articles

Unconstitutional takeover in the Northern Territory

by Greg McIntyre SC[1]

Introduction

In the wake of the *'Little Children are Sacred'* report to the Northern Territory government the Commonwealth government on 21 June 2007 declared a 'national emergency' arising from the sexual abuse of Aboriginal children and announced it would introduce the following measures in Aboriginal communities in the Territory:

- A sixth month ban on alcohol on Aboriginal land,
- The compulsory acquisition of Aboriginal townships for five years to improve property and public housing,
- A ban on pornographic videos and an audit of Commonwealth computers to identify pornographic material,
- The quarantining of 50% of welfare payments so it can only be spent on essentials,
- Linking of income support and family assistance to school attendance and providing meals to children at school which are to be paid for by parents,
- Compulsory health checks for Aboriginal children under 16,
- An increase in police numbers on Aboriginal communities,
- Engaging of the army in providing logistical support, and
- Abolishing the entry permit system to Aboriginal reserves for common areas, road corridors and airstrips[2].

On 7 August 2007 the Commonwealth Government introduced into the Parliament the following Bills:

- *Northern Territory National Emergency Response Bill* 2007
- *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill* 2007
- *Social Security and Other Legislation Amendment (Welfare Payment) Reform) Bill* 2007

This legislative package was said to be intended to implement a collection of measures announced by the Prime Minister and the Minister for Families, Community Services and Indigenous Affairs on 21 June 2007, in response to the Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007, Ampe Akelyernemane Meke Mekarle *'Little Children are Sacred'* - authored by Pat Anderson and Rex Wild (Anderson/Wild report)[3] which was handed down on 15 June 2007[4].
The task identified for that Inquiry was principally to "[e]xamine the extent, nature and factors contributing to sexual abuse of Aboriginal children". The inquiry found that the incidence of child sexual abuse was "directly related to other breakdowns in society", and that "the cumulative effects of poor health, alcohol, drug abuse, gambling, pornography, unemployment, poor

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[2] *The Australian*, Friday June 22, 2007, p 4

[3] http://www nt.gov au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf

[4] *The Weekend Australian*, June 16-17, p 1

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

- Compulsory acquisition of 'town camp' leases;
- The appointment of Government business managers in communities;
- A limitation on bail and sentencing discretion in the Northern Territory with respect to the application of customary law or cultural practice to excuse, justify, authorise or lessen the seriousness of violence or sexual abuse;
- The licensing and assessment of community stores on Aboriginal land for appropriate financial and retail practices;
- The retention by the Commonwealth of ownership of facilities constructed on Aboriginal land; and
- The progressive abolition of the Community Development Employment Programme.

Commonwealth legislative power in the Territory: The Territory's power

The power which the Commonwealth Government relied upon to authorise the enactment of the two Northern Territory National Emergency Response Acts is the power under section 122 of the Constitution (Cth) of the Parliament to "make laws for the government of any ... territory placed by the Queen under the authority of and accepted by the Commonwealth".

The Northern Territory is a self-governing territory.[10] However, it is subject to the power of the Commonwealth to override its laws and withdraw its power to make laws.[11] In the event of an inconsistency between a Commonwealth and a Territory law, the Commonwealth law will prevail.[12] This result is said to follow from the doctrine of paramountcy. The subordinate legislature is not competent to enact laws which are inconsistent with or repugnant to those of the paramount legislature.[13] This is reinforced by covering clause 5 of the Constitution, which recites that "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on ... people... of every part of the Commonwealth".

The limitations upon the Parliament in legislating under section 51 of the Constitution (Cth) are generally thought not to apply to the power to legislate pursuant to section 122. This is said to arise from the role of section 51 in distinguishing between the legislative powers of the Commonwealth Parliament and the State Parliaments in a federation. The Territories are not part of the federal "compact".[14]

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[10] *Northern Territory (Self-Government) Act 1978* (Cth)

[11] See, for example, the *Euthanasia Laws Act 1997* (Cth)

[12] *Attorney-Genera (Northern Territory) v Hand* (1989) 25 FCR 345 at 363, 366-7, 90 ALR 59, *Northern Territory v GPAO* (1999) 196CLR 553, 161 ALR 318, [1999] HCA 8 at [43]-[61], [202], [219]

[13] *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59, per Lockhart J at [75]

[14] See *Attorney-General (Commonwealth) v The Queen (Boilermaker's Case)* [1957] AC 288, Privy Council at [320]

education and housing and general disempowerment lead inexorably to family and other violence and then on to sexual abuse of men and women and, finally, of children".

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

Evolution of the measures

A number of changes occurred to the elements of the 'emergency intervention' between its announcement on 21 June 2007 and the implementation of the legislative package on 15 September 2006.

A key feature of the elements of the intervention was that they were each to be enforced by law. In relation to one of those elements the compulsory aspect has been deleted. The Government initially announced that health checks would be compulsory and directed towards obtaining evidence of child sex abuse. The health checks which are said to have occurred so far in 29 communities of more than 2000 children have occurred voluntarily and from the "waist up".[5] The head of the Government's Northern Territory Emergency Response Taskforce, Sue Gordon is reported in The West Australian newspaper as saying that the Government had made the right decision in backing down and that the health checks should not be aimed at uncovering sexual abuse.[6]

The proposed abolition of the permit system for entry to Aboriginal land also underwent a significant change between the June announcement and the introduction of the legislation. The permit system was to continue to apply to 99.8 per cent of Aboriginal land in the Northern Territory.[7] The amendments to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) effected by the *Families, Community Services and Indigenous Affairs and other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 ("Other Measures Act") was to continue to exempt from the permit system all the categories of persons who were exempt in the original form of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), including Commonwealth and Territory Parliamentarians and government officers. It added a category of exemption being a person or category of person 'specified by the Minister'. That allowed the Minister to specify for exemption from the permit system persons performing functions such as assessing community stores for licensing purposes.

The Rudd Labor Government on 21 February 2008 introduced a bill amending the provisions concerning the permit system.[8] Under that bill the permit system will be re-introduced, with the Minister having power to authorise an exemption for journalists.[9]

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

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

[7] Brough, M., *Second Reading Speech, National Emergency Response Bill 2007*, House of Representatives, Tuesday 7 August 2007: Hansard, p 12.

[8] http //www abc net au/lateline/content/2007/s2169856 htm accessed 7 April 20008

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

In *Teori Tau v Commonwealth*[15] Barwick CJ, speaking for the High Court, said –

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

However, where there is a power other than the Territories power to support the law, an exercise of the power must comply with section 51(xxxi).[16] In such circumstances, where the Commonwealth acquires land, it must do so on just terms.

Acquisition of land

Part 4 of the NTNER Act deals with acquisitions of land by making a statutory grant of 5 year leases to the Commonwealth, rent free (unless the Minister requests the Valuer-General to determine a rent)[17] and on such terms as the Commonwealth Minister may determine from time to time, in respect of numerous areas of land held for the benefit of Aboriginal people. Section 60 in Part 4 of the NTNER Act and section 134, which applies to other forms of acquisition of property in the NTNER Act, such as the acquisition of the assets of a community store,[18] deals with the issue of compensation for the acquisition in similar terms. Section 134 provides that:

> (1) Subsection 50(2) of the Northern Territory (Self-Government) Act 1978 and section 128A of the Liquor Act do not apply in relation to any acquisition of property referred to in those provisions that occurs as a result of the operation of this Act (other than Part 4).
>
> Note: Section 60 deals with acquisitions of property that occur as a result of the operation of Part 4.
>
> (2) However, if the operation of this Act (other than Part 4) would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
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> (3) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.
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> (4) In subsection (2):
> "acquisition of property" has the same meaning as in paragraph 51(xxxi) of the Constitution.
> "just terms" has the same meaning as in paragraph 51(xxxi) of the Constitution.

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

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

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[15] (1969) 119 CLR 564.

[16] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, per Gaudron J at 561, Toohey J at 560, Gummow J at 614 and Kirby J at 661-2; with Brennan CJ at 540-1, Dawson J at 551-2 and McHugh J at 575-6 following *Teori Tau*.

[17] Section 35(2) and 62 of NTNER Act

[18] Pursuant to section 112 of the NTNER Act.

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

In my view if the operation of the NTNER Act results in an acquisition of property otherwise than on just terms it is invalid in so far as it does. The NTNER Act is an Act of the Parliament which has two purposes of (i) making laws for the government of the Northern Territory, but, more particularly, (ii) making special laws for the people of the Aboriginal race and it is, therefore, a law enacted pursuant to a power in s 51 and is subject to the limitation in s 51(xxxi) that it be on just terms.[19]

In order for the acquisition to be on just terms the law must amount to:

> a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country.[20]

The procedure for determining the compensation must be fair. As Deane J suggested in the Tasmanian Dams Case[21] a process may not be fair if it requires the claimant to accept what is offered by the Commonwealth or seek and wait for a Court determination. That appears to be the effect of sections 134(3) and 60(3). The provisions therefore arguably fail to accord just terms within the requirement of section 51(xxxi) of the *Constitution* (Cth).

As *The Australian*[22] has reported, the North-East Arnhem Land people on 20 September 2007, like the Tiwi Island community of Nguiu a month earlier, agreed with the Commonwealth Government to sign a 99 year lease of Aboriginal land to the Commonwealth. These agreements appear to trigger the operation of section 37(7) of the NTNER Act, which provides that:

> If the Land Trust grants a township lease that covers all of the land, the lease granted under section 31 of that land is terminated by force of this subsection.

A "township lease" is a lease granted under the 19A of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Under that provision the lease must be for 99 years to an "approved entity", which is defined as a Commonwealth entity or a Territory entity.

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[19] See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, per Gaudron J at 568. It should be noted that in *Kruger v Commonwealth*[1997] HCA 27; (1997) 190 CLR 1; (1997) 146 ALR 126; (1997) 71 ALJR 991 it was found that the *Aborigines Ordinance 1918* (NT) was enacted as an exercise of the Territories power and the exercise of that power was not limited by other provisions of or implied freedoms in the Constitution. No consideration was given to the question of whether it might also have been enacted under the race power.

[20] Dixon J in *Grace Bros Pty Ltd vCommonwealth* (1946) 72 CLR 269 at 290.

[21] *Commonwealth v Tasmania* [1983] HCA 21, (1983) 158 CLR 1 at 291.

[22] Thursday September 20, 2007, p. 1

What that means is that those communities have chosen an agreed 99 year lease to the Commonwealth over an imposed 5 year lease. Galarwuy Yunipingu, leader of the North-East Arnhem Land people and former chairman of the Northern Land Council wrote in *The Australian*:[23]

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

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

a) the traditional Aboriginal owners understand the nature and purpose of the lease and consent to it;
b) any Aboriginal community or group affected has been consulted; and
c) the terms and conditions are reasonable.[24]

Present indications[25] are that the NLC will not consent to the substitution proposed in Arnhem Land. One can readily understand why the NLC might adopt the view that there is no benefit to traditional owners in agreeing to grant the Commonwealth a 99 year lease in return for the Commonwealth performing functions which it has a public duty to perform; providing funding for health, housing, education and infrastructure.

The Rudd Government has announced that it will investigate the "effectiveness" of the 99 year lease scheme and its link to "shared responsibilities agreements" which make the provision of funding and services to Aboriginal communities subject to pre-conditions, such as that parents send children to school.[26] Warren Mundine, Chairman of the New South Wales Aboriginal Land Council and a former ALP National President, supports the 99 year lease scheme as providing an opportunity for individual Aboriginals to obtain 99 year leases from the Commonwealth to establish businesses.[27] It may have been overlooked in the course of the national debate that since 1976 the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), section 19(2) and (7) have provided that a Land Trust may grant a lease to an Aboriginal person for residential purposes or for the conduct of a business for 10 years or such other period as the Minister may consent to. Subsequent amendments to that section have increased the period for which a lease can be granted without Ministerial approval to 40 years and allowed for the granting of an estate or interest in the land for any purpose with consent of the Minster and at the direction of the Land Council.[28]

No lease of any length will, by itself, create an economic opportunity for Aboriginal people. There is no present capacity for the 99 year lease to be transferred except to an "approved

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[23] Friday September 21, 2007, p. 14

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

[25] Pers. Comm.. Ron Levy, Principal Legal Officer, Northern Land Council.

[26] *The Australian*, Wednesday February 20, 2008, p 3 and Thursday February 21, 2008, p 1.

[27] *The Australian*, Thursday February 21, 2008, p 1.

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

entity" with the written approval of the Commonwealth Minister[29] and it may not be used as security for a borrowing.[30] Where an opportunity exists to trade in goods or services, then, in some instances, that may be enhanced by the trader having a secure base, such as a lease of land or premises from which to operate the business. The capacity to mortgage or sell the trading base of that business to another is constrained by the provisions referred to.

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

Commonwealth executive power in the Territory

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

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

While accepting that the Commonwealth Parliament has plenary power to legislate in relation to the Territory, the Executive power, which may accompany that legislative power, is not unlimited. The exercise of the executive power of the Commonwealth is subject to the direct legislative control of the Commonwealth Parliament pursuant to the *Northern Territory (Self-Government) Act* 1978.[31] Section 51(xxxix) gives the Commonwealth Parliament power to legislate in relation to matters incidental to the exercise of any power vested by the Constitution in the Parliament or any power vested in the Government of the Commonwealth.

The Commonwealth executive power is not entirely limited to the enumerated heads of power in the Constitution. As Brennan J said in Davis v Commonwealth:[32]

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

However, the Commonwealth Parliament exercised its legislative power in relation to the topic of the exercise of executive power in the Northern Territory when it enacted the *Northern Territory (Self Government) Act* 1978 (Cth). That act vests executive and prerogative powers of

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

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

[31] *Victoria v Commonwealth* (1975) 134 CLR 338 (the *AAP* case), per Jacobs J at 406.

[32] (1988) 166 CLR 79, at 110-111.

the Crown for the Northern Territory in the Administrator of the Northern Territory[33], as advised by the Executive Council of the Northern Territory[34]. The Parliament has, therefore, vested the executive power with respect to the Northern Territory in the Northern Territory Government and correspondingly limited the executive power of the Commonwealth Government.

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

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

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

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

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

However, this does not address the question of the authority under which any officer is performing functions in the Northern Territory. If the Northern Territory Government agrees to accept under its executive wing police officers offered by the Commonwealth, then the correct

[33] Sections 31 and 32

[34] Section 33

balance in the exercise of executive power may be in place. However, the amendment to the *Australian Federal Police Act* 1979 suggests that such officers remain under the direction of the Commonwealth Government. If they are being deployed to the Territory and operating solely under the direction of the Commonwealth Government, then the Commonwealth is exercising executive power which usurps that of the Territory contrary to the *Northern Territory (Self Government) Act* 1978 (Cth), regardless of whether that Act applies to the Other Measures Act.
The activities of the Australian Defence Force ("ADF") in the Northern Territory can only be pursuant to the direction of Commonwealth Government[35]. The Territory Government does not have any power to direct them. It may be that the ADF can be directed by the Commonwealth Government to enforce Commonwealth legislation.[36] However, the issue arises whether in the present situation the ADF, either before or after the implementation of the package of legislation on 15 September 2007, has been or will be implementing Commonwealth legislation. It has not been suggested that before 15 September 2007 it was enforcing Commonwealth legislation and there is no indication that its role will change. The question then arises as to the power under which the Commonwealth is directing the ADF to perform functions on its behalf in the Northern Territory.

As Murphy J suggested in *Li Chia Hsing v Rankin*:[37]

> There may be serious questions as to how far the defence forces may properly be involved in civil affairs.

The Commonwealth would have difficulty in putting a convincing argument that the activities of the ADF in the Northern Territory were being carried out in the "defence of the Commonwealth".[38] In my view the defence power could not sustain the directions being given by the Commonwealth to the ADF to be engaged in the Northern Territory. If the Commonwealth can give directions to the ADF to assist it in generally exercising its executive power (a matter which is subject to considerable doubt in my view), then one returns to the limitations upon the Commonwealth exercising such power in the face of the *Northern Territory (Self Government) Act* 1978 (Cth). The Commonwealth is precluded by that Act from usurping the executive power vested in the Northern Territory Government by directing the ADF to engage in executive functions on its behalf in the Territory.

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

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

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[35] *Constitution* (Cth), sections 51(vi), 52(ii), 69, 70, 114 and 119.

[36] *Li Chia Hsing v Rankin* [1978] HCA 56; (1978) 141 CLR 182; *Ravenor Overseas Inc v Redhead* (1998) 152 ALR 416; 74 ALJR 671; [1998] HCA 17.

[37] [1978] HCA 56, Murphy J at [15].

[38] *Constitution* (Cth), section 51(vi).

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

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

(a) make an agreement with an association under subsection 20(2) of the *Crown Lands Act* (NT), as modified by the NTNER Act on behalf of the Northern Territory Minister;[39]

(b) engage in acts of forfeiture of a lease of land, or resumption of land, under the Special Purposes Leases Act (NT) or the Crown Lands Act (NT), as modified by the NTNER Act on behalf of the Northern Territory Minister or the Administrator of the Northern Territory;[40]

(c) exercise the same powers in relation to an incorporated association, within the meaning of the Associations Act (NT), as the Northern Territory Commissioner under Division 2 of Part 9 of that Act.[41]

Conclusions

The NTNER Act operates to acquire property by the statutory creation of 5 year leases of land held for the benefit of Aboriginal people in favour of the Commonwealth. That is an acquisition otherwise than on "just terms" and it is constitutionally invalid. Traditional owners of Maningrida in Western Arnhem Land and the township's Bawinanga Aboriginal Corporation, acting in accordance with this view, have commenced proceedings in the High Court seeking a declaration that the five year lease imposed by the NTNER Act on the Manigrida land is invalid as an acquisition of land contrary to section 51(xxxi) of the *Constitution*, wrongly suspending the rights of traditional owners under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and denying protection to Aboriginal sacred sites within the lease area.[42]

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

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[39] See NTNER Act, section 41.

[40] NTNER Act, sections 44 and 46.

[41] NTNER Act, section 81.

[42] Toohey, P., *Indigenous Community Network*, 7 March 2008: http //icnn com au accessed 7 April 2008.