



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

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

**Date introduced:** 7 August 2007

**House:** House of Representatives

**Portfolio:** Families, Community Services and Indigenous Affairs

**Commencement:** The Schedules commence at various times, mostly either the day after, or within 28 days of Royal Assent. See clause 2 of the Bill.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

[Senate inquiry into the Bill.](#)

### Purpose

The Bill seeks to introduce the following measures:

- banning the possession of pornography within ‘prescribed areas’
- extending the mandate of the Australian Crime Commission to include ‘Indigenous violence and child abuse’
- deploying Australian Federal Police as ‘special constables’ to the Northern Territory Police Force (NTPOL)
- providing that the Commonwealth can retain an interest in buildings and infrastructure on Aboriginal land if it funds their construction or major upgrade, and
- removing the permit system which currently governs access to Aboriginal land in the NT.

### Background

The Bill was introduced to the Parliament along with four other Bills as a package on 7 August 2007. The other Bills are:

- Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (the Welfare Payment Bill)

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- Northern Territory National Emergency Response Bill 2007 (the Emergency Response Bill)
- Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008, and
- Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008.

Due to the short time-frame allowed for Parliamentary consideration, the Library produced an [interim Bills Digest](#) on the package of Bills on 7 August,<sup>1</sup> and is now issuing a separate Bills Digest on each Bill.

The quick passage of these Bills has been unusual, if not unprecedented. The second reading debate in the House of Representatives occurred cognately (all five Bills were debated together), and they were passed on the evening of the date of introduction. Relevant aspects of the debate in the House of Representatives, including defeated ALP amendments to this Bill, are considered in detail below. The Hansard can be accessed [here](#), on pages 1–18 and 45–84.

On 7 August it was also announced in the media that the Bills as a package would be sent for a Senate inquiry. The Senate began the second reading debate on the Bills soon after their introduction on 8 August (the Hansard can be accessed [here](#), see pages 1–8 and 23–43).

The Bills were referred ‘at whatever stage they have reached by 12:45pm on Thursday 9 August’ for [inquiry](#) to the Senate Legal and Constitutional Affairs Committee for a [hearing](#) on Friday 10 August, with the report to be tabled on Monday 13 August. As of the hearing date, the Committee had received over 150 [submissions](#). The Bills are listed for debate on Monday 13 and Tuesday 14 August and could be passed by the Tuesday.

The Australian Democrats and the Greens did propose to send the Welfare Bill to the Community Affairs Committee (which technically covers the FACSIA portfolio), and nominated longer reporting dates, but these motions were defeated (see Senate [Hansard](#) for 8 August at pages 95–9).

### Basis of policy commitment

The Explanatory Memorandum claims that the purpose of the Bill is to ‘provide for the Australian Government’s response to the national emergency confronting the welfare of

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1. Law and Bills Digest Section and Social Policy Section, ‘Northern Territory national emergency response Bills 2007—interim Bills Digest’, *Bills Digest*, no. 18, Parliamentary Library, Canberra, 2007–08, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd018.pdf>.

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Aboriginal children in the Northern Territory, and other measures, by amending existing Commonwealth legislation'.<sup>2</sup>

This rationale flows from measures announced by the Prime Minister and the Minister for Families, Community Services and Indigenous Affairs on 21 June 2007, in response to *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": The Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, authored by Pat Anderson and Rex Wild (the Anderson/Wild report).<sup>3</sup> Many commentators have noted, however, that there appears to be very little overlap between the 97 recommendations of the report and the measures which the Federal Government announced and to which it now seeks to give effect. Most of the recommendations in the report were addressed to the NT Government. The Federal Government has said that it is responding to the *issue* raised in the report, not to its recommendations. The federal measures may not be called for in the report, but that need not mean that these measures are inconsistent with those being recommended in the report. It is noted that the authors of the report have indicated their discontent with the Federal Government's response.

#### Background to the permit system

**Schedule 4** of the Bill makes amendments to the current access arrangements to Aboriginal land in the Northern Territory. The Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) currently enables the permit system on Aboriginal land in the Northern Territory. Section 70 makes it an offence for a person to enter or remain on Aboriginal land except (among other things) in accordance with the ALRA or with a law of the Northern Territory (penalty: \$1100). Section 73 gives the Northern Territory Legislative Assembly power to make laws regulating or authorising entry onto Aboriginal land, but any such laws must provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition.

In the *Aboriginal Land Act* (NT), authorised by section 73 of the ALRA, section 4 makes it an offence for people to enter or remain on Aboriginal land and certain roads without a permit (penalty: \$1000). Section 8 says the legislation does not authorise the entry of a person to a living area without the permission of the owner or the occupant. Section 11 empowers the Administrator, on the recommendation of a Land Council, to declare an area of Aboriginal land or a road to be an 'open area' or 'open road' which can be entered without a permit.

Permits can be issued by the traditional owners of the area concerned, the relevant Land Council, the Administrator of the Northern Territory (where a person has applied for a

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2. *Explanatory Memorandum*, p. 1.

3. [http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa\\_final\\_report.pdf](http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf).

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permit to use a road and been refused or the permit has not been issued in a reasonable time) and, if in respect of certain Commonwealth or Northern Territory Government employees, the relevant Northern Territory Minister.

The Land Council and the traditional owners can revoke their own or each other's permits and delegate their authority to issue permits. Most permits are issued without charge.

Reform of the permit system was first recommended in *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (August 1998), known as the 'Reeve report'. John Reeve Q.C. found that:

In many respects the permit system is a carry over from the native welfare system that applied to Aboriginal reserves in the Northern Territory prior to the introduction of the Act. Under that system, Aboriginal people were not allowed to travel off those reserves without permission and other Australians were not allowed to enter those reserves without permission. Whilst the former aspect has not been retained in the permit system, the latter has.

It is patently clear that the permit system is in need of reform.

If the permit system were removed and Aboriginal people were provided with similar rights in relation to their land to those held by other Territorians, Aboriginal people would not be disadvantaged in the process. Indeed, in my view, they would be considerably advantaged by being unburdened of a system they do not support and from the improvement in race relations that would probably follow as a result of the removal of a racially discriminatory measure.<sup>4</sup>

Reeve recommended that:

- section 70 of the Act should be repealed
- Part II of the *Aboriginal Land Act* (NT) should be repealed, and
- amendments should be made to the *Trespass Act* (NT) ... to make it applicable to Aboriginal land and to allow Aboriginal landowners to make better use of it.

In the years that followed, there were few other public challenges to the wisdom of the permit system, but it was questioned by a magistrate in 2002.<sup>5</sup> On 12 September 2006, the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, announced a reconsideration of Commonwealth legislation allowing for the permit

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4. J. Reeve, Q.C., *Building on Land Rights for the Next Generation. Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, 'Synopsis', <http://www.austlii.edu.au/au/journals/AILR/1999/6.html>, accessed on 7 August 2007.
  5. 'Court ruling challenges Aboriginal land exclusion rights', *The World Today*, ABC Radio, 20 November 2002, <http://www.abc.net.au/worldtoday/stories/s731220.htm>.

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system that restricts entry to some remote Indigenous communities. The Minister put the view that increased external scrutiny would be in the interests of vulnerable persons in what are closed communities, and that liberalisation would also bring economic benefits that would help to promote the self-reliance and prosperity of Aboriginal people in remote communities.<sup>6</sup>

In October 2006 Minister Brough issued a discussion paper<sup>7</sup> to examine and seek comment on options for an improved system of access to Aboriginal land under the ALRA and related legislation that would both respect the integrity of Aboriginal land and facilitate the normal interactions necessary for social and economic development. Minister Brough presented the problem of the current arrangements as follows:

The permit system is a vestige of the former protectionist system of Aboriginal reserves under which entering or leaving Aboriginal lands was restricted. While Aboriginal people are now of course free to leave, entry restrictions for non-Aboriginal people remain. While the current system was put in place with the best of intentions, its maintenance is no longer appropriate. With modern communications having broken down many of the barriers of remoteness, the current paper system of permits is increasingly anachronistic and ineffective. It is clear that, despite its restrictions, the current permit system has not prevented the scourge of drug trafficking or violence and abuse occurring in many communities.

...[T]he permit system is not an alternative to adequate policing. Arguably the permit system serves only to restrict those inclined to respect the law – not those who already flout the law and operate in spite of the permit system...<sup>8</sup>

Minister Brough argued that a new system regulating access to Aboriginal land should operate to:

- ensure the normal interactions of society can occur, including external scrutiny
- allow individual Aboriginal people to engage with and benefit from the market economy without hindrance

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6. Hon. M. Brough, Minister for Families, Community Services and Indigenous Affairs, 'Answer to a question without notice: Indigenous Communities', House of Representatives, *Debates*, 12 September 2006, p. 16.

7. Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for Change? Discussion Paper*, Canberra, 2006, [http://www.oipc.gov.au/permit\\_system/docs/Permits\\_Discussion\\_Paper.pdf](http://www.oipc.gov.au/permit_system/docs/Permits_Discussion_Paper.pdf).

8. Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for Change? Discussion Paper*, Canberra, 2006, p. 4 [http://www.oipc.gov.au/permit\\_system/docs/Permits\\_Discussion\\_Paper.pdf](http://www.oipc.gov.au/permit_system/docs/Permits_Discussion_Paper.pdf).

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- distinguish between ‘communal or public space’ and ‘private space’ on Aboriginal land
- ensure open access to ‘public space’, including townships and related roads
- protect the privacy of ‘private space’, including residences and most Aboriginal land
- respect Aboriginal culture on traditional lands, particularly in the support it gives to protection of sacred sites and to ceremonies
- continue to allow for effective land management by Aboriginal groups, and
- be simple to administer, preferably by government, to ensure transparency and accountability.<sup>9</sup>

Minister Brough presented five options, of which Option Two was

2. Provide open access to communal or public space (such as townships and roads) and maintain the current permit-based system of restricted access to non-public spaces (such as private residences and sacred sites). This option would need legislation and work defining public and non-public spaces, but give greater potential for inhabitants to engage with the market economy and mainstream society.<sup>10</sup>

It was not explicit which of the five options was being favoured by the Government when the Minister announced the ‘National emergency response to protect Aboriginal children in the NT’, but the current amendments look most like Option Two.<sup>11</sup> The Minister’s media release included the stated intention of ‘scrapping the permit system for common areas, road corridors and airstrips for prescribed communities on Aboriginal land’. That announcement, along with earlier and subsequent ones, however, drew many expressions of concern.

Some submissions to the discussion paper, resubmitted to the Senate inquiry on this Bill argue that the permit system was not a major contributor to community underdevelopment and social dysfunction, that its scrapping was not one of the recommendations of the Rex/Wild report, and that it would only make the control of alcohol, drugs and outside predators even more problematic.<sup>12</sup> As the Law Council of Australia states:

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9. op. cit, p. 5.

10. op. cit, pp. 6–7.

11. Hon. M. Brough, Minister for Families, Community Services and Indigenous Affairs, [\*National emergency response to protect Aboriginal children in the NT\*](#), media release, 21 June 2007.

12. See for example, the Combined Aboriginal Organisations of the Northern Territory, Submission No. 125.

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There is no evidence presented in the discussion paper that the permit system unnecessarily impedes media access to Aboriginal lands, or has contributed to the economic and social isolation of Aboriginal communities. The prevailing view among experts in this area is that the poor economic and social outcomes for Indigenous Australians remain tied to poor service delivery, lack of housing, lack of employment opportunities, lack of education and training, poor health and life expectancy and serious drug and alcohol problems affecting Indigenous populations in both metropolitan and regional areas.<sup>13</sup>

The Police Federation of Australia goes further in support of the current system:

Operational police on the ground in the Northern Territory believe that the permit system is a useful tool in policing the communities, particularly in policing alcohol and drug-related crime. It would be most unfortunate if by opening up the permit system in the larger public townships and the connecting road corridors as the Government intends, law enforcement efforts to address the ‘rivers of grog’, the distribution of pornography, and the drug running and petrol sniffing were made more difficult.<sup>14</sup>

Readers are referred to a comprehensive [report](#) on the permit system by Professor Jon Altman was provided to the Senate inquiry as an attachment to submission no. 51 by Oxfam Australia.<sup>15</sup> Professor Altman finds no evidence that the partial abolition of the permit system will reduce child sex abuse, and finds the amendments may be unworkable in practice.

#### Position of significant interest groups/press commentary

The legislation has provoked strong critical reactions and an equally strong defence by the Government. The view by former Territory Labor MLA John Ah Kit that the legislation represents the beginning of the end for Aboriginal culture and is ‘in some way genocide’ was widely reported.<sup>16</sup> Former Federal Court judge Murray Wilcox said the legislation was ‘so blatantly discriminatory—it’s grotesque’.<sup>17</sup> Minister Mal Brough stated that

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13. Law Council of Australia, Submission no. 52, see especially Attachment B.

14. Submission no 24, p. 3.

15. Professor J. Altman, “‘National Emergency’ and Land Rights Reform: Separating fact from fiction. An assessment of the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976. Briefing paper for Oxfam Australia’, 7 August 2007, <http://www.oxfam.org.au/campaigns/indigenous/docs/land-rights-altman.pdf>.

16. Danielle Cronin, ‘Laws get tick amid claims of genocide’, *Canberra Times*, 8 August 2007, p. 9.

17. Annabel Stafford, ‘Labor gets behind NT intervention’, *The Age*, 8 August 2007, p. 8.

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anyone who queried the funding amount of \$570 million in the first year was 'either not a parent or did not have a soul'.<sup>18</sup>

During the House of Representatives debate, the Opposition moved several amendments relating to the *Racial Discrimination Act 1975*, the permit system, and the need for a review after one year. However, Opposition leader Kevin Rudd stated that the ALP broadly supported the Bills.<sup>19</sup>

The plan also has some indigenous supporters. John Moriarty, a member of the National Indigenous Council, gave evidence to the Senate inquiry that the plan was a 'breath of fresh air'.<sup>20</sup> Noel Pearson, director of the Cape York Institute, has acknowledged that while certain aspects of the plan have been 'clumsy and ill-conceived', the Government was right to take immediate action:

To those who have argued the Government has a hidden agenda of taking control of Aboriginal land, Pearson says that if there is a land grab it will empower Aboriginals by giving them a chance to obtain private leasehold title for housing and businesses. In any event, he says, social order must count ahead of land rights in the priorities of indigenous Australians.<sup>21</sup>

Northern Territory Chief Minister Clare Martin stated that she was opposed to the Bills and was 'disappointed' by federal Labor's decision to support the changes to the permit system and five year leases. Ms Martin said the reforms had 'nothing to do with attacking the problem of child abuse' and were widely opposed by the people they were intended to help. She said the message from bush communities was 'loud and clear':

Don't take our land or change the permit system...That message was delivered by the Aboriginal delegation in Canberra and I am disappointed the message has not been heard.<sup>22</sup>

The general media response can be sampled by a survey of the editorials of major Australian newspapers from 8 August 2007, compiled by the AAP:

*The Australian* felt that sweeping laws to combat indigenous child abuse in the Northern Territory are the 'first step on a long, worthy, if costly road':

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18. Laura Tingle, 'Brough justice: assimilate or be damned', *Australian Financial Review*, 10 August 2007, p. 87.
  19. Annabel Stafford, op cit.
  20. Senate Committee Hansard, 10 August 2007, forthcoming.
  21. Editorial, 'Aboriginal crisis: it is time to talk', *Canberra Times*, 8 August 2007, p. 12.
  22. Tara Ravens, 'NT: Martin says she is disappointed with Federal Labor', AAP, 8 August 2007.

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There is a huge potential for things to go wrong, but it is difficult to envisage a worse situation than the one that exists.<sup>23</sup>

The *Adelaide Advertiser* felt the Howard Government has 'abused parliament by rushing through 500 pages of legislation covering the intervention into NT indigenous communities':

Who is to say that in the detail the government has not given itself unintended or undesirable powers?<sup>24</sup>

*The Age* in Melbourne also focused on the democratic process and said the Federal Government was 'wrong to expect the House of Representatives to approve the federal takeovers of Northern Territory Aboriginal communities and of the Murray-Darling Basin within a day of legislation being introduced':

The Opposition, though, is so desperate to avoid being split this late in the term that yesterday it decided to support the legislation, while proposing some amendments as a sop to Labor consciences concerned by its discriminatory elements.<sup>25</sup>

The *Northern Territory News* said the 'only valid argument against scrapping permits to enter Aboriginal land - that grog runners and drug smugglers would have a field day - would be nullified by the laws', but identified a 'loophole' for fishermen:

Does this mean grog runners will be able to pack a fishing rod along with the cartons of beer and claim they are going fishing?<sup>26</sup>

The *Australian Financial Review* saw the reforms as moving back to a policy of assimilation and asked:

Whether you think such a shift is a good idea, it is profoundly shocking that it is taking place with virtually no public debate. But even if you put this lack of debate aside, the reasons for the bureaucratic and cabinet disquiet are alarming. The bureaucracy's concern is simply about whether it has the physical capacity to implement the plan without creating a disaster.<sup>27</sup>

See also David Marr, [Entering Dangerous Territory](#), *Sydney Morning Herald*, 11 August 2007, p. 33.

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23. Editorial: Laws first step on lengthy road.

24. Editorial: Treating Parliament with contempt.

25. Editorial: Legislate in haste, PM and you may repent at leisure.

26. 'What the Australian newspapers say today', AAP, 8 August 2007.

27. Laura Tingle, 'Brought justice: assimilate or be damned', *Australian Financial Review*, 10 August 2007, pp. 87-8.

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## Financial implications

The Explanatory Memorandum states that the total resourcing for the measures contained in the Bill for the 2007–08 financial year is \$4.9 million.<sup>28</sup> See further the 'Financial Implications' section of the Emergency Response Bills Digest.

## Main provisions

### Suspension of the *Racial Discrimination Act 1975*

**Clause 4** suspends part of the operation of the *Racial Discrimination Act 1975* (the RDA). See extended discussion of the RDA issues in the 'Background' section of the Bills Digest on the Emergency Response Bill. See also the [submission](#) and evidence of the Human Rights and Equal Opportunity Commission to the Senate [inquiry](#).

### Schedule 1—Prohibited material

#### Purpose

Schedule 1 amends the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) to prohibit the possession, control and supply of pornography in 'prescribed areas'.<sup>29</sup>

Pornography—or 'prohibited material' as it is described in the Bill—is films (including DVDs and videos) or publications that have been classified by the Commonwealth Classification Board according to the Classification Code as RC (Refused Classification), X18+ (sexually explicit material) and Category 1 or Category 2 Restricted material, as well as unclassified material likely to be classified in those categories.

#### Basis of policy commitment

The Explanatory Memorandum notes that the Anderson/Wild report revealed that the availability of pornography in Indigenous communities is a factor that contributes to child sexual abuse in those communities, the grooming of children for sex, and the normalisation of inappropriate sexualised and violent behaviour in children.<sup>30</sup>

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28. *Explanatory Memorandum*, p. [ii].

29. The definition of prescribed areas will be the same as that contained in the Northern Territory National Emergency Response Bill 2007.

30. *Explanatory Memorandum*, p. 5.

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The Bill's provisions for the prohibition of pornographic material are therefore the Government's response to this problem, and as the Explanatory Memorandum argues, they are necessary to help in the establishment of normal standards in Indigenous communities.

## Background

The Classification Act facilitates the operation of a national classification scheme, a cooperative arrangement between the Commonwealth, states and territories. The Classification Act provides that the Classification Board shall classify films (including videos and DVDs), computer games and certain publications according to the National Classification Code. As part of the national scheme, each state and territory has enacted complementary classification enforcement legislation that prescribes penalties for classification offences and provides for enforcement of classification decisions in the particular jurisdictions.<sup>31</sup>

In the Northern Territory, the *Classification of Publications, Films and Computer Games Act 2005* (NT) provides the framework for prohibitions on dealing with pornography of different classification categories and enforcement. Restrictions apply to the sale, exhibition, attendance at and copying of films and computer games which are unclassified, or classified RC, or films which are classified X18+. In addition, there are restrictions on the sale or delivery of publications which are unclassified, classified RC or classified Category 1 Restricted or Category 2 Restricted.<sup>32</sup> In the Northern Territory (as in the Australian Capital Territory), the sale and hire of X18+ classified material is permitted but on a restricted basis.

## Provisions

**Item 1** inserts a **new Part 10** into the Classification Act to prohibit the possession, control and supply of pornography in 'prescribed areas'.

The Bill distinguishes between two types of prohibited material:

- *Level 1 prohibited material*, which is essentially sexually explicit material classified as X18+, Category 1 Restricted or Category 2 Restricted, and
- *Level 2 prohibited material*, which is Refused Classification (RC) material.

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31. Annual Report of the Classification Board and the Classification Review Board, 2005–2006, pp. 9–10.

32. These terms are defined in the Classification Code and the definitions are set out in the Explanatory Memorandum at pp. 6–8. Categories 1 and 2 Restricted are used for publications; X18+ is used for films and computer games; and RC is used for films, computer games and publications.

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The Bill in **proposed sections 101 and 102** makes the *possession or control* of prohibited material an offence in prescribed areas. Unlike existing offences in Northern Territory legislation, the prohibition applies to mere possession of the prohibited material without any intention of selling, copying or hiring. The penalty is 50 penalty units (i.e. \$5,500) in relation to level 1 prohibited material and 100 penalty units for level 2 prohibited material.

**Proposed section 103** prohibits the supply of ‘prohibited material’ (both levels 1 and 2) in and to prescribed areas. Supply includes preparation, transportation, guarding, concealing or possession with the intention to supply to a person in a prescribed area. Supply is defined broadly and includes distribution on a not-for-profit basis. The penalty for this offence is 100 penalty units. For the supply of five or more prohibited items, the onus of proof is reversed and the penalty is 200 penalty units and/or imprisonment for two years. A reversal of the onus of proof means the defendant must prove that he or she did not have the requisite intention or belief. The Explanatory Memorandum argues that the reversal of the onus of proof in this context is considered appropriate to assist in prosecutions of people trafficking in commercial quantities of prohibited material.<sup>33</sup> By way of comparison, the Northern Territory Classification Act contains an offence of possessing with intention to sell or exhibit RC classified films or unclassified films likely to be classified RC or R18+. The penalty is 200 penalty units and/or 2 years imprisonment and where a person has made 10 or more such copies, the onus of proof is reversed (section 50C).

**Proposed sections 106–109** provide for police powers to seize and destroy ‘prohibited material’. Entry and search must be done by warrant or consent in accordance with Part 1AA of the *Crimes Act 1914*. The Northern Territory Classification Act, like other state and territory classification Acts, also contains similar search and seizure provisions.

**Proposed section 100** clarifies that the offences in Part 10 are to apply in addition to state and territory legislation. Similarly **proposed section 111** clarifies that the search and seizure powers in this Part operate in addition to state and territory legislation.

**Proposed section 113** refers to compulsory acquisition of property, presumably relating to any seized films, videos and publications. The provision is drafted according to a formula used in other Schedules of the Bill for acquisition of property. It suspends subsection 50(2) of the *Northern Territory Self-Government Act 1978*, which refers to the acquisition of property on just terms according to section 51(xxxi) of the Constitution. It also provides that where there is an acquisition of property to which section 51(xxxi) applies, then the Commonwealth is liable to pay a ‘reasonable amount of compensation’. Further discussion of acquisition-of-property provisions is found at page 20 of the Digest.

The provisions in Schedule 1 are subject to a **five-year sunset clause**.

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33. *Explanatory Memorandum*, p. 10.

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## Schedule 2—Law enforcement

The Explanatory Memorandum states that the amendments in Schedule 2 to the powers and functions of the Australian Crime Commission (ACC) and Australian Federal Police are designed to ‘protect Aboriginal children in the Northern Territory from harm’.<sup>34</sup>

The proposed amendments in **Schedule 2** relating to the Australian Crime Commission were not part of the Anderson/Wild report or any debate preceding the Bill’s introduction, apart from general discussions of ‘law and order’.

### Background—Australian Crime Commission

**Schedule 2, Part 1** amends the *Australian Crime Commission Act 2002* (ACC Act).

The [ACC](#) (formerly the National Crime Authority but with enhanced intelligence functions) commenced operations on 1 January 2003. According to the latest Annual Report, the aim of the ACC is to ‘reduce the incidence and impact of serious and organised criminal activity on the Australian community’ (see section 7A of the ACC Act).<sup>35</sup>

To achieve this aim, the ACC has a range of special coercive powers such as the capacity to compel attendance at examinations, production of documents and the answering of questions (similar to a Royal Commission). The ACC also has an intelligence-gathering capacity and a range of investigative powers common to law-enforcement agencies, such as the power to tap phones, use surveillance devices and participate in controlled operations. These powers will be expanded if the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 currently before the House of Representatives is passed by the Parliament.<sup>36</sup> Another Bill before the Parliament, the Telecommunications (Interception and Access) Bill 2007, if passed, will deem all child-pornography offences to be serious offences for the purpose of obtaining a warrant to intercept phone calls, emails, and other forms of telecommunications.<sup>37</sup>

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34. *Explanatory Memorandum*, p. 15.

35. Joint Committee on the Australian Crime Commission, [Review of the Australian Crime Commission Act 2002](#), Canberra, 10 November 2005, p. 7.

36. See further Sue Harris Rimmer and Bronwen Jagers, ‘[Crimes Legislation Amendment \(National Investigative Powers and Witness Protection\) Bill 2006](#)’, *Bills Digest*, no. 110, Parliamentary Library, Canberra, 2006–07.

37. See further Bronwen Jagers, ‘Telecommunications (Interception and Access) Bill 2007’, [Bills Digest](#), no. 10, Parliamentary Library, Canberra, 2007–08.

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## National Indigenous Violence and Child Abuse Intelligence Task Force

The [National Indigenous Violence and Child Abuse Intelligence Task Force](#) (NIITF) was announced in July 2006, and will coordinate national action in the collection and sharing of information and intelligence relating to child abuse, violence, drugs, alcohol, pornography and fraud affecting Aboriginal and Torres Strait Island communities. Activities will be coordinated by the Task Force's operational head, based in Alice Springs, with support from ACC and jurisdictional staff working from Darwin and other ACC offices. Subject to ACC Board approval, the NIITF will operate until late 2008, with a final report to the ACC Board due in mid-2009. The ACC website for the NIITF states:

The fundamental drivers of Indigenous violence and child abuse are social and economic. Accordingly, the NIITF is adopting an approach which is 'non punitive' and respectful of Indigenous people and cultures. National and regional level consultative arrangements will be established, where possible utilising existing structures. In these processes, particular efforts will be made to engage with and involve Indigenous elders, leaders and women's groups.<sup>38</sup>

The Law Society of the NT was critical of this development at the time because of the 'Star Chamber' powers of the ACC. The Society stated in a media release that:

Threatening witnesses with gaol is unlikely to help if Indigenous people are already facing an environment of threats and intimidation.<sup>39</sup>

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38. According to the ACC website, the NIITF has the following objectives:

- improving national coordination in the collection and sharing of relevant information and intelligence;
- enhancing national understanding about the nature and extent of violence and child abuse in Indigenous communities;
- providing related intelligence and other advice, including on organised criminal involvement in drugs, alcohol, pornography and fraud; and
- conducting research on intelligence and information coordination and identification of good practice in the prevention, detection and responses to violence and child abuse in Indigenous communities.

These are being addressed through:

- building an enhanced national intelligence capability in relation to violence and child abuse in Indigenous communities; and
- informing future law enforcement, and wider government, decisions on addressing violence and child abuse in Indigenous communities. ('National Indigenous Violence and Child Abuse Intelligence Task Force (NIITF)', [http://www.crimecommission.gov.au/html/pg\\_NIITF-1.html](http://www.crimecommission.gov.au/html/pg_NIITF-1.html), accessed on 7 August 2007.)

39. Law Society of the NT, *Safeguards needed to ensure Task force success*, media release, 19 July 2006.

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## Provisions

### Division 1

Under existing subsection 7C(c), the Board can authorise the ACC, in writing, to undertake intelligence operations or to investigate matters relating to *federally relevant criminal activity*.<sup>40</sup>

The main change made by **Division 1 (items 1 to 14)** is that the words ‘serious and organised crime’ are deleted from the definition of *federally relevant criminal activity* (and elsewhere in the definitions subsection 4(1)) and replaced with the term *relevant crime*.

**Item 6** inserts a new definition of *relevant crime* into subsection 4(1) to include:

- (a) serious and organised crime; or
- (b) Indigenous violence or child abuse.

*Indigenous violence or child abuse* is further defined widely in **item 5** as ‘serious violence or child abuse committed by or against, or involving, an indigenous person’. *Serious violence* is further defined in **item 9** as limited to an offence punishable by a minimum three years imprisonment. *Child abuse* is also defined in **item 2** as limited to an offence punishable by a minimum three years imprisonment.

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40. The ACC currently has four Special Investigations on foot:

- High Risk Crime Groups
- Established Criminal Networks - Victoria
- Money Laundering and Tax Fraud
- Wickenby Matters (tax investigation)

There are five Special Intelligence Operations:

- Illicit Firearm Markets
- Amphetamines and Other Synthetic Drugs
- Serious and Organised Fraud
- Crime in the Transport Sector
- Illegal Maritime Importation and Movement Methodologies

and finally two Task Forces:

- National Indigenous Violence and Child Abuse Intelligence Task Force
- Outlaw Motorcycle Gangs National Intelligence Task Force.

(‘Current Board Approved Determinations and Task Forces’,  
[http://www.crimecommission.gov.au/content/about/Investigations\\_Info/ACC-Board\\_Determinations\\_Task\\_Forces.pdf](http://www.crimecommission.gov.au/content/about/Investigations_Info/ACC-Board_Determinations_Task_Forces.pdf), accessed on 10 August 2007.)

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The Explanatory Memorandum explains that the Government fully intends the full range of ACC powers to be directed at the issue, and that it is clearly envisaged by the Government that these offences would not normally be caught by the term ‘organised crime’.

Offences concerning Indigenous violence or child abuse (including sexual offences) are unlikely to meet the first set of elements, which require that the offence involves two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques. Even if the first set of elements were met, not all offences relevant to Indigenous violence or child abuse would be captured by the list of the type of offences which for present purposes would be limited to ‘violence offences’ and certain Commonwealth child sex offences involving the use of a carriage service.

The government wishes to ensure that the existing special coercive powers of the ACC should be available for the purpose of an operation/investigation (or special operation/investigation) into Indigenous violence or child abuse, should the ACC Board decide that their use for this purpose should be authorised.<sup>41</sup>

#### Divisions 2 and 3

The amendments in **Division 2** would allow an ACC examiner to request or compel information, documents or things held by a state or territory agency that are relevant to an operation/investigation, provided an arrangement is in force between the Commonwealth and the state or territory. Presumably this will allow the ACC to compel information from the NT Government.

The **Division 3** amendments would extend the term of appointment for ACC examiners from five to 10 years. The Explanatory Memorandum does not explain how this amendment is in any way connected to the Bill’s purpose.

#### Australian Federal Police

**Schedule 2, Part 2** amends the *Australian Federal Police Act 1979* (the AFP Act) to put beyond doubt that members of the Australian Federal Police (AFP) deployed to the Northern Territory Police Service (NTPOL) and appointed ‘special constables’ can exercise all of the powers and duties of a member of the NTPOL under Northern Territory legislation.

The provisions are made retrospective to 21 June 2007, the date of the first deployment of AFP officers to the Northern Territory.

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41. *Explanatory Memorandum*, p. 16.

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### Schedule 3—Infrastructure

**Schedule 3** of the Bill grants the Commonwealth and the NT Government an ongoing property interest in any building or major renovation funded on Aboriginal land. This Schedule (especially **proposed section 20ZD**) should be assessed in conjunction with changes to leases proposed by Part 4 of the Emergency Response Bill.

Readers are directed to the breakdown of the available costings for the emergency plan in the accompanying Bills Digest for the Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008, which refers to a range of Commonwealth building programs, such as accommodation for Commonwealth public servants.

There is a question mark as to whether these amendments could in practice trigger a compulsory acquisition of property rights (discussed further below under Schedule 4).

The question also arises as to whether a renovation over the defined threshold amount of \$50 000 is sufficient to grant an exclusive statutory right (**proposed section 20W**).

### Schedule 4—Access to Aboriginal land

**Schedule 4** of the Bill effectively scraps the existing permit system relating to common areas of Aboriginal land and allows entry for a wide range of people (highlighted in [options 2 and 3](#) of the Brough discussion paper, outlined above).

**Item 9** repeals existing subsection 70(2A) of the ALRA and replaces it with a **new subsection 70(2A)** which details a long list of people who may enter or remain on Aboriginal land, including:

- the Governor-General or appointees
- the Northern Territory Administrator or deputy
- a member of the Commonwealth Parliament or the Northern Territory Legislative Assembly
- a candidate for election to the Commonwealth Parliament (representing an NT electorate or as an NT Senator) or to the Northern Territory Legislative Assembly
- a person performing functions under the ALRA or another law of the Commonwealth or under a law of the Northern Territory
- a person performing functions as a Commonwealth or Northern Territory officer (that is, an employee or appointee)
- a person performing functions as a NT local government officer, member or employee, or
- a person acting in accordance with the ALRA or a law of the Northern Territory.

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In addition, under **proposed new section 70(2BB)**, the Minister would be able to authorise a specified person, or any class of persons, to enter or remain on Aboriginal land. This provision has a **sunset clause of five years** from commencement (**70(2BD)**).

Under **proposed section 70F**, a person would be able to enter and remain on a ‘common area’ within community land, if the entry or remaining was not for a purpose that is unlawful. A ‘common area’ is defined as an area that is generally used by members of the community concerned, but does not include a building, a sacred site, or other areas which may be prescribed by regulation (**subsection 70F(20)**). Some temporary restrictions may apply to protect privacy for events such as cultural ceremonies.

Access to common areas would not apply in relation to areas that are covered by leases under section 19 of the ALRA (**subsection 70F(2)**). Regulations may be made providing that specified common areas are taken to be public parks for the purposes of NT law relating to public parks (**subsection 70F(5)**). The relevant Land Trust will not be obliged to maintain a common area to a level that is suitable for use by the public, and will not be liable for any loss, damage or injury to a person using a common area (**subsection 70F(8)**).

**Proposed new Schedule 7** of the ALRA details all ‘community land’ in the NT.

**Proposed new sections 70B, 70C, 70D and 70E** allow a person to use a road, aerodrome or boat-landing place to travel to and from any community land, provided that the purpose of access to the community land is not unlawful. Some temporary restrictions may apply to protect privacy for events and to protect public health and safety (for example for road upgrades or repairs).

A person will be able to enter or remain on Aboriginal land to attend a court hearing (**proposed s. 70G**).

### Compulsory acquisition

**Item 18** provides for compensation for acquisition of property:

- (1) Subsection 50(2) of the *Northern Territory (Self-Government) Act 1978* does not apply in relation to any acquisition of property referred to in that subsection that occurs as a result of:
  - (a) the operation of this Schedule; or
  - (b) an action taken under, or in accordance with, section 70B, 70C, 70D, 70E, 70F or 70G of the *Aboriginal Land Rights (Northern Territory) Act 1976* (as inserted by this Schedule).
- (2) However, if:

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- (a) the operation of this Schedule; or
- (b) an action taken under, or in accordance with, section 70B, 70C, 70D, 70E, 70F or 70G of the *Aboriginal Land Rights (Northern Territory) Act 1976* (as inserted by this Schedule);

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.

- (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.
- (4) In subitem (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.

The sections discussed in this context include:

- **Proposed sections 60 to 64** (acquisition of leases) and **134** (catch-all) in the Emergency Response Bill
- **Proposed new section 113 in Schedule 1** of this Bill (amends the *Classification (Publications, Films and Computer Games) Act 1995* to prohibit classified material (pornography) in prescribed areas—compulsory acquisition presumably relates to any seized material), and
- **Item 18 of Schedule 4** (under present discussion)

Also notable is **Schedule 3** of this Bill, which grants the Commonwealth an ongoing property interest in any building or major renovation it undertakes on Aboriginal land. There is no acquisition section in Schedule 3. There is a question as to whether these amendments could in practice trigger a compulsory acquisition of property rights.

In considering whether the provisions are constitutional, there is a threshold question.

Does the constitutional guarantee in section 51(xxxi) apply to the Commonwealth acquisition of Aboriginal land in the NT?

The law surrounding section 51(xxxi) of the Constitution is complex in relation to its application to the territories. This is for two reasons, firstly that section 51(xxxi) is not expressed to apply to territories, only the states, and secondly because of the plenary

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nature of section 122 of the Constitution, which allows the Commonwealth unlimited power to make laws for the government of any territory.

For example, it was long thought that section 51(xxxi) had no application to acquisitions of property in the Northern Territory. This flowed from the High Court's interpretation of section 122 ('the territories power') in *Teori Tau*, a unanimous 1969 decision which was upheld in a number of subsequent cases well into the 1990s.<sup>42</sup>

However, in the *Newcrest* decision in 1997, a majority of four to three held that the constitutional requirement of 'just terms' could apply in the Northern Territory. Three judges overruled *Teori Tau*, while Toohey J refused to do so but substantially narrowed its application.<sup>43</sup> The upshot is that the application of section 51(xxxi) in the Northern Territory is not a foregone conclusion, but that present authority leans heavily towards its application to acquisitions under Commonwealth law where they are referable to a legislative power other than the territories power in section 122.

This issue was recently discussed in *Bennett v Commonwealth* (2007) 234 ALR 204 at paragraph 194 of the decision, showing that the area is still open for debate.

*Teori Tau v The Commonwealth* was considered in *Newcrest Mining (WA) Ltd v The Commonwealth*, which was concerned with mining leases over land in the Northern Territory. Commonwealth legislation purported to operate on the land contained within those leases. A majority of the Court (Toohey, Gaudron, Gummow and Kirby JJ) held that s 51(xxxi) fettered the Commonwealth's legislative power generally, while three Justices of the majority (Gaudron, Gummow and Kirby JJ) would have overruled *Teori Tau v The Commonwealth* and found that s 51(xxxi) fettered s 122 as well. Toohey J, however, thought "it would be a serious step to overrule a decision which has stood for nearly thirty years and which reflects an approach which may have been relied on in earlier years". His Honour was therefore unwilling to overrule it.<sup>44</sup>

Is a compulsory-acquisition provision necessary for the Schedule 4 rights to common areas such as roads and aerodromes?

It could be argued that as the permit system is a creature of statute, it can be taken away by statute without attracting the constitutional guarantee (in other words, it is an *inherently defeasible right*). However, statutory rights can be property for the purposes of section 51(xxxi), and there is an argument as to whether the permit system is merely a codification

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

43. [Newcrest Mining \(WA\) Limited v Commonwealth](#) [1997] HCA 38; (1997) 190 CLR 513.

44. [Bennett v Commonwealth](#) [2007] HCA 18 at 195.

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of private property rights, communally held, which give property holders the right to exclude others.<sup>45</sup>

If section 51(xxxi) does apply, are the Bill's provisions valid?

*Current position*

If subsection 50(2) were not suspended, acquisition of property in the NT would be on just terms pursuant to subsection 50(2) of the [Northern Territory \(Self-Government\) Act 1978](#). This would be interpreted in accordance with the common law, that is, it must be fair and even if an amount is not specified, there should be a fair and just procedural framework for the determination of compensation.

*If the Bills pass*

All the acquisition provisions above displace subsection 50(2) of the NT Self-Government Act. This is possible due to the fact that the Self-Government Act is a creature of the Commonwealth Parliament. There is an argument that the Commonwealth wanted the entire scheme to be found in a single Commonwealth Act.

However, the upshot is that, in lieu of a provision that reflects the standard constitutional position, a new formula which has not been the subject of judicial scrutiny in this context is being proposed.

*What is different to the current position?*

The new provisions refer to an acquisition on just terms and reference section 51(xxxi) but also use the formula 'reasonable amount of compensation'.

The use of this formula seems to have three possible distinctions:

- it does not specifically apply paragraph 51(xxxi) to the acquisition
- it does not require just terms
- if the acquisition is otherwise than on just terms, the Commonwealth is liable to pay a 'reasonable amount of compensation', as distinct from 'just terms'.

What is the meaning of *reasonable amount of compensation*? Does it equate to *just terms*?

The proposed compensation scheme could therefore be read as providing that the Commonwealth should provide just terms but if not, then a reasonable amount of

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45. See further discussion of the case *WMC* (1998) 194 CLR 1 by Sean Brennan, [Native Title and the 'Acquisition of Property' under the Australian Constitution](#), [2004] MULR 2, footnote 199.

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compensation is to be paid. Providing a list of issues for the court raises the question of whether the Government is trying to displace the judicial discretion of *solatium*.

*Solatium* is a term basically meaning compensation to a person for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of its acquisition.

*Solatium* in the context of compulsorily acquiring Aboriginal land has been considered very [complex](#) by property valuers.<sup>46</sup>

The Minister has been reported in the media referring to the notion of in-kind compensation—such as education grants, renovations and so forth—as reasonable.

Mr Brough said “rent and improvements”, including infrastructure programs, could count as compensation. And he conceded some traditional owners might have to wait a long time until they received any compensation.<sup>47</sup>

In the Senate hearing on 10 August, a Federal Government official refused to say what form the compensation will take when more than 70 Aboriginal communities are taken over for five years.

Greens Senator Rachel Siewert asked senior government bureaucrat Wayne Gibbons what form it would take.

What’s been implied in the media is that provision of infrastructure may be used as compensation and I’ve just asked you to guarantee to me that that is not the case and that the issues around compensation are completely separate from the other interventions.

The other provision of infrastructure and things like that and you’ve just said to me [that] you’re not prepared to talk about it now?

Mr Gibbons replied: ‘No, because I believe I’d be prejudicing the Commonwealth in those negotiations, Senator’.<sup>48</sup>

In summary, the issues are:

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46. John Sheehan, ‘Compensation for the Taking of Indigenous Common Property: The Australian Experience’, 2000, <http://dlc.dlib.indiana.edu/archive/00000577/00/sheehanj061500.pdf>, accessed on 10 August 2007.
47. Patricia Karvelas, ‘[Right to tribal law scrapped](#)’, *The Australian*, 7 August 2007.
48. ‘Govt under fire over ‘patronising’ intervention push’, ABC News, 10 August 2007, <http://www.abc.net.au/news/stories/2007/08/10/2001459.htm>. Quotation should be checked against Committee Hansard when available.

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- there is no way of knowing what view the High Court would take of in-kind compensation.
- there is also clearly an argument, in fact necessitated by the rules of statutory interpretation, that there could be a divergence between compensation on just terms and reasonable compensation.

This means that if the High Court finds that section 51(xxxi) applies, there is certainly a question around the invalidity of the formula ‘reasonable amount of compensation’.

What happens if the court finds the provisions constitutionally invalid?

A challenge to section 51(xxxi) is not designed to get the applicant more compensation. If the court finds that the provisions authorise an acquisition on terms that are unjust, they will be rendered void *ab initio*.

There has been commentary to the Senate inquiry as to whether the acquisition of property rights proposed by the NT Bills is open to constitutional challenge and if so, on what grounds.<sup>49</sup> Senator Bob Brown submitted an opinion by Brian Walters QC to the inquiry,<sup>50</sup> which finds the provisions invalid.

## Concluding comments

When introducing the package of Bills into Parliament, Minister Mal Brough claimed that the Bills were ‘all about the safety and wellbeing of children’.<sup>51</sup>

The nexus between some of the amendments and this overarching stated purpose is not clear, and is not explained in the accompanying materials such as the Explanatory Memorandum.

For example, changing the appointment terms of ACC examiners from five years to 10 years in **Schedule 2**, and the Commonwealth retaining an interest in buildings that it renovates in **Schedule 3** do not seem to be directly linked to the situation of child abuse in the NT (although the Schedule 3 provisions should be read in conjunction with the lease provisions in Part 4 of the Emergency Response Bill).

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49. See especially the submissions by the Gilbert and Tobin Centre of Public Law, Submissions no 40 and 40a, plus evidence presented by the Law Council of Australia based on Submission no. 52. Hansard for the 10 August hearing will be available [here](#).

50. Submission no. 101.

51. Hon. M. Brough, Minister for Families, Community Services and Indigenous Affairs, ‘Second reading speech: Northern Territory National Emergency Response Bill 2007’, House of Representatives, *Debates*, 7 August 2007, p. 7.

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It is difficult to see the justification for suspending the operation of the Racial Discrimination Act to provisions such as these, even if the argument holds that the other provisions could be properly categorised as ‘special measures’.

In other cases, the causal nexus between the provisions and the aim of protecting children is disputed, as is the case of the **Schedule 4** amendments relating to overriding the current permit system for access to Aboriginal land. There is at least a range of valid opinion—which ought to be properly considered—that the permit system may protect children. One example is the [report](#) by Professor Jon Altman for Oxfam Australia.<sup>52</sup> Parliamentarians are directed to the commentary on the permit system from the Senate inquiry hearings on 10 August when the Hansard becomes available.

Even if the provisions only apply to common areas, a small percentage of Aboriginal land currently under the permit system, it is these common areas which may most effect the life of a remote community.

Also, the unusual drafting of the provisions mean that a constitutional challenge could be made, as explained above, which creates uncertainty about the validity of the Bill. This will not be an immediate effect. A High Court challenge can take some time and the right case, as the court does not provide advisory opinions. As ANU academic Jennifer Clarke has stated in relation to the compulsory acquisition provisions:

This is like putting up a sign saying, "If you want the money, you'll have to take us to the High Court", which is not what you'd expect in an emergency.<sup>53</sup>

A similar question that might be asked is whether the measures in **Schedule 1** regarding pornography are likely to be effective in combating the problems concerning the welfare of Aboriginal children in the Northern Territory.

The provisions in **Schedule 1** go further than the Northern Territory classification enforcement legislation (and indeed other State classification legislation) in that they contain offences for mere possession of RC, X18+ and other sexually-explicit material in prescribed areas. In legislating in this way, the Federal Government has chosen to move outside the cooperative classification scheme that has been perceived as operating successfully between the Commonwealth, states and territories since 1995.<sup>54</sup>

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52. Professor J. Altman, “National Emergency” and Land Rights Reform: Separating fact from fiction. An assessment of the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976. Briefing paper for Oxfam Australia’, 7 August 2007, <http://www.oxfam.org.au/campaigns/indigenous/docs/land-rights-altman.pdf>.

53. Jennifer Clarke, The great federal land grab, *The Canberra Times*, 13 August 2007, p. .

54. As an aside, the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, currently before the Parliament, represents another example of

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Social commentator Bettina Arndt has suggested in recent media reports that the proposed ban on X-rated material is a red herring and a token gesture designed to convince people that there is a quick fix for the horrendous sexual abuse taking place in some indigenous communities. Ms Arndt argues that X18+ videos are mild in comparison with the unclassified and illegal violent sexual material that has readily been available in the Northern Territory.

Porn is a red herring but one that appeals to an electorate always squeamish about sexual matters. It's disappointing that a Government brave enough to attempt bold solutions to the shameful state of these outback communities would resort to playing the porn card. Banning sexy videos will have no impact on the complex drug-fuelled interplay of social and cultural factors that leads to the rape of a three-year-old child. Deep Throat simply isn't part of the equation.<sup>55</sup>

And yet sexually violent material and child pornography (that is, material classified or likely to be classified as RC) is already banned under the Northern Territory Classification Act and the Criminal Code.

As the Anderson/Wild report indicates, pornography is a problem in the Northern Territory. However, the report's recommendation is to enforce the criminal code already in place, which makes it an offence to expose children to sexually explicit material, and to conduct an education campaign to get this message across.<sup>56</sup>

The Schedule 1 amendments apply only to the Northern Territory and are subject to a five-year sunset clause.

However, the amendments made to the remit of the Australian Crime Commission in **Schedule 2** go far beyond the current situation in the Northern Territory. The amendments are not geographically defined or time-limited, but affect the mandate of the ACC itself, dependent on the deliberations of the Board.

The amendments in Division 3 relating to the appointments of ACC examiners do not seem to relate to the purpose of the Bill in that they are not obviously directed to the NT plan at all, and in this sense appear opportunistic.

Definitions of key terms such as *federally relevant crime* were originally predicated on the need to carefully delimit the capacity to deploy the ACC's special coercive powers only against serious and organised crime.

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the Commonwealth legislating in relation to classification without the cooperation of the states and territories.

55. Bettina Arndt, '[Porn a red herring in fight against abuse](#)', *West Australian*, 29 June 2007, p. 16.

56. Recommendation 87.

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The Parliamentary Joint Committee on the Australian Crime Commission report, *Review of the Australian Crime Commission Act 2002*, tabled on 10 November 2005, summarised that:

The ACC therefore exists to provide investigations that operate across jurisdictional boundaries, equipped with the necessary specialist expertise and resources, and able to focus exclusively on organised crime rather than street crime/volume crime.<sup>57</sup>

The second reading speech for the Bill establishing the ACC noted, in relation to the previous National Crime Authority:

The National Crime Authority does not deal with simple street level crime, but with the web of complex criminal activity engaged in by highly skilled and resourceful criminal syndicates.<sup>58</sup>

Whilst the allegations of child abuse and violence in the Northern Territory are extremely serious and alarming, the question remains whether the ACC is an appropriate body to deal with such abuse. Family violence within Australian society generally may be endemic and serious in both the moral and legal senses of the term, but most Australians would not categorise it as organised crime. The NIITF itself recognises that a ‘non-punitive approach’ is therefore appropriate. There do not appear to be any trans-boundary/organised crime elements to the allegations which would normally justify engaging the controlled operations/coercive powers of the ACC. Parliament may wish to consider, in the absence of such elements, whether good community policing is more appropriate to the task.

Even if Parliament answers that question in the negative, there is a strong argument that these amendments should not be rushed. The Attorney-General’s Department recently conducted a [review of specific provisions of the National Crime Authority Act 1984 and the Australian Crime Commission Act 2002](#), with the final report imminent. Mr Mark Trowell QC conducted the review on behalf of the Australian Government. Any major amendments to the scope and nature of the ACC should arguably not be made until the outcome of the review is tabled and considered.<sup>59</sup>

Finally, the amendments in Division 1 of Schedule 2 do not appear consistent with international law, in the sense that they could apply punitive measures in a racially

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57. Joint Committee on the Australian Crime Commission, [op. cit.](#), p. 9, paragraph 2.14.

58. Hon. D. Williams, Attorney-General, ‘Second reading speech: Australian Crime Commission Establishment Bill 2002’, House of Representatives, *Debates*, 26 September 2002, p. 7328.

59. The review was (originally at least) required to be provided to the Inter Governmental Committee on the ACC by 12 April 2007 at the latest. (Hon. C. Ellison, Minister for Justice and Customs, [Review of specific provisions of the National Crime Authority Act 1984 and the Australian Crime Commission Act 2002](#), media release, 8 December 2006).

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discriminatory manner.<sup>60</sup> The definition of Indigenous violence and child abuse refers to violence or abuse ‘by, or against, or involving an Indigenous person’. The mere involvement of an Indigenous person in a serious incident should not be enough to trigger the full force of the ACC’s special powers, even if subject to the discretion of the Board.

These are weighty issues which require further deliberation. Parliament may wish to consider the utility of adding sunset clauses or mandatory-review provisions to this Bill.

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60. Committee on the Elimination of Racial Discrimination, ‘General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system’, [\*Report of the Committee on the Elimination of Racial Discrimination. Sixty sixth session \(21 February–11 March 2005\), Sixty seventh session \(2–19 August 2005\)\*](#), United Nations General Assembly A/60/18, pp. 98–108.

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