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# COMPULSORY INCOME MANAGEMENT UNDER THE STRONGER FUTURES LAWS – PROVIDING ‘FLEXIBILITY’ OR OVERTURNING FREEDOM OF CONTRACT?

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by Dr Shelley Bielefeld

## INTRODUCTION

This article argues that whilst income management has been heralded by the Government as providing ‘greater choice and flexibility’ for welfare recipients,<sup>1</sup> the scheme significantly erodes freedom of contract for those subject to it. The doctrine of freedom of contract maintains that consumers are to have freedom to enter into contracts for goods and services of their own choice with merchants of their own choice.

Compulsory income management was developed as part of the Coalition Government’s 2007 Northern Territory Emergency Response (the ‘Intervention’). The Government chose to respond to the *Little Children are Sacred* report on sexual abuse of Indigenous children in remote Indigenous communities with a wide ranging Intervention.<sup>2</sup> Income management was applied to all Indigenous people in the Northern Territory (‘NT’) who were welfare recipients in the Government’s newly defined prescribed communities. This was so regardless of an absence of evidence that such measures would be either effective or desired by those subject to them. Despite this, the incoming Labor Government decided to continue income management when it came to power late in 2007. At this time there was substantial criticism of the compulsory income management scheme, both nationally and internationally. The Government had initially suspended the *Racial Discrimination Act 1975* (Cth), preventing welfare recipients from having any domestic means of seeking a remedy in relation to the multifaceted aspects of the Intervention legislation, including income management. Strong arguments were raised that the income management scheme was racially discriminatory and breached Australia’s human rights obligations contained in the *International Convention on the Elimination of Racial Discrimination*.<sup>3</sup>

Consequently, the Labor Government modified the income management scheme in 2010, alleging that this now made the scheme ‘non-discriminatory’. Under the 2010 legislation compulsory income management applied

to those defined under the Social Security legislation as ‘disengaged youth’, ‘long-term welfare recipients’, ‘vulnerable’ welfare recipients, and those referred for ‘child protection’ issues.<sup>4</sup> They also created a category of ‘voluntary income management’.<sup>5</sup> These categories have been retained in the Federal government’s recent 2012 *Stronger Futures* legislative package, which consists of the *Stronger Futures in the Northern Territory Act 2012* (Cth), the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) and the *Social Security Legislation Amendment Act 2012* (Cth) (‘SSLA Act’).

The latter Act has amended the *Social Security (Administration) Act 1999* (Cth) (‘SSA Act’) and extended the operation of the 2010 income management categories, ensuring that many more Indigenous Australians can now be made subject to income management across the nation. Although the legislation no longer engages in *direct* racially targeted discrimination, the issue of *indirect* racial discrimination remains because the majority of welfare recipients in the NT are still Indigenous, and other Indigenous communities are now subject to the scheme in South Australia.

There has been sustained critique of compulsory income management in a range of sources,<sup>6</sup> yet it is now embedded more firmly than ever due to the *Stronger Futures* legislative package. The *SSLA Act* contains expansive referral powers for state and territory agencies.<sup>7</sup> Such authorities can refer welfare recipients for compulsory income management regardless of where they live. The Act provides that the Minister may specify a state, territory or area where income management will be applied.<sup>8</sup> The Act also prevents welfare recipients from being able to escape the confines of income management due to a change of residence.<sup>9</sup>

The *Stronger Futures* legislation allows for some variability in the operation of the income management scheme depending upon the location in which a welfare recipient resides. One of the significant changes from July 2012 was the implementation of location based income management

to apply not only in the Northern Territory but also in some metropolitan and other regional areas. This has led to a roll out of targeted income management measures based upon residence for those in several locations earmarked by Government as ‘disadvantaged’. These include Bankstown in New South Wales, Logan in Queensland, Rockhampton in Queensland, Playford in South Australia, and Greater Shepparton in Victoria.<sup>10</sup> Compulsory income management applies in these areas for the ‘child protection’ and ‘vulnerable’ categories. Welfare recipients in these areas may also choose to sign on for ‘voluntary’ income management. Under the new scheme Indigenous people are still likely to be significantly over-represented in the income management categories.

Serious overrepresentation in the income management categories remains a reality for Indigenous people living in the NT. Income management is now applied to all welfare recipients in the NT except for pensioners. Data released late in 2012 shows that in the NT ‘About 90 per cent of people subject to income management are Indigenous ... and Indigenous people are much less likely to apply for, or be granted, an exemption.’<sup>11</sup> This raises a concern that indirect discrimination against Indigenous Australians occurs through the Government’s so-called ‘non-discriminatory’ income management measures. Indigenous people in the NT whose income is managed ‘are often geographically remote or isolated and among the least empowered to pursue review rights or complaints mechanisms.’<sup>12</sup> Thus a disproportionate number of Indigenous Australians experience restrictions on their contractual freedom and autonomy due to income management, which sits uneasily with Australia’s international obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’).

### FREEDOM OF CONTRACT—BASIC CITIZENSHIP RIGHT

It is arguable that the Government acts inconsistently with the colonial legal system’s principle of freedom of contract in placing limitations on Indigenous people’s contractual freedom via the compulsory income management scheme. Australia has strong theoretical traditions grounded in the political ideology of liberalism. As a philosophy, liberalism upholds the freedoms of the individual as the preferred model to provide for human flourishing.<sup>13</sup> One such freedom of considerable importance in a capitalist economy is freedom of contract. The doctrine of freedom of contract holds that:

- (1) contracting parties should be free to agree to whatever agreement they wish; and (2) people should be free to decide

to enter into contracts with whoever they please and should not be compelled to enter contractual relationships.<sup>14</sup>

That this freedom has been regarded as fundamentally important in contract law for many long years is seen in the esteemed judgement of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* where he declared that:

[I]f there is one thing which more than another public policy requires it is that men [sic] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.<sup>15</sup>

The implementation of compulsory income management impedes the contractual freedom of those who are subject to it. It does this in two ways. First, it does this by prescribing a specified range of goods as ‘priority needs’, limiting the type of goods that may be purchased by welfare recipients due to the significant proportion of their income that is subject to income management. Secondly, these measures ensure that those subject to compulsory income management are no longer free to enter into whatever contractual agreements they wish.

The amount of money quarantined for income management is usually 50 per cent of a fortnightly welfare payment, 100 per cent of all lump sum payments and 70 per cent of a fortnightly welfare payment where there is a child protection issue.<sup>16</sup> Under the income management scheme the amount quarantined for income management can only be spent on a specific range of items at Government approved stores using a BasicsCard. These items are defined by legislation as ‘priority needs’ under s 123TH(1) of the *SSA Act*. They include food, clothing, health, housing needs and certain household utilities. The list of priority needs, whilst long, certainly has its limitations. Notably, there are items that are not expressly included—mobile phone bills, internet access, online shopping, the cost of family outings and transportation costs outside of those associated with the Government determined list of ‘priority needs’. With the exorbitant cost of maintaining landlines many may well prefer to have a mobile phone rather than a landline. The ALRC has also noted that ‘the limited definition of ‘priority needs’ ... poses particular difficulties for victims of family violence’.<sup>17</sup>

Compulsory income management prevents welfare recipients from purchasing certain goods and services with a BasicsCard. These include alcohol, tobacco and

pornographic material under s 123TI(1) of the *SSA Act* and gambling services under s 123TI(2). Interestingly, recent data shows that these issues were not actually problematic for the majority of those surveyed who were subject to income management.<sup>18</sup> If an income managed welfare recipient wishes to spend their income on non-excluded items that are not deemed to be 'priority needs', they must engage in the time consuming (and some would say humiliating) task of asking Centrelink to make a payment for the desired item or service.<sup>19</sup> No permission will be granted to spend income managed funds on other items unless 'priority needs' have first been met.

The compulsory income management scheme also substantially eradicates freedom of choice in regards to who may supply the goods or services that a welfare recipient may wish to purchase, even if they can provide a cheaper price. The scheme tends to promote purchase from large corporations rather than independent stores or markets, which has been a subject of legitimate complaint by those whose income is managed and controlled by the BasicsCard scheme, as it can lead to increased costs in goods and services.<sup>20</sup> Consumers subject to compulsory income management can no longer bargain for the best price for desired goods and services. Welfare recipients have indicated that:

[T]he BasicsCard could not always be used where it was most convenient for people to shop or where they would prefer to shop. This was especially the case for farmers markets and other outlets that may sell fresh, cheap food, but that did not have a contract with Centrelink to accept the BasicsCard.<sup>21</sup>

Compulsory income management therefore removes the liberty of welfare recipients to form contracts with whomever they prefer and effectively compels them to form contracts with those with whom they may not wish to contract. Thus the 'voluntariness' of contractual relations is significantly tarnished.

Australia has a lamentable history when it comes to impinging upon Indigenous peoples' rights to enter into contracts of their own choice. This is evident in the so-called contracts of employment with inhumane and exploitative working conditions that were forced upon Indigenous workers in Australia's earlier colonial era. Legislation allowed for Indigenous people to experience extreme levels of control over their vocation and to be forced to work for slave rations.<sup>22</sup> Throughout the earlier era of Australian colonisation freedom of contract was denied to Indigenous people, who were unjustifiably seen as less deserving of liberalism's promises regarding individual autonomy. Indigenous Australians in receipt of

welfare payments have been even less likely to be accorded liberal rights. Instead they have routinely been subject to the paternalistic control of the state.<sup>23</sup>

It is high time the Government acknowledged that Indigenous people have the right to enter into contracts of their own choosing. Governments that seek to fetter Indigenous peoples' freedom of contract are harking back to the paternalism of an earlier colonial period that Australia would do better to leave behind. For a modern day government to deny that Indigenous people have a right to engage in freedom of contract sits uneasily with the liberalism inherent in Australia's legal and political discourse. It is quite contradictory. Every citizen should be deemed to have contractual capacity where they are of the appropriate age and of sound mind. Any diversion from this principle runs counter to the liberal ideology underpinning Australian society.

#### WHAT ARE THE IMPLICATIONS FOR THE AUTONOMY OF INDIGENOUS PEOPLES?

Compulsory income management has a disproportionate impact on Indigenous Australians, particularly in the Northern Territory, but now potentially Australia wide due to the extensive referral powers under the *Stronger Futures* legislative package. Compulsory income management places limitations on the contractual freedom of welfare recipients. It allows the Government to restrict welfare recipients from entering into contracts for purchases of their own choice with merchants of their own choice. It is questionable whether such restrictions can genuinely be described as promoting 'greater choice and flexibility', as claimed by the Government;<sup>24</sup> rather it appears that these measures overturn freedom of contract for those subject to them.

Australia has belatedly endorsed the UNDRIP, which contains many hard fought rights regarding the autonomy of Indigenous peoples.<sup>25</sup> This international instrument arose out of a desire to prevent the repetition of past injustices and abuses that have occurred as a consequence of the colonial practices of imperial nations. Australia has yet to fully implement its obligations under the UNDRIP. The removal of autonomy and contractual freedom inherent in the compulsory income management scheme is contrary to the spirit of the UNDRIP which aims to protect Indigenous peoples from discrimination (Article 2), and promote self-determination (Article 3) and autonomy (Article 4). A government that will not permit so many of its Indigenous citizens to freely exercise contractual rights on an individual level has little chance of effectively addressing the serious challenges

of racial injustice that remain unresolved in Australia. The compulsory income management laws should be promptly repealed.

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- 1 Department of Human Services, 'BasicsCard' <<http://www.humanservices.gov.au/customer/enablers/centrelink/income-management/basicscard>>.
- 2 *Ampe Akelyernemane Meke Mekarle – 'Little Children are Sacred'* (Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007) <<http://www.inquirysaac.nt.gov.au>>.
- 3 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). Letter from the United Nations to the Australian Government, 28 September 2009 <[http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Australia28092009.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf)>.
- 4 s 25 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) ('SSOLA Act'). Definitions of 'vulnerable welfare payment recipients', 'disengaged youth', and 'long term welfare payment recipients' are contained in s 36 of that Act, resulting in amendments to the *SSA Act*.
- 5 s 25 of the *SSOLA Act*. This allows welfare recipients to choose to enter voluntarily into the income management scheme by entering 'a voluntary income management agreement' pursuant to s 123UFA of the *SSA Act*. Voluntary income management agreements are dealt with further under ss 123UM-123UO of the *SSA Act*.
- 6 Eva Cox, 'Evidence-Free Policy Making? The Case of Income Management' (2011) 12 *Journal of Indigenous Policy* 1, 85-7; Paddy Gibson, *Return to the Ration Days – The NT Intervention: grass-roots experience and resistance*, (Jumbunna Indigenous House of Learning, University of Technology Sydney, June 2009) 10-12 <<http://www.jumbunna.uts.edu.au/pdfs/JIHLBP11.pdf>>; Michele Harris (ed), *A Decision to Discriminate – Aboriginal Disempowerment in the Northern Territory* (Concerned Australians, 2012) 63; Peter Billings and Anthony Cassimatis, 'Redesigning the Northern Territory Emergency Response – Social Welfare Reform and Non-Discrimination' (2010) 27(2) *Law in Context* 58, 62, 66-8, 74, 80; Peter Billings, 'Social Welfare Experiments in Australia: More Trials for Aboriginal Families?' (2010) 17 *Journal of Social Security Law* 164, 168, 180-1, 189; Jon Altman, Centre for Aboriginal Economic Policy Research, *Income Management and the Rights of Indigenous Australians to Equity* (2010) 1-10; Philip Mendes, 'Compulsory Income Management: A Critical Examination of the Emergence of Conditional Welfare in Australia' (2012) *Australian Social Work* 1, 1-14; Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians – Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522-5, 534-62.
- 7 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth), 2. Section 6 of Part 1 of Schedule 1 of the *SSLA Act* amends the *SSA Act* and inserts s 123TGAA which gives the Minister power to declare that a department (a), body (b), or agency (c) is a 'recognised State/Territory authority' for the purposes of referral for compulsory income management.
- 8 See for example ss 23, 24 and 25 of Part 2 of Schedule 1 of the *SSLA Act* which amends the *SSA Act* and inserts respectively ss 123UCA(3), s 123UCB(4) and s 123UCC(4) which all allow the Minister to 'specify a State, a Territory or an area' for the purposes of income management.
- 9 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth), 3. See for example s 15 of the *SSLA Act* which inserts s 123XPAA(4)(b) and s 123XPAB(4) (b) into the *SSA Act*, and s 26 of the *SSLA Act* which inserts s 123UCC(1)(c) into the *SSA Act*.
- 10 Department of Families, Housing, Community Services and Indigenous Affairs ('FASCIA'), *Place-based income management* <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/programs-services/place-based-income-management>>.
- 11 J Rob Bray et al, 'Evaluating New Income Management in the Northern Territory: First Evaluation Report' (Social Policy Research Centre UNSW, July 2012) 254.
- 12 Commonwealth Ombudsman, *Review of Centrelink Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions* (June 2012) 1.
- 13 Andrew Heywood, *Political Ideologies – An Introduction* (Palgrave Macmillan, 3<sup>rd</sup> ed, 2003) 28, 32.
- 14 J W Carter, *Cases and Materials on Contract Law in Australia* (LexisNexis Butterworths, 6th ed, 2012) 6-7.
- 15 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.
- 16 FASCIA, above n 10, 2.
- 17 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (Report No 117, 2011) 279.
- 18 Bray et al, above n 11, 185.
- 19 *Ibid* 234-5.
- 20 *Ibid*; Australian Council of Social Service (ACOSS), Submission to Senate Community Affairs Legislation Committee, *Inquiry into Social Security and other legislation amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and related bills*, February 2010, 17.
- 21 Bray et al, above n 11, 91.
- 22 Garth Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (Australia and New Zealand Book Co, 1973) 62; Rosalind Kidd, *The Way We Civilise – Aboriginal Affairs – the untold story* (University of Queensland Press, 1997) 234-5.
- 23 Bielefeld, above n 6, 522-5, 528-62.
- 24 Department of Human Services, above n 1.
- 25 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).