

Summary of Northern Territory National Emergency Response Bill 2007 (Cth)

Part 1 - Preliminary

Part 1 - Introduction

Part 1 describes the object of the Act, being to “improve the wellbeing of certain communities in the Northern Territory” (cl.5). Part 1 also states the Act (other than Parts 1, 4, 6 and 8 and Schedule 1) has no effect after five years. Part 1 also deals with the prescribed areas covered by the Act.

Summary Comment on the Bill

The Bill is clearly directed to regulate at an almost micro-level the many day to day activities of all members of Indigenous communities in the Northern Territory, including those who have succeeded in obtaining legal rights to land on the basis of the legal system’s recognition of their entitlements to the land under traditional laws and customs. Land ownership and enterprise issues are included in the Bill alongside “child abuse” issues. The former are non-urgent issues, which ought to be removed from the Bill and be the subject of respectful consultation with those persons and bodies affected by them. Those remaining parts of the Bill need to be improved in places to overcome key concerns of the kind noted in this summary.

Part 1 - Detail on Important Clauses

c4 Prescribed areas (the area to which the part 2 alcohol and part 3 publicly funded computer provisions apply)

- Prescribed area means (cl.4(2) and (3)):
 - an area covered by paragraph (a) of the definition of Aboriginal land in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (this is Aboriginal land for which there is an existing grant, rather than certain kind of pending grant called a grant in ‘escrow’); and
 - roads, rivers streams and the like are excluded from that Act;
 - land granted to an association under the *Lands Acquisition Act (NT)* (these are freehold grants for community living areas); and
 - town camps identified in a Ministerial declaration.

Part 2 - Alcohol

Part 2 - Introduction

Amongst other provisions, by Part 2 prescribed areas are deemed to be public places for the purposes of the *Police Administration Act* (NT). In the result, if a police member has reasonable grounds for believing a person is intoxicated in such an area the member may, without warrant, apprehend that person and take them into custody. A police member is also entitled to enter into private property and take a person into custody if the member believes the person is intoxicated.

Part 2 - Summary Comment

The powers conferred on police to make arrests without warrant are wide and discretionary in their application (a person can be arrested for being intoxicated in their own home!). There

Private and confidential

has been very little time given to allow transition to the strict alcohol control provisions. The Bill is silent on whether the diversion programs, which have been committed to by successive Federal governments as a result of the RCIADIC, will be applied.

Part 2 - Detail on Important Clauses

Division 2 - Prescribed areas

c11 Notice of areas

- Commission to place at customary access places and departure locations notices stating it is an offence to bring liquor into, and be in possession or in control of liquor and to consume it or sell it within the prescribed area (cl.11(1)). The Commission must similarly publish such details in a newspaper circulating in the district (cl.11(2)).

c12 Modification: prescribed areas (modifies *Liquor Act* (NT))

- Clause deals with various offences for liquor possession and consumption in prescribed areas (cl.12(2) and (3)). The clause also deals with offences through the supply of liquor to third persons and the transportation of liquor for the supply to third persons where the third person is in a prescribed area (cl.12(4)). If the quantity of alcohol involved in such an offence is greater than 1,350 ml (equal to 3 cartons of 24 containers of beer at 5% strength), the maximum penalty is 680 penalty units (\$74,800 at \$110 per penalty unit) or 18 months imprisonment (cl.12(6)).

c18 Application of *Police Administration Act* (this alters the operation of the *Police Administration Act* (NT))

- Division 4 of Part VII of the *Police Administration Act* applies to each prescribed area as if it were a public place.
- This means:
 - if a police member has reasonable grounds for believing a person is intoxicated in a prescribed area the member may, without warrant, apprehend that person and take them into custody.
 - a police member can, without warrant, enter into private property and take a person into custody if the member believes the person is intoxicated.
 - the police can remove from that person for safe keeping until the person is released from custody, any money or valuables that are found on or about the person or any item that is likely to cause harm to that person or any other person.
 - the person can be held in custody for as long as it reasonably appears to the police that the person remains intoxicated.
 - the person held in custody cannot be charged with an offence; shall not be questioned by a member of the police in relation to an offence; and shall not be photographed or have his or her fingerprints taken.
 - the person so apprehended may at any time request a police member take that person before a justice to enable the person to make an application for release.

Division 3 - Sales of liquor for consumption away from licensed premises

c20 Sales of liquor for consumption away from licensed premises

- Clause deals with offences committed by licensees of licensed premises, and their employees, selling quantities of alcohol greater than 1,350 ml – equal to 3 cartons of 24 containers of beer at 5% strength (cl.20(2)). The section also deals with identification and information required before sale of alcohol by a licensee to a person (cl.20(5) and (6)).

Division 5 – Application of offences

c25 Application of offences

- This clause means that the offence provisions under part 2 apply from the 29th day after the Bill receives the Royal Assent (see also the commencement table in cl.2 which provides that part 2 commences on the day after the Bill receives the Royal Assent). This is an extremely short period of time to allow transition to the strict alcohol control provisions under part 2.

Part 3 - Requirements for publicly funded computers

Part 3 - Introduction

By Part 3, with publicly funded computers, a designated responsible person must keep records of who uses the computer, the time during which; and the day during which they use the computer. If the person does not they will have committed an offence under the Act. Records must be kept for three years.

A designated responsible person must develop an acceptable use policy, which must state, amongst other things, that persons must not use the computer to access or send communications containing materials or statements that contravene or form part of an activity that contravenes Commonwealth, State or Territory laws. The policy must also state that a person cannot use a computer to access or send communications that slanderous, libellous, defamatory, offensive or obscene or to send spam emails. If a person does not develop such a policy they have committed an offence of strict liability.

A responsible person must also audit twice yearly “in a manner determined in writing by the Minister” the computer.

Part 3 - Summary Comment

The offences created for failure by a responsible person to carry out prescribed obligations relevant to publicly fund computers are severe and disproportionate to the obligations imposed on a responsible person. Failure to develop a computer policy, for example, is a criminal offence. Rights of privacy are liable to be infringed.

Part 3 - Detail on Important Clauses

c26 Obligation to install filters

- Responsible persons for a publicly funded computer must install Commonwealth accredited filters onto the computer. A responsible person is the head of the body (whether incorporated or not) that has custody and control of the computer and, if there is not such a person, the individual whose has custody and control of the computer (cl.3, definition of ‘responsible person’). A publicly funded computer is one that is owned or leased by, or loaned from, a body receiving government funding and which is located in a prescribed area (cl.3, definition of ‘publicly funded computer’). It is an offence of strict liability under cl.30 not to install the required filters.

c27 Keeping records of use of publicly funded computers

- A responsible person must keep records of who uses such a computer; the time during which; and the day during which they used the computer. If they do not do so it is an offence of strict liability under cl.30. Records must be kept for three years.

c28 Development of acceptable use policy

- A responsible person for a publicly funded computer must also develop a policy relating to the kinds of use of the computer that are acceptable. The policy must state that the person must not use the computer to access or to send a communication containing, material or a statement that contravenes, or forms part of an activity that contravenes, a law of the Commonwealth, a State or a Territory; or that incites a person to so contravene; or that is slanderous, libellous or defamatory; or that is offensive or obscene. The policy must also state that persons using the computer cannot send “an anonymous or repeated communication that is designed to annoy or torment” (cl.28(3)).
- The offence of not so developing a policy “is an offence of strict liability” pursuant to the Commonwealth *Criminal Code* (cl.30(7)).

c29 Auditing publicly funded computers

- The responsible person must ensure the computer is audited “in the manner determined in writing, by the Minister” twice a year (cl.29(1)).

Part 4 - Acquisition of rights, titles and interests in land

Part 4 - Introduction

Part 4 provides for the compulsory acquisition of 5 year leases for specified Aboriginal land, specified community living areas and certain land at Nauiyu (Daly River) and Tennant Creek. It also provides for the Commonwealth control of leases for town camp areas in Darwin, Katherine, Tennant Creek and Alice Springs. Finally, it provides a special regime for the use and regulation of these lands.

Part 4 - Summary Comment

Any existing Aboriginal land in the Northern Territory becomes the subject of a compulsory lease to the Commonwealth and can become compulsorily acquired by the Commonwealth.

Traditional rights of use and occupation in compulsorily leased Aboriginal lands will be displaced by the existence of the compulsory lease. And, the right for an Indigenous person to even reside on such land will be capable of being cancelled by the Commonwealth at any time. No due process protections will exist for a resident excluded from leased land acquired by the Commonwealth. The Commonwealth right to exclude is not confined to the blameworthy.

Rights of native title holders are not protected in the same way as other non-Indigenous rights, titles or interest, which is discriminatory and contrary to section 10 of the *Racial Discrimination Act 1975* (Cth).

The notice period for lease resumption is reduced from 6 months to 2 months, which demonstrates less favourable treatment of town camp special purpose lessees. The extent of the power to make regulations which may effectively redraft the *Special Purpose Lease Act* (NT) and the *Crown Land Act* (NT) ‘for the purposes of this section’ is ambiguous.

The lack of any of the conventional safeguards for compulsory acquisition proves the less favourable treatment for the leases over the town camp areas to which this Division 2 applies. There is a need for procedural safeguards of the kind found in the *Land Acquisition Act 1989* (Cth).

It is not true that the Bill promises compensation for landowners and lessees who are deprived of their property rights by the compulsory lease acquisition provisions. Rather, there is a conditional obligation to pay compensation which suggests the Commonwealth Government will raise constitutional arguments to evade compensation. There is nothing to prevent the Bill making an unequivocal commitment to provide compensation.

Part 4 - Detail on Important Clauses

Division 1 - Grants of leases for 5 years

Subdivision A - Grant of lease

c31 Grant of lease for 5 years

- This clause compulsorily creates a lease between the Commonwealth and the 'relevant owner'. This is done by fictional device whereby the statute declares that a lease is 'granted to the Commonwealth by the relevant owner' of the land. The land the clause applies to is primarily that set out in schedule 1, parts 1 to 3 (specified Aboriginal land, specified community living areas and certain land at Nauiyu (Daly River) and Tennant Creek) of the Act.
- Additional land can be added by regulation to that category where it meets the criteria in cl.31(1)(b). Potentially any Aboriginal land (where there is an existing grant, rather than a certain kind of pending grant – also called 'escrow') can be added to this category. When added, a lease is compulsorily created in favour of the Commonwealth after the disallowance period for the regulation has ended (cl.31(2)(v)).
- The commencement of the 5 year leases are staggered according to their category under cl.31(2)(a) (see also cl.32 and 33). They all come to an end on the fifth anniversary of the commencement of cl.31 (cl.31(2)(b)).

c34 Preserving any existing right, title or other interest

- This clause preserves the 'right, title or other interest in land' that existed before the compulsory creation of the cl.31 leases. While not stated, it is obvious that this protection does not extend to the 'relevant owner' of the land prior to the creation of the compulsory leases. The clause will protect leases and licences (see cl.34(10)) that were in place before the creation of a compulsory lease. Native title rights and interests are not protected in a similar way (cl.34(2) and 51). This detrimental treatment of native title is contrary to section 10 of the *Racial Discrimination Act 1975* (Cth).

c35 Terms and conditions of leases

- The Commonwealth compulsory leases confer exclusive possession and quiet enjoyment (cl.35(1)). The concepts of exclusive possession and quiet enjoyment are well known to Australian property law. Exclusive possession confers the right to exclude all others, even the owner of the land, except where the right is otherwise limited by the lease instrument or law. Quiet enjoyment is the right to undisturbed occupation as against the owner of the leased land (the landlord). The right of exclusive possession means that, where a Commonwealth compulsory lease exists, the Commonwealth will have the right to exclude any person formerly resident upon that land unless they have some legal right to remain. Many persons currently on that land will not have such a right to remain (for example, the traditional rights of use and occupation protected by s.71(1) of the ALR Act, which is the legal entitlement of many residents in townships on Aboriginal land, is displaced by the existence of the Commonwealth compulsory lease: see ALR Act s.71(2)). Many residents on land that becomes a Commonwealth compulsory lease would have a bare licence to be resident which, although protected under cl.34(10), will be capable of cancellation at any time under cl.37.
- Even though the Commonwealth will have exclusive possession, it will not be liable for damage to persons or property 'as a result of the condition, at the time the lease takes effect, of the land, or of buildings or infrastructure on the land.' This begs the question of who will be liable. Presumably, it will be the 'relevant owner' (typically, the land trust of Aboriginal land). The difficulty for that relevant owner will be that it can no longer control access to, and use of, the relevant land.
- The owner of land cannot vary or terminate a Commonwealth compulsory lease (cl.35(4)). Termination is the most common response to persistent breach of a tenant's obligations.

Removing this option is controversial. The discretion to terminate is entirely with the Commonwealth (cl.35(7)).

c36 Determination of additional terms and conditions

- To the extent not set out by cl.36, the terms and conditions of a Commonwealth compulsory lease are determined, and may be varied at any time, by the Minister under this clause.
- The status of the Commonwealth interest in land as a lessee is important because it creates obligations on the part of the relevant owner as landlord, not only rights of land use in the Commonwealth. The Minister may, under this clause, impose obligations upon a relevant owner that they are not financially capable of meeting (e.g. the duty to repair infrastructure). The ability to unilaterally impose obligations that may have significant cost would be a threat to the solvency of many relevant owners.

c37 Termination etc. of rights, titles, interests or leases

- The power to terminate any existing 'right, title or other interest in land' is probably the mechanism for excluding residents of Commonwealth compulsory lease areas who are resident under a bare licence. There is no procedural safeguards for such persons under this Bill. As a consequence, they may be arbitrarily excluded from the lease area without reasons or due process.

Subdivision B - Special provisions relating to particular land

c42 Rights of way

- This clause is extremely vague, particularly in subcl.(2). At the extreme, it authorises Commonwealth access through land of any tenure where that access is by 'the shortest practicable route, on an existing road or track' between two Commonwealth compulsory leases. The drafting intention may have been to confine the right of access to access between multiple compulsory leases over the land of a single land trust (or parcel). If that is so, the drafting here does not reflect the intention. It needs to be made clear.

Division 2 - Acquisition of rights, titles and interests relating to town camps

Subdivision A - Resumption and forfeiture of land under the Special Purposes Leases Act

c43 Effect of Special Purposes Leases Act

- This clause describes the extent of application of cl.44 (which modifies the operation of the SPL Act). Primarily, the application of cl.44 is to special purpose leases (SPLs) over land set out in schedule 1 part 4 (certain town camp areas in Darwin, Katherine, Tennant Creek and Alice Springs).
- Potentially any land in the Northern Territory subject to a SPL can be added by regulation and so become subject to Commonwealth control under the Bill. This is so regardless of whether a particular SPL has any connection with Aboriginal communities, their welfare or the delivery of services to Aboriginal communities.

c44 Modification of Special Purposes Leases Act

- This clause confers certain powers and functions under SPL Act on the Commonwealth Minister. These powers and functions relate to the administration of SPLs but not their grant (e.g. consideration of rental appraisal objections, lease forfeiture, the power to resume a lease).
- Paragraph 44(1)(b) reduces the notice period for lease resumption from 6 months to 2 months (which demonstrates less favourable treatment for town camp SPL lessees and represents a violation of the *Racial Discrimination Act 1975* (Cth)).
- Subclause 42(3) is a Henry VIII clause and inappropriate. It permits the making of regulations which may effectively redraft the SPL Act 'for the purposes of this section' (see also cl.43(5)). The extent of the power to redraft is ambiguous.

- Subclause 42(4)(b) imposes a 5 year limit on the lease forfeiture and resumption power of the Commonwealth Minister.

Subdivision B - Resumption and forfeiture of land under the Crown Lands Act

c45 Effect of Crown Lands Act and 46 Modification of Crown Lands Act

- These clauses are effectively equivalent to those of Subdivision A, but made for altering the operation of the CL Act.
- They apply where the town camp areas set out in schedule 1 part 4 are subject to a lease under the CL Act.
- As with Subdivision A, the application of Subdivision B can potentially be extended by regulation to any land in the Northern Territory subject to lease under the CL Act and so become subject to Commonwealth control. Again, this potential exists whether or not a particular lease under the CL Act has any connection with Aboriginal communities, their welfare or the delivery of services to Aboriginal communities.
- Clause 44 confers power upon the Commonwealth Minister to deal with breach of lease conditions and resumptions for leases under the CL Act.
- Paragraph 44(1)(b):
 - displaces the power to specify a resumption period in lease and imposes a fixed 2 month period in its place (and so, for leases already existing, interferes with vested contractual rights);
 - imposes a fixed 2 month notice period where, for a lease with no notice period stated in the lease, the period would be 6 months or (for a resumption for cultivation) 2 years;
 - removes the capacity to specify the mode of calculating compensation for resumption in lease instruments and instead imposes the default procedure of Valuer General valuation (and so, for existing leases with agreed valuation provisions, interferes with vested contractual rights);
 - violates the *Racial Discrimination Act 1975* (Cth).

Subdivision C - Vesting rights, titles and interests in land in the Commonwealth

c47 Vesting rights, titles and interests in land in the Commonwealth

- This clause permits the Commonwealth to compulsorily acquire land subject to SPLs and leases under the CL Act in the town camp areas set out in schedule 1 part 4 (and, if an appropriate regulation is made, potentially any SPL or lease under the CL Act in the Northern Territory).
- Subclause 47(3) reproduces the effect of a compulsory acquisition declaration under s.41(1) of the *Land Acquisition Act 1989* (Cth). This means that upon compulsory acquisition, all interests, except native title and those specifically excepted, are extinguished. The specifically excepted interests include any mining or petroleum interest (cl.47(9)). A compulsory acquisition under this Subdivision provides none of the safeguards that arise under the *Land Acquisition Act 1989* (Cth) (see also cl.50(2) which excludes the application of the *Land Acquisition Act 1989* (Cth)). The lack of any of the conventional safeguards for compulsory acquisition proves the less favourable treatment for the leases over the town camp areas to which Division 2 of the Bill applies and represents a violation of the *Racial Discrimination Act 1975* (Cth). Contrary to the claim that Parliament in this Bill is authorising urgent action, there is nothing in Subdivision C that requires the compulsory acquisition of the town camp areas (which may be distinguished with Commonwealth compulsory leases, which are created by the Bill). The existence of Ministerial discretion about Subdivision C (in the Bill) acquisition creates the need for procedural safeguards of the kind found in the *Land Acquisition Act 1989* (Cth).
- It is remarkable that Subdivision C permits a lessee's interest (either in a SPL or a lease under the CL Act) to be extinguished without notice to lessee (compare *Land Acquisition Act 1989* (Cth) s.48).

Division 3 - Effect of other laws in relation to land covered by this Part etc.

c50 Application of Commonwealth and Northern Territory laws

- This clause ensures that cl.52 and part 2 divisions 1 and 2 will, if enacted, prevail over all Commonwealth and Territory law, including the unwritten law, meaning they will prevail over the fundamental rules of the common law and equity about property law. This provision allows the stated provisions to override basic property law rules of long standing, such as those that apply to the relationship of landlord and tenant. It would be preferable if such rules were only displaced after they were clearly identified and the rationale for displacement established.

c51 Native Title Act

- This clause has the effect that all of the specified acts to be done under the Bill are not subject to the future act rights set out in and standards of the *Native Title Act 1993* (Cth) (including the right to negotiate) but, rather, suppress native title to the extent of any inconsistency (the 'non-extinguishment principle').

c52 Aboriginal Land Rights (Northern Territory) Act

- Subclause 52(7) excludes the ALR Act requirement for land council consent for any transfer, sublease or creation of subordinate interest in, a lease. When read with cl.31(5) (which precludes the transfer of a Commonwealth compulsory lease, but permits a sublease or licence), this means that subleasing and licensing of Commonwealth compulsory leases will take place without land council informed consent.

c53 Public Works Committee Act

- This clause excludes the application of *Public Works Committee Act 1969* (Cth) s.18 (which deals with the reference of public works to the Committee, and particularly requires the relevant Minister to provide certain information upon the moving of a motion of reference in either House of Parliament) in respect of any works that are proposed to be carried out by the Commonwealth on land the subject of Commonwealth compulsory leases and/or on compulsorily acquired SPL or CLA lease land, or SPL or CLA lease land where the relevant lease has been resumed or forfeited. This means the Commonwealth can carry out any and all public works on such land without reference to the Committee.

c54 Application of Commonwealth laws

- This clause confers a general power on the Minister to give exemptions from Commonwealth law. Where by legislative instrument the Minister specifies a Commonwealth law, or provision of a Commonwealth law, that law or provision has 'no effect to the extent that it would, apart from [clause 54], regulate, hinder or prevent the doing of an act' for the land in the same categories as cl.53. This clause is unprecedented.
- Although the specification is done by legislative instrument, and so subject to disallowance, this presents little safeguard given the dramatic power the clause represents. It could, for example, remove the application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to land acquired by the Commonwealth under the Bill.
- It is unclear what is 'an act' in subcl.(1). The term is not defined, and must be, given the extraordinary reach of powers of the Minister by this clause.

c58 Modification of certain NT laws for land covered by this Part etc.

- This clause confers an extensive Commonwealth power to alter Northern Territory law by regulation. It applies to Northern Territory laws concerning planning, infrastructure, the subdivision or transfer of land, local government and other matters prescribed by regulation. The power to modify relates to land acquired by the Commonwealth under the

Bill. This provision effectively enables the Commonwealth to take away from the Northern Territory power in this area.

Division 4 - Miscellaneous

c60 Compensation for acquisition of property

- For the purposes of the Bill this clause displaces subsection 50(2) of the *Northern Territory (Self-Government) Act 1978* (Cth), which provides 'Subject to section 70 [acquisition of interest vested in Territory], 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'.
- The clause does not guarantee compensation to the land trusts, lessees and freehold owners who are deprived of their property rights under part 4 of the Bill. Rather, there is a contingent guarantee. Subclause 60(2) provides that compensation is only payable if the Constitutional 'just terms' protection for the acquisition of property applies (s.51(xxxi) of the Commonwealth Constitution). This clearly relates to the controversial application of that protection in the territories in light of the Commonwealth territory power (s.122). The High Court, in the Kakadu Case (*Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513) said that the constitutional just terms protection did apply in the Northern Territory. This clause foreshadows that the Commonwealth may force compensation claimants to the High Court in an effort to re-litigate the Kakadu Case. There is nothing to prevent the Bill from providing an unconditional guarantee of just terms compensation. The Bill obviously does not do that.
- Just terms compensation must be payable to the deprived owner (subcl. 60(2)). It cannot be redirected or conditional as suggested by Minister Brough (see SMH article of 7 August, 'Those communities [i.e. communities for which land is compulsorily acquired] are eligible for compensation but Mr Brough said it would not be in the form of cash but may also include infrastructure upgrades, improvements to town buildings or the construction of new housing').
- Furthermore, there is a procedural element of 'just terms compensation' (the right to know of the existence of an acquisition) that is not satisfied by the Bill.

c61 Amounts paid or payable

- This clause may result in the compensation payable under cl.60 being other than on just terms. It requires a clawing back of Commonwealth funding, to be set off against compensation payable, given at any time even after the acquisition (but, of necessity, prior to the determination of compensation). Furthermore, there is no requirement that the funding had been directed to the deprived owner whose interest in land is acquired. It may, for example, have been paid to a third party who voluntarily expended Commonwealth funds on infrastructure on the land. Such conditional compensation is unfair, and does not represent just terms compensation.

c62 Payment of rent

- This clause authorises the Commonwealth Minister to request the Valuer General of the Northern Territory to determine the rental of Commonwealth compulsory leasehold land. It is entirely at the discretion of the Commonwealth Minister to request the rental determination. There is an obligation for the Commonwealth to pay the amount once determined (cl.62(5)). Given the sequence in cl.31(1), it is inevitable that the Commonwealth compulsory lease will be in place prior to rental determination. However, no rental is payable by the Commonwealth except under cl.62 (see cl.35(2)). So, unless the Commonwealth Minister makes the cl.62(1) request, no rental will be payable on a Commonwealth compulsory lease.

Part 5 - Business management areas

Part 5 - Introduction

This part provides for the alteration of contracts in business management areas and confers very broad powers of Ministerial direction of community service entities in those areas. A 'business management area' is effectively any of the areas acquired under part 4 of the Bill other than the town camp areas (schedule 1 parts 1 to 3) or an area specified in schedule 2 of the Bill (cl.3, definition of 'business management area', para.(b) and (c)). There is a discretion to add areas by regulation or Ministerial legislative instrument (*ibid.*, para. (a) and (d)).

Part 5 - Summary Comment

This Part imposes a further layer of Commonwealth regulation of funding and bureaucratic supervisory control, at a very micro-level, over areas of lands that are presently Aboriginal lands. The Minister has a great deal of unfettered subjective discretion to retrospectively vary previously agreed funding arrangements and to direct service provision. There are also extensive powers to give directions, back by penalties, to community service entities. This level of Commonwealth power for intervention and control is a disincentive for enterprise development in Aboriginal communities.

Under this part, effectively, every functioning community service entity in a business management area is liable to have an Government observer appointed.

There is little proportionality between the Commonwealth powers of supervision and control and the apparent legislative purpose of achieving efficient and effective service delivery.

Part 5 - Detail on Important Clauses

Division 1 - Funding agreements

c65 Commonwealth may vary or terminate funding agreements

- This clause confers upon the Commonwealth the power to vary an existing funding agreement in certain respects. A 'funding agreement' is, essentially, an agreement between the Commonwealth and a 'community services entity' for the provision of services in a business management area (cl.3, definition of 'funding agreement'). A community services entity (CSE) is a local government, an incorporated association or an Aboriginal and Torres Strait Islander Corporation (cl.3, definition of 'community services entity'). The category can be expanded by a Ministerial legislative instrument (*ibid.*, para.(d)).
- The power to vary applies to any matter relating to the release of funding, the way funds are to be expended, reporting arrangements, the appointment of persons to control funds provided and the way assets even partly with Commonwealth funding are to be 'used, managed or secured' (cl.65(2)). The power to unilaterally vary a subsisting contract is unfair. There is a presumption against the legislative interference with vested contractual rights. This explicit power overcomes that presumption.
- Subclause 65(3) effectively retrospectively inserts the terms set out in schedule 3 of the Act into all subsisting funding agreements. The schedule 3 terms facilitate the termination of, or the reduction in scope of, subsisting funding agreements.

c66 Effect of varied funding agreement

- This clause provides that funding agreements altered under cl.65, or which have the schedule 3 terms inserted, continue as altered for the balance of their term regardless of the 5 year sunset clause in cl.6 of the Bill.

Division 2 - Directions relating to services provided in 3 business management areas

- This Division confers upon the Commonwealth Minister substantial powers of direction in respect of services and assets. These powers of direction are backed by civil penalties of up to 50 penalty units (\$5,500 at \$110 per penalty unit).
- The power to give directions that attract penalties for non-performance is a power that must be demonstrably justifiable in the public interest. The breadth of the powers of direction in the Bill are unfair.
- The power of direction for services is ambiguous in its scope. Subclause 67(1) provides the following 3 conditions precedent to the exercise of the Minister's power of direction:
 - The first is that a CSE provides services in a business management area. This is an objective question. However, it is unusual that it is the mere provision of services that is a condition, rather than there being some kind of existing legal obligation (say by contract) to provide a service. If provision without contractual obligation is enough, then voluntary service provisions will attract the Minister's power of direction. This is unfair.
 - The second is a more subjective one, that the Minister is satisfied the service is not being provided ((b)(i)) or that the service is not being provided to the satisfaction of the Minister ((b)(ii)). [It is difficult to reconcile the para.(a) condition that a CSE is providing services with the subpar.(b)(i) condition that a service is not being provided] It is not clear that the services provided (referred to in para.(a)) are connected to the particular services in this second condition. For example, is it enough that the CSE provides services enough to trigger the power of direction or is it necessary that the CSE provides (or is contracted to provide) the actual service that is not being provided, or the Minister is not satisfied about the provision of? The earlier would be extremely unfair – a CSE providing service A could then be directed to provide service B even though it has no legal obligation to do so prior to the direction.
 - The third is again subjective and requires Ministerial satisfaction 'that funding has been provided by the Commonwealth or the Northern Territory that could be used by the [CSE] to provide the service'. This condition is ambiguous. It is far from clear that this condition requires that the funding be provided to the CSE. It would be unfair for a CSE to be subject to a power of direction where funding was not provided to it but to some other entity. Also, the phrase 'could be used' is unclear. Does the phrase speak to the present or the future? If the future, the power of direction would arise merely because a source of funding was available to a CSE even though no allocation had been made.
- Similar problems arise for the power of direction for assets. The criteria for the exercise of the power of direction in cl.68(1) make no connection between the asset owned or controlled by a CSE and government funding for the acquisition of an asset. So an asset procured with no government funding could be the subject of a direction as long as the CSE receives government funding. And this arises regardless of whether there are contractual obligations attached to the use of the non-government funded assets (for example, where an asset has been donated by a community service organisation and a contractual commitment exists that the asset be used for the purpose specified by the community service organisation).
- Other problems for cl.68(1) are:
 - that para.(b) does not require that the services provided by the CSE be funded, merely that they are being provided;
 - it is unclear in para.(c)(i) if 'required' means desirable or required by a legal obligation;
 - para.(c)(ii) suffers from the same difficulty as para.67(1)(c) in the ambiguity of 'could be used';
 - para.(c)(ii) talks of services in the plural whereas para.67(1)(b) and (c) use the singular – it is not clear if this is intended to have interpretive significance (e.g. a

CSE provides many services and one of them is Commonwealth funded, but the power of direct for assets can be made in respect of any of the services).

- The problem of an overly broad power of direction for assets is apparent from a direction to transfer the ownership of an asset to the Commonwealth under cl.68(2)(d)(ii). Taking the conditions for the exercise of the power of direction for assets at their broadest, the Minister could direct that a vehicle owned by a CSE purchased with its or any non-government funds be transferred to the Commonwealth because the CSE is providing a Commonwealth funded service in a business management area. (It is of course a requirement of cl.68(2) that the direction be made 'for the purpose of providing funded services in the business management area.')
- The power of direction for assets makes no provision for divided ownership of assets and the rights of a person with any property interest not in possession. These can be widely varied indeed, for example a security interest holder, a lessor, an entity with a statutory rights of sale, a bailor etc. The capacity for a direction about assets to violate the property interests of third parties is substantial. There is no provision of the Bill that ensures that a person who receives an asset from a CSE as a result of a Ministerial direction holds the assets subject to the prior proprietary interests of third parties. This state of affairs represents a profound risk to those financial institutions and business entities that lease, lend and finance assets possessed by CSEs.

Division 3 - Observers of community services entities

- This division deals with ministerial appointment of observers to a community services entity. This power to appoint an observer is not conditioned and is unfair. As drafted, there is no requirement that the CSE to which the observer is appointed be in receipt of government funding. It need not even provide services in a business management area – only 'perform functions'. Effectively, every functioning CSE in a business management area is liable to have an observer appointed.

Division 4 - Commonwealth management in business management areas

- This Division confers upon the Minister powers of supervision and control of community government councils, including suspension of all its members (cl.78(2)) under the *Local Government Act* (NT) and of incorporated associations under the *Associations Act* (NT), in respect of the provision of services by such bodies in a business management area. The powers of supervision and control are exercised upon inappropriate conditions (for example, the members can be suspended if Commonwealth funding 'could be used' to provide the service (cl.78(2)(b)); see also cl.81(2)(b)). The power of supervision and control is completely disproportionate to the apparent legislative purpose of achieving efficient and effective service delivery. For example, although the power of suspension of a community government council is arguably limited by cl.78(2) to matters in relation to service delivery, the Commonwealth Minister is given the same powers of the Territory Minister under part 13 of the *Local Government Act* (NT) for community government councils in all other respects.

Part 6 - Bail and sentencing

Part 6 - Introduction

Part 6 makes clear that customary law or cultural practices cannot be taken into consideration in the context of bail applications and conditions and in determining criminal sentences.

Part 6 - Summary Comment

There is no urgent justification for this abolition of the discretion of bail authorities and courts to take into account customary law or cultural practices in bail applications and sentencing.

Part 6 - Detail on Important Clauses

c90 Matters to be considered in certain bail applications

- In determining whether to grant bail or the conditions to which bail granted will be subject a bail authority must not take into consideration any form of customary law or cultural practice as a reason for excusing or lessening the seriousness of the alleged criminal behaviour (cl.90(1)(b)(i)).
- Similarly, in determining the sentence to be passed or the order to be made the court must not take into account any form of customary law or cultural practice as a reason for excusing or lessening the seriousness of the criminal behaviour (cl.91).

Part 7 - Licensing of community stores

Part 7 - Introduction

Part 7 deals with the licensing of community stores, being businesses that are carried on in a prescribed area, one of the main purposes of which businesses is the provision of grocery items and drinks, but it does not include businesses such as takeaway food shops or fast food shops, roadhouses and the like.

Part 7 - Summary Comment

This part is similar to part 5 in that the Secretary is given enormous discretionary power to determine whether to licence community stores (community stores are defined to include businesses that provide grocery items and drinks but does not include businesses such as takeaway food shops or fast food shops, roadhouses and the like, which is a very arbitrary distinction) and to micro-manage them.

Part 7 - Detail on Important Clauses

Division 1 - Meaning of expressions

c93 Meaning of assessable matters

- For the purpose of determining whether to grant community store licence to a person, the Secretary must consider such 'assessable matters' as the community store's capacity to participate in a requirement of an income management regime and the quality, quantity and range of groceries and consumer items promoted (cl.93(1) and (2)).

Division 2 - Assessments of community stores

c94 Community stores may be assessed

- The Secretary may require an authorised officer to assess a community store to decide whether or not to grant a community store licence or deciding whether to revoke it and/or impose conditions upon it (cl.94(1)).

c95 Notice of assessment to be given

- This section deals with what must be specified in written notices that an assessment is to take place.

Division 3 - Licensing of community stores

Subdivision A - Granting and refusing to grant community store licences

c97 Decision to grant or refuse a community store licence

- The Secretary must not grant a community store licence to a person if the Secretary "is not satisfied" that the community store will be "operated in a satisfactory manner" having regard to, amongst other things, any matter the Secretary considers relevant (cl.97(3)).

Subdivision B - Conditions of community store licences

c103 Conditions that may be specified or imposed

- A licence condition may require the operator of a community store to appoint an external or independent manager (cl.103(2)).

c105 Condition about monitoring and audits

- A condition of a community store licence is that the holder must allow the Secretary or an authorised officer to enter the premises to audit or monitor compliance with the conditions of the licence; to inspect things at the premises; and produce documents and materials relevant to auditing and monitoring compliance (cl.105(1)).

Subdivision C - Revocation and variation of community store licences

c106 Revocation of community store licence

- The Secretary may by notice revoke a licence if the Secretary believes on reasonable grounds that a licence condition has been breached or the licensee has committed an offence against this Act or the licence was obtained improperly or is satisfied that the community store is not being operated in a satisfactory manner having regard to the assessable matters (cl.106(1)).

c107 Variation of community store licence

- The Secretary may vary the community licence at any time on the Secretary's own initiative, or on application, and impose licence conditions or additional licence conditions (cl.107(1)-(3)).

c108 Procedure before revoking or varying a community store licence

- Before revoking or varying a community store licence a person must be given notice inviting the person to make written submissions, which notice period must not be less than seven working days after the date on which the notice is given (cl.108(1)(3)).

Division 4 - Acquisition by the Commonwealth

c112 Acquisition by the Commonwealth of assets and liabilities of a community store

- In respect of eligible assets held by a community store, by the owner or by an operator of a community store when a licence has not been granted, extended or has been revoked, the Minister may declare that the legal and beneficial interests and assets vest in the Commonwealth without any conveyance, transfer or assignment, with the Commonwealth to become the successor in law of the holder of those assets (cl.112(1) and (2)).

Division 5 - Authorised officers

c116 Appointment of authorised officers

- The Secretary may appoint appropriately qualified officers to be authorised officers for the purposes of the exercise of powers under Part 7 of the Act.

c118 Power to enter premises for the purpose of making assessments

- To assess a community store under cl.94 an authorised officer may enter premises of the community store, but only if the occupier consents to such entry and the officer's identity card has been shown (note if consent is unreasonably withheld, the Secretary may refuse to grant a licence) (cl.118(1) and (2), see also cl.97(4)(a)(i)).

c119 Authorised officers may obtain access to records and assistance

- In assessing a community store under cl.94, the authorised officer is entitled to have produced to them by the operator of the community store such documents and material as are reasonably necessary for the officer to make the assessment, and the operator must

provide the authorised officer with such assistance and facilities as are necessary and reasonable to make the assessment. Failure to do that constitutes an offence of strict liability under s.6.1 of the Commonwealth *Criminal Code*.

Part 8 - Miscellaneous

Part 8 - Important Clauses and Comment

c132 *Racial Discrimination Act*

- This section states that the provisions of the Act and acts done under them are for the purpose of the *Racial Discrimination Act* special measures (clause 132(1)) and are excluded from part II of the *Racial Discrimination Act* (clause 132(2)).
- These two subclauses are contradictory. Part II of the *Racial Discrimination Act 1975* (Cth) does not apply (with one irrelevant exception) to, or in relation to, a special measure under para.4 of article 2 of the International Convention for the Elimination of All Forms of Racial Discrimination. So, if subcl.(1) is correct to characterise the Bill and acts done under it as special measures, then subcl.(2) is not required.
- The effect of these two subclauses is to prevent any judicial testing of whether the Bill, and acts done under it, are in fact special measures as claimed. With subcl.(1) and (2), Parliament is able to state that the Bill, and acts done under it, are special measures without every being exposed to judicial scrutiny. This procedural exclusion violates the Convention.

c134 Compensation for acquisition of property

- If the operation of this Bill (other than Part 4 of it) results in the acquisition of property to which paragraph 51(xxxi) of the Commonwealth Constitution applies otherwise than on just terms the Commonwealth is liable to pay a reasonable amount of compensation to the person (clause 134(2)).
- This clause is an equivocal provision of compensation and suffers from the same problems as those identified above for cl.60.

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