the comprehensive assertion of government authority over Aboriginal townships. The concept of a lease superficially accords with the property-based structure of the ALRA and secures 'exclusive possession and quiet enjoyment' of the land for the Commonwealth, plus unilateral decision-making control over what is a permitted use for the land. But we have seen that this involves a distortion of the notion of a lease used elsewhere in the law, including in the ALRA itself. Perhaps a compulsory five-year lease is simply a proxy for a sweeping assertion of government control that happens to fit loosely with the Act. The Minister's Second Reading Speech in August 2007 lends some support to this interpretation of the Commonwealth's intentions. Mr Brough said that five year leases could be terminated early in a particular community where it was clear that 'intensive Commonwealth oversight' was no longer required.[40]

We submit that 12 months into the Intervention it should be possible for the Commonwealth to specify with much greater precision the legal barriers, if any, to effective government action and the shortfall, if any, in essential Commonwealth powers. We also submit that alternatives exist to meet any such need including section 19 leases. The Commonwealth need not undermine property rights and the genuine consensual use of leasing under the ALRA through a sweeping measure of expropriation.

Summary
Ensuring sufficient housing in good repair is a top priority in improving the living conditions of Aboriginal people in remote communities. Governments from both side of politics deserve credit for committing substantial new money and energy to this area. To date, however, the Commonwealth has made only a vague and weak case as to why compulsory five-year leases over Aboriginal townships are a necessary part of the Intervention.

We submit that unless a new and compelling case can be made by the Commonwealth to the Review Board for the retention of sweeping Commonwealth control of Aboriginal townships on an emergency basis, compulsory five year leases should be abandoned in favour of less unilateral measures. Secure long-term tenure arrangements for government investment in housing or infrastructure were never going to be achieved by this measure. Alternatives have always existed in the Act and they have been augmented in 2006 and again in 2008 by legislative amendments regarding township headleases. Government and community energy should be channelled in these directions of negotiation and partnership. If the Commonwealth can identify specific shortfalls in power or barriers to access in fixing infrastructure, it should be possible for template agreements to be negotiated with Land Councils which can then be adapted for each community's local conditions as necessary. If statutory change is necessary, it can be

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[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2008 at 14 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs).

properly scrutinised and debated in Parliament. If five year leases are not abolished, the compensation regime should shift from reliance on section 51(xxxi) of the Constitution to an upfront statutory entitlement and rent should not be a discretionary matter for the government of the day.

Yours sincerely

Sean Brennan