Recognising Human Rights in Australia’s Third World: A critical analysis of the displacement and dispossession caused by the Federal Government’s Northern Territory Emergency Response

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Abstract
The Australian Government’s race-based response to socio-economic problems in the Northern Territory has arguably led to a throwback to forcible integration, characteristic of the assimilation era, albeit in a modified ‘neo-liberal’ form. This article explores the legislative provisions underpinning the Northern Territory Emergency Response and the Northern Territory Government’s Working Future policy for homelands/outstations, through the lens of international human rights law and critically evaluates whether displacement and dispossession has occurred. It is contended that various provisions function to compel the movement of people away from their homelands, which potentially places Australia in breach of its international legal obligations.

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Recognising Human Rights in Australia’s Third World:¹
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¹ Upon visiting prescribed communities in the Northern Territory in 2009, Amnesty International Secretary General Irene Khan observed levels of exclusion, poverty and disempowerment akin to third world standards. Khan stated, ‘For a country which, by human development standards, is the third most developed in the world and one which has emerged from the global financial crisis comparatively unscathed, such a level of poverty is inexcusable, unexpected and unacceptable … In the heart of this first world I found scenes more reminiscent of the third world’: Amnesty International, The shocking reality in the heart of Australia (2009) Amnesty International <http://www.amnesty.org.au/poverty/comments/22120/>.
1. Introduction

Australia’s treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians.2

On 21 June 2007 the Australian Government announced a ‘national emergency’ in response to the Little Children are Sacred Report,3 which documented high levels of domestic violence and child abuse in Aboriginal communities in the Northern Territory.4 A suite of legislation was introduced to parliament and passed with bipartisan support within ten days, thereby giving retrospective validation to ministerial action taken prior to this time pursuant to press releases.5 This legislation, which was quickly implemented in prescribed areas of land without consultation, was designed to deal with the breakdown in social norms and to encourage socially responsible behaviour.6 A broad range of measures targeted toward welfare and employment reform, law and order, land and housing arrangements as well as child and family health was implemented by the policy package.7 Despite the Northern Territory Emergency Response (NTER) representing a long-awaited commitment to alleviating Indigenous socio-economic disadvantage,8 little overall progress has been made in terms of improving the living standards in Indigenous communities,9 which have been described as ‘reminiscent of the third world’.10 It

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6 This land is held under the Aboriginal Land Rights Act 1976 (NT) and encompasses 73 of the larger Aboriginal settlements and 500 communities in total.
is unfortunate to note that two years after the intervention was implemented, the poor living standards in Indigenous communities drew the following comment from the Minister for Indigenous Affairs, Jenny Macklin:

> Last night in Hoppy’s Camp, a town camp on the outskirts of Alice Springs, little children were trying to sleep in houses crammed with as many as 16 other people. Chances are they were kept awake by the noise of adults drinking and shouting. Other children might have slept on the dry bed of the Todd River, taking their chances with packs of feral dogs rather than the violence that pervades the town camps. This is not a refugee camp or a war zone. This is 21st century Australia. It is the confronting day-to-day reality of life in the Alice Springs town camps.11

Due in large part to the non-consensual and mandatory nature of the wide-ranging emergency measures, various commentators have contended that the NTER is ineffectual and inconsistent with human rights standards.12 Accordingly, the Australian Government has received a great deal of criticism both nationally and internationally.13 The initial response to the intervention, as reported by the independent Government appointed Northern Territory Emergency Response Review Board (‘the Review Board’), was that a great deal of humiliation, fear and confusion was felt amongst the Aboriginal community.14 According to the NTER’s critics, these failings were due in large part to the nature of the Australian Government’s action, which was steeped in paternalistic rhetoric as opposed to a community led, collaborative approach based on evidence of good practice.15

Furthermore, there is evidence to suggest that the intervention has contributed to increased levels of itinerancy and homelessness amongst Aboriginal people who have left their home communities in order to avoid the punitive and paternalistic aspects of the NTER.16 Speaking of the influx of visitors to Alice Springs town camps, Macklin stated there is a ‘pressing need for

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10 Amnesty International, above n 1.
13 See generally J Altman and M Hinkson (eds), Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia (2007).
14 The NTERRB consisted of Peter Yu, Marcia Duncan and Bill Gray in addition to a panel of ten experts and was appointed by the Australian Government to conduct an independent and transparent review of the NTER. The Board visited 31 communities and met with representatives from 56 communities and 140 organisations. Over 200 submissions were received and considered by the Board in its assessment. It provided its report to the Australian Government on the 13 October 2008. See NTERRB, above n 7.
15 By way of example, John Howard was quoted in 2007 as saying, ‘We’ve been too timid about intervening, because we’ll be accused of paternalism and all sorts of other things. Well, frankly, the care and protection of children is more important to me than slavishly following some philosophy or doctrine’: Australian Broadcasting Corporation, ‘Indigenous Plan Questioned’, PM, 22 June 2007.
17 NTERRB, above n 7, Appendix 9.
extra accommodation to combat homelessness and house the town’s large transient Indigenous population’.\(^\text{18}\) This ‘internal displacement’ is further evidenced by a recent appeal to the United Nations for refugee status by the Alyawarra people,\(^\text{19}\) a claim that speaks to the severe marginalisation of Indigenous people ‘living under the heavy hand of Government’.\(^\text{20}\) The term ‘Internal Displacement’, for the purpose of this article, has been borrowed from forced migration studies in order to describe the situation occurring in the NT. Like refugees, internally displaced persons\(^\text{21}\) require protection and are defined as:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognised state border.\(^\text{22}\)

Given the slow progress on the part of the Australian Government to reinstate the \textit{Racial Discrimination Act 1975} (Cth) (‘\textit{RDA}’),\(^\text{23}\) which was suspended to enable the enforcement of the NTER, appeals to the UN remained the only available avenue open to aggrieved Indigenous peoples in the Territory to seek redress or to hold the Government accountable for the past four years.\(^\text{24}\) In direct response to the situation in the NT, various international bodies\(^\text{25}\) have


\(^{19}\) The group, which consisted of 4000 people, requested the Special Rapporteur, James Ananya to recognise the group as internally displaced. As spokesperson Richard Downs stated, ‘We’ve got no say at all. We feel like an outcast in our community, refugees in our own country’: AAP, ‘Alyawarra people as UN for refugee status’, \textit{The Australian} (online), 26 August 2009 <http://www.theaustralian.com.au/news/breaking-news/alyawarra-people-ask-un-for-refugee-status/story-fn3dxity-1225766399795>.


\(^{22}\) See \textit{Guiding Principles on Internal Displacement}, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998). Francis Deng pioneered this idea in the 1990s in a study commissioned by the United Nations Commission on Human Rights (UNHCR) due to the inadequacy of the existing refugee definition, which failed to encapsulate a majority of the world’s most vulnerable group of people who are not subject to refugee protections because they remain within the jurisdiction of their home country. See Francis Deng, \textit{Protecting the Dispossessed: A Challenge for the International Community} (1993).

\(^{23}\) The \textit{RDA} is the domestic instrument which implements the \textit{International Convention on the Elimination of All Forms of Racial Discrimination} (opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969 (‘\textit{ICERD}’)) into Australian law. \textit{ICERD} was signed by Australia on 13 October 1966 and ratified on 30 September 1975.

\(^{24}\) Billings explains that in the absence of appeal rights to administrative tribunals and with no merits review, stifled parliamentary scrutiny of the legislation and a concentration of legislative power in
highlighted Australia’s treatment of Indigenous groups as a major human rights issue. Of particular concern was the fact that the measures were and remain targeted toward a distinct group of peoples identified by race who have suffered a long history of discrimination at the hands of the Government. Arguably, by failing to recognise the unique history and disadvantaged state of Australia’s first peoples, the Commonwealth has reverted to a form of coercive governance, akin to colonial assimilation, to the detriment of Aboriginal culture and self-determination.

This article also seeks to critique various provisions of the NTER through the lens of international human rights law, in order to evaluate whether ‘internal displacement’ and dispossession has occurred as a result of the Australian Government’s policies. In particular, Part 2 will focus on the rationale behind the ‘national emergency’ and the politics underpinning welfare and land reforms as well as the more recent Indigenous housing and remote service delivery policy announced by the NT Government (Working Future). These issues will be explored so as to create a backdrop against which the purpose and effect of the Commonwealth and NT Government’s ongoing intervention can be better understood. Part 3 will examine the potential of international law to create binding norms in a domestic setting and in particular the importance of the guiding principles enshrined in the Universal Declaration on the Rights of Indigenous Peoples (‘UNDRIP’).

In Part 4, the notions of population displacement and freedom of movement will be discussed in relation to certain aspects of the NTER, namely alcohol prohibitions and compulsory quarantining of social security benefits as well as changes to Community Development Employment Projects (CDEP). It is contended that various aspects of the NTER function to compel the movement of people away from their homelands into ‘mainstream society’ and have


See Human Rights Council, above n 8.

also hindered the traditional migratory patterns of Indigenous people. In Part 5, the compulsory acquisition of rights over Aboriginal land and the leasing of town camps to the Commonwealth will be investigated in order to show how land rights and the right to self-determination have been fundamentally breached. Finally, in Part 6 it is argued that the Australian Government’s funding arrangements for certain ‘hub’ towns, which necessitate rural to urban migration, breaches Australia’s international legal obligations.

2. **Background to the Northern Territory Emergency Response**

The official impetus for the emergency intervention was the *Little Children are Sacred Report*, which was published after the NT established a Board of Inquiry into the sexual abuse of Aboriginal children.\(^{28}\) The Inquiry reported high levels of violence, domestic abuse, family breakdown and social ill health in remote Indigenous communities and called for an end to the neglect and maltreatment of Aboriginal children. The Report signified not only a need for reinvestment in communities by the Government, but also engagement and consultation with affected individuals.\(^{29}\) After eight months of consultations with forty-five Indigenous communities, the Inquiry found that the historically top-down approach of successive Governments had not only left communities ‘feeling disempowered, confused, overwhelmed and disillusioned’ but was also a factor that had contributed to social dysfunction.\(^{30}\) In order to create positive outcomes in the future, it was recommended that the Australian Government engage in a cooperative, two-way dialogue with Indigenous peoples.\(^{31}\) This approach recognised the importance of both the unique culture and human dignity of Aboriginal people.\(^{32}\)

Within one week of the public announcement of the report’s findings,\(^{33}\) the former Coalition Government, which lost office in 2007, declared a ‘national emergency’, to constitute ‘special measures’ for the purposes of the RDA and state and territory anti-discrimination laws.\(^{34}\)

\(^{28}\) *Little Children are Sacred*, above n 3, 40.

\(^{29}\) Ibid.

\(^{30}\) Ibid 50.

\(^{31}\) Ibid.

\(^{32}\) Ibid 50-5.

\(^{33}\) The Report was publicly released on 15 June 2007 and the Northern Territory Emergency Response was announced on 21 June 2007. It was not until August 2007 that the Government’s legislative package implementing the scheme was passed by the Australian Parliament, giving retrospective effect to the measures. See NTERRB, above n 7.

\(^{34}\) Racial discrimination is otherwise prohibited under ss 9 and 10 of the Act, which implement arts 2 and 5 of *ICERD* (above n 23). These articles provide that state parties must undertake action to prohibit and eliminate any differential treatment on the basis of race in domestic law. The exception being ‘special measures’ or affirmative action, positive discrimination or preferential treatment, which serve to achieve the *de facto* or substantive equality of a disadvantaged group of peoples. This is permitted under art 1(4) of *ICERD* and is required under art 2(2) when circumstances call for it. The High Court considered the requirements of special measures in the case of *Gerhardy v Brown* (1985) 159 CLR 70, namely that they are for the sole purpose of securing the advancement of the group, the membership of the group is based on race, they are necessary for this purpose and that they are temporary. Importantly Brennan, J in that case, considered the third requirement to involve the determination of the wishes of the beneficiaries which implies that consultation must be undertaken and consent received in order to qualify as being adequately and reasonably adapted to the purpose of advancement. See Rees, Lindsay and Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) 457-463 for an explanation of the reasoning of Brennan J in that case.
Through an unprecedented use of emergency powers legislation, the Parliament remarkably excluded the operation of these human rights protections. This evidenced a lack of legitimacy and perhaps a concern about legal ramifications on the part of the Government. Despite the fact that the Rudd Government expressed its commitment to reinstating the RDA when elected in 2007, it was only in 2010 that legislative action to this effect took place. These reforms are quite wide-ranging in principle; however, whether much changes in practice is the critical question.

The Government justified the expediency with which the legislation was pushed through Parliament on the basis of child protection. The link, however, between the safety and wellbeing of Aboriginal children and the Government’s intervention has been questioned for being tenuous, misconceived and in furtherance of the Government’s own economic and political aims. The initial absence of ‘just terms’ compensation for the acquisition of Aboriginal land, and the lack of culturally appropriate support programs to counsel individuals through the transition, lends weight to this assertion. It is therefore unsurprising that the intervention has failed to garner broad support from the Indigenous community.

Given the prevailing legacy of past legal and political schemes imposed by successive Governments, which have had deleterious effects on the wellbeing of Indigenous peoples, it is also unsurprising that such heavy-handed policy arrangements have proved to be controversial. From colonisation up until the 1960s, protectionist measures such as reserves and missions were intended to provide ‘asylum’ for Aboriginal ‘refugees’ in which they could be


36 Under the amendments proposed prior to the enactment of this Act, the scheme was to be extended Australia wide in order to promote socially responsible parenting behaviour amongst all Australian welfare recipients deemed to be financially vulnerable and in need of monitoring. The rationale behind this reform was to make the Government’s emergency response measures more clearly conform with the requirements of special measures or non-discrimination under the RDA. See Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 14. However, as will be explained in further detail in Part 4.3 of this article, the Act has failed to a significant degree to fulfil this intention.

37 It should be noted that in 2008 the Australian Parliament under former Prime Minister Kevin Rudd’s leadership made a formal Apology to Indigenous Australia for historical wrongs and committed to COAG six measurable targets to decrease social disadvantage, while also establishing a new national Indigenous representative body. Therefore, it was hoped that the NTER would be reformed so that it would no longer in a racially discriminatory way. However, it has been suggested that despite a change in Government, which at first blush signalled a new era for Indigenous affairs, very little reform has been made to the paternalistic and discriminatory nature of the intervention. See, eg, J Altman, ‘NT Intervention three years on: Government’s progress report is disturbing’, Crikey (online), 21 June 2010 <http://www.crikey.com.au/2010/06/21/nt-intervention-three-years-on-Governments-progress-report-is-disturbing/>.

38 L Behrendt, ‘The Emergency We Had to Have’ in Altman and Hinkson (eds), above n 13, 15, 16.


40 See, eg, Altman and Hinkson (eds), above n 13.

prepared for ‘life as a productive and assimilated member of the mainstream community’. These policies were aimed at ‘absorbing’ or ‘breeding out’ the Aboriginal race and saw the Aboriginal population reduced to just 2.5 per cent of today’s population.

The objective of ‘normalising’ Aboriginal Australia is clearly a persistent theme being revisited in the dominant Western social and political sphere. Arguably, the NTER is yet another attempt at eliminating difference by creating a unified, homogeneous nation in which formal equality is given primary importance. Contemporary advocates of this view contend that integration into the mainstream economy, individual responsibility for social ills and a limited role of the Government is the most viable approach to overcoming Indigenous socio-economic disadvantage.

It has also been suggested that rural to urban migration is a more socially and economically feasible solution than funding what have been described as living ‘cultural museums’. It is in this context that the NTER emerges as a new form of ‘social engineering’ for the goals of the former conservative Coalition Government.

Furthermore, the ideology underpinning the Australian Government’s culturally conservative policy package cannot be disconnected from the Howard Government’s numerous attempts at

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45 Formal equality is now generally regarded as problematic as it perpetuates difference. See M Thornton, The Liberal Promise – Anti-Discrimination Legislation in Australia (1990) in which Thornton recognises that substantive equality is to be understood with due regard to the Aristotelian concept of justice, that is, ‘different cases need to be treated differentially; the same treatment is necessarily unjust’. For this reason, positive discrimination policies may be necessary as a form of redistributive justice. This has been criticised by politicians such as Pauline Hanson for favouring minority groups. However, affirmative action policies are recognised under international human rights law. See for example Stalla Costa v Uruguay (1987) UN Doc CCPR/C/30/D/198/1985.
48 Australian Broadcasting Corporation, ‘Vanstone says remote Indigenous communities becoming cultural museums’, AM, 9 December 2005. See also Hughes, above n 47. This appears to be the rationale behind the recently implemented ‘hub and spoke’ model of remote service delivery, which will be explained in more detail in Part 6 of this article. Under the Remote Service Delivery National Partnership Agreement agreed through the Council of Australian Governments, responsibility for funding arrangements was transferred from the Commonwealth Government to the states and territories. This scheme provides for the withdrawal of services to outstations and homelands with resources being allocated only to certain communities that reach a threshold population requirement, thereby necessitating movement to the closest hub town to access basic services. See Council of Australian Governments, National Partnership Agreement on Indigenous Economic Participation (2008) <http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf>; Northern Territory Government, Outstations/homelands policy: Headline Policy Statement (May 2009) <http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf>. 
rolling back Aboriginal land rights won in the High Court.\textsuperscript{49} For example, in 2006, one year before the implementation of the NTER, the former Government began negotiating a bill to reform the \textit{Aboriginal Land Rights (Northern Territory) Act 1976} (Cth).\textsuperscript{50} The proposed aim of the legislation was to grant ninety-nine year leases over Aboriginal land to the Government to improve housing and the economic development of Indigenous people.\textsuperscript{51} However, the Bill also provided for mining on Aboriginal lands with limits on the amount of rent landowners could charge and a break up of representative land councils.\textsuperscript{52} In respect of the Howard Government, Calma notes:

\begin{quote}
Over its 11-year term, it made changes to native title and land rights policies to normalise Indigenous peoples interests in the land and in doing so reduced the recognition of Indigenous peoples human rights'.\textsuperscript{53}
\end{quote}

In light of such statements, it is unsurprising that the former Federal Government has been accused by Aboriginal leaders of using ‘child sexual abuse as the Trojan horse to resume total control of our lands’.\textsuperscript{54} Indeed, the Government has received a great deal of criticism from the Indigenous and non-Indigenous community in relation to the legitimacy of the various economic and political rationales underpinning the NTER.\textsuperscript{55} Of particular concern is that through the implementation of compulsory race-based measures, Aboriginal culture is perceived as the sole cause of social dysfunction. The fact that the crisis is also attributable to a history of dispossession, social disadvantage, inequality and the ‘absence of full citizenship’, is consistently overlooked.\textsuperscript{56} Further, without consultation and consent,\textsuperscript{57} the measures have been criticised for failing to comply with Australia’s international human rights obligations.\textsuperscript{58}

\begin{footnotes}
\item[50] \textit{Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007} (Cth) introduced into the House of Representatives on the 24 May 2007.
\item[54] P Turner and N Watson, ‘The Trojan Horse’ in Altman and Hinkson (eds), above n 13.
\item[55] NTERRB, above n 7.
\item[56] Roderic Pitty, ‘The Unfinished business of Indigenous citizenship in Australia and New Zealand’ in Neumann and Tavan, above n 21, 29.
\item[57] Measures that may impact negatively on rights, such as limitations upon the availability of alcohol, may be considered “special measures” where they are done after consultation with, and generally the consent of, the ‘subject’ group … Measures taken with neither consultation nor consent cannot meaningfully be said to be for the ‘advancement’ of a group of people, as is required by the definition of special measures … To take any other approach contemplates a paternalism that considers the views of a group as to their wellbeing irrelevant. Such an approach in the context of Indigenous people is contrary to their right to self-determination as well as undermining their dignity. Such an approach could allow for measures to be taken that would be “a step towards apartheid”: Human Rights and Equal Opportunity Commission, above n 12.
In summary, the underlying policy objective of economic integration into mainstream society and privatisation of land rights has enlivened the human rights debate about the collective right of Indigenous peoples to self-determination and autonomy. This prompts the question, has the past really been left behind or does it continue to shape the present? In other words, has the NTER resulted in dispossession, forced acculturation and a denial of freedom of movement or forcible population displacement reminiscent of bygone eras and if so, is assimilation, albeit in a modified, 'neo-liberal' form, at the heart of the Government's policy of socio-economic 'integration'?

3. The Importance of International Human Rights Law

Through the work of various United Nations human rights bodies, it has become well recognised within the international community that nation states, although sovereign within their own territorial domain, remain accountable for their treatment of minority groups. In principle, this means Governments have a responsibility to protect the rights of vulnerable minority groups within their borders and in the event that they intentionally violate this duty or fail for 'benign neglect', the international community has a role in holding it accountable. As Henkin writes, 'Half a century of human rights law has washed away notions that how a state treats its inhabitants is nobody else's business, is within its domestic jurisdiction, is within the state's exclusive power which is the very essence of sovereignty'. Over time, the UN has, established a number of mechanisms directed towards promoting Indigenous rights, as a distinct body of rights pertaining to the unique culture, history and collective nature of Indigenous peoples. The principles enshrined in the relevant human rights instruments have been fundamentally

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60 See ICERD, art 5(d)(i) (the right to freedom of movement and residence within the border of the State).
61 O Mazel, ‘The Evolution of Rights: Indigenous Peoples and International Law’ (2009) 13 Australian Indigenous Law Reporter 1, 140. Traditionally, the concept of state sovereignty was directed toward the protection of a state from interference by powerful foreign Governments. However, with the atrocities of the Second World War came the growing recognition that a Government's treatment of its minority population is a matter of international concern. See G Robertson, Crimes Against Humanity: The Struggle for Global Justice (3rd ed, 2006).
64 These include the International Labor Organisation, the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues and the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples. Additionally the Human Rights Committee, through the International Covenant on Civil and Political Rights and the Committee on the Elimination of Racial Discrimination has brought attention to the vulnerable state of Indigenous peoples worldwide. It is increasingly clear that Indigenous peoples are no longer invisible in international law insofar as the normative human rights framework is concerned.
important to the development of domestic law. Of specific importance is UNDRIP, which Australia recently endorsed on 3 April 2009 under the Rudd Government.

In order to briefly discuss the potential implications of Australia’s non-compliance with UNDRIP, it is necessary to briefly examine the relationship between international treaties and Australian law. Put simply, the position in Australia is that an international treaty which has not been implemented through domestic legislation cannot create rights or obligations in Australian law. This long-standing principle has been held to apply even in circumstances where the ratification of a treaty had received Parliamentary approval. Thus, the breach of an international legal obligation which has not been incorporated into domestic law by the legislature is non-justiciable in Australian courts by an individual. It appears, therefore, that UNDRIP’s status in terms of Australian law will determine whether any breach is justiciable in Australian courts.

UNDRIP is an international convention which, despite being formally endorsed by Australia, has not yet been incorporated into Australian law. As such, a breach of an international legal obligation arising pursuant to UNDRIP is non-justiciable in Australian courts by an individual. Furthermore, if one were to accept that certain clauses of UNDRIP form part of customary international law (even with all the inherent difficulties and ambiguities that surround which laws have obtained customary status), any breach thereof probably also remains non-justiciable in Australian courts. This is due to the fact that Australian courts have consistently rejected the notion that customary international law is automatically incorporated into Australian law without being formally transformed by parliament.

In terms of completeness, it is perhaps worth mentioning that international treaties may be used by the courts with regards to the interpretation of statutes and common law given that Australian courts make a presumption of consistency with international obligations. If the

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65 It should be noted that international law treaties such as ICERD necessarily form the basis of domestic human rights protection mechanisms such as the RDA and the Native Title Act 1993 (Cth). See G Nettheim, above n 51, 176.

66 It is important to note that the declaration was not endorsed by the Australian Government until 3 April 2009, nearly two years after the NTER and is not domestically legally binding. Importantly however, the declaration mirrors Australia’s pre-existing human rights obligations under international human rights treaties and therefore sets important principles for the Government to aspire to. Furthermore, drafting of the declaration began in 1985 and in 2007 was formally supported by 143 nations. Australia was one of only four nations that voted against UNDRIP’s endorsement at this time. Therefore, at the time of the NTER the Australian Government was fully aware of UNDRIP’s contents. Given its normative force prior to national endorsement, UNDRIP has therefore been selected as the standard against which Australia’s policy package will be assessed. See Jenny Macklin, ‘Statement on the United Nations Declaration’, above n 58.

67 This principle is supported by a considerable body of case law. See, eg, Chow Hung Ching v R (1948) 77 CLR 449, [478] and more recently Kruger v Commonwealth (1997) 190 CLR 1, [70]-[71] (Dawson J), [87] (Toohey J), [159] (Gummow J).


70 Chow Hung Ching v R (1948) 77 CLR 449, 462 (Latham CJ), 471 (Starke J), 477 (Dixon J); Jago v District Court of New South Wales (1988) 12 NSWLR 558.

71 See Polities v Commonwealth (1945) 70 CLR 60.
wording of a statute or the action of a decision maker is clearly contrary to international standards, then Australia would be in violation of its international obligations and failure to implement the convention into Australian law is not a defence in these circumstances. Thus, UNDRIP could potentially be used as an aid in construction where there is ambiguity in the common law or a statute. Moreover, as a soft law instrument which sets powerful, aspirational benchmarks and holds strong moral force, UNDRIP may over time acquire the status of a customary norm of international law to which Governments can not derogate. In this way and in the absence of a Bill of Rights or constitutionally entrenched rights to protect the rights of Indigenous people, the international human rights system serves as an important normative framework that “provide[s] Indigenous Australians with powerful advocacy tools”.

Unfortunately, due to the lack of effective mechanisms to enforce international law against failing nation states, international law is often perceived to be inherently weak. Although various international inter-governmental institutions and non-governmental organisations play a role in scrutinising alleged violations with a view to ensuring compliance, international law relies primarily on State Municipal enforcement regimes to promote and protect human rights standards. By way of example, international treaty monitoring bodies, such as the High Commissioner for Human Rights and the Security Council, may review and comment on States human rights records. Their reports and subsequent determinations, however, are not binding and the issuing body generally lacks the power to enforce any legal sanctions. Historically, Australia’s conduct in response to adverse reports from various UN human rights bodies has not been favourable. In A’s Case for example, the Human Rights Committee concluded that by amending domestic legislation to hold a group of asylum seekers in detention, Australia was in breach of its obligations under the ICCPR. The Committee recommended that Australia pay compensation. The Australian government, however, rejected this view and argued that the Committee had wrongly interpreted the ICCPR in reaching that decision. No further action was taken (or indeed could be taken) by the Human Rights Committee.

Instances such as this serve to highlight the inadequacy of global human rights protection mechanisms and in particular, Australia’s attitude towards the international system. It is of particular concern that Australia faces few, if any, implications for failing to fulfil its international legal obligations. The lack of enforcement mechanisms, particularly in relation to human rights, remains one of the fundamental issues of international law.

In the case of the NTER, the Federal Government was able to fundamentally alter the existence of Indigenous people without their free and informed prior consent. By treating Indigenous

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people’s rights as subordinate to the majority opinion prevailing at a given point in time, it is arguable that the Government has effectively created a false dichotomy. The right to liberty and freedom, the cornerstone of democratic society, is a special privilege amenable to parliamentary discretion for Indigenous people but an inviolable right for the rest of Australia. This sentiment was captured by one Indigenous community resident who so aptly stated:

And now you set up this Intervention in Australia, amongst Australian Indigenous people. And we Indigenous people say that we should be living together, one country, one Prime Minister, and seeing each other and treating each other equal. But nothing happens like that. You are dividing the nation into two and you said that intervention policy is two different policy, one for black and one for white...78

Whether the Commonwealth Government’s various legislative provisions underpinning the NTER and the Working Future policy constitutes legitimate differential treatment or whether it evidences that Australia is fundamentally out of step with human rights norms has been the subject of much debate. Although it is conceded that a full understanding of Australia’s international legal obligations requires reference to an extensive range of NTER measures and international treaties, it is beyond the scope of this article to do so. This article will instead focus on four measures, namely, alcohol prohibitions, compulsory income management, the abolition of CDEP and five year leases, in addition to the recently implemented ‘hub and spoke’ model of remote service delivery, with specific regard to the rights of Indigenous peoples enshrined in UNDRIP.

It is contended that the cumulative effect of the emergency measures constituting the intervention potentially breach a number of fundamental rights contained in UNDRIP. Namely, the right to self-determination, non-discrimination and autonomy (Articles 1-6), freedom from assimilation, cultural destruction and forced relocation from land (Articles 7-10), the right to maintain traditional connection to, and ownership of, land and territories (Articles 25-32), in addition to the right to freedom of movement enshrined in the ICCPR (Article 12). While the Government’s official objective over the past three years was to attain equality for Indigenous peoples, a purportedly laudable aim, the intervention as a whole potentially places Australia in breach of its international law obligations in relation to what can notionally be described as ‘internal displacement’.

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77 Individual and social liberty and freedom are the fundamental principles which underpin the ideology of the Liberal National Party who were in power at the time the NTER was implemented. As former Minister of Parliament Joe Hockey described, ‘[i]ndividual liberty is based on an acceptance that we are all fallible – that there is no certainty that any one person or any one society knows “the truth”. It is only through diversity, debate and discourse that we can come closer to understanding what is right’: Joe Hockey, ‘In Defence of Liberty’ (Speech to the Grattan Institute, 11 March 2010) 4.

78 Concerned Australians, This is What we Said: Australian Aboriginal People give their views on the Northern Territory Intervention (2010) 13.
4. The Northern Territory Emergency Response and Population Displacement

4.1 Alcohol Prohibitions

In conjunction with various other measures, the NTER sought to re-instate law and order in Indigenous communities in the NT. Broadly speaking, the NTER introduced a prohibition on the possession, transportation, sale and consumption of alcohol in prescribed areas for the safety and protection of Aboriginal children from alcohol related violence. The alcohol prohibition measure drew criticism for causing increased stress and confusion and being largely ineffective in its desired purpose. As the measure was imposed from the top-down and in the absence of rehabilitative support programs, community led schemes and individual responsibility were seen to be undermined. It is unfortunate to note that this negated the potential effectiveness of the prohibitions to achieve the Government’s aim of creating positive behavioural change and reducing alcohol related community dysfunction. As Larrakia concluded,

The Government’s interventions have inadvertently displaced Aboriginal peoples. In doing so, the socio-cultural and poverty issues for many had only deepened and shifted in location, while the challenges for service providers in Darwin had escalated.

Anecdotal evidence further suggested that internal migration prompted by the traditional ‘pull’ factors of urban centres had been increased by the ‘push’ factors emanating from this measure and revealed ‘a potential for substantial demographic and social upheaval’. Significantly, various other submissions reported continued alcohol abuse outside government imposed dry areas and an increase in remote community residents travelling to regional towns in order to escape the prohibition. Further, this evidence of ‘urban drift’ or ‘internal displacement’ is supported by media reports of perceived pressure on ‘hotspots’ and calls for increased funding from local Governments to support the provision of basic services such as housing and schooling.

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79 NTERRB, above n 7, Chapter 2.
81 Aboriginal Medical Services Alliance of the Northern Territory, Submission to the Northern Territory Review Board (2008), Part 7.
83 Taylor, above n 21.
The Government has generally acknowledged that urban drift has implications for the service delivery policies of the state. However, the Federal Government has rejected the perception that the NTER has caused an increase in mobility or dislocation to an extent over and above the norm and maintains that in the absence of a ‘quantum residential shift of population’, post intervention drift is merely a continuation of this trend. This conclusion is seemingly supported by statistical data taken by state Government and local agency sources as well as data collected by service providers, schools and Centrelink departments. The data, however, is not impartial and merely captures movement of a more permanent or formal manner, which require a change of address or submission of other personal details with authorities.

There is evidence to suggest that Indigenous people have a completely different understanding of, and experience with, residency, home, family and contact with authorities and that they may in fact choose to remain invisible to bodies of officialdom. Due to the experience of social and cultural marginalisation faced when dealing with administrative bodies of the state, disengagement or the choice to be homeless rather than live under Government regulation, is the only course of autonomous action left open to individuals subject to the NTER. Therefore, evaluating the claim of ‘internal displacement’ in terms of the predominantly Euro-centric, conventional and sedentary understanding of the concept of home and residency is a

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In the past few decades Indigenous rural to urban migratory patterns have been well documented, therefore urban drift has largely been ignored as a matter of concern for Indigenous self-determination, autonomy, and control. See Australian Broadcasting Corporation, ‘Post-intervention urban drift claims unfounded: Chalmers’, ABC News (online), 12 May 2008 <http://www.abc.net.au/news/stories/2008/05/12/2241554.htm>; Charles Darwin University, NT intervention not the cause Indigenous urban drift: study (17 December 2008) <http://ext.cdu.edu.au/newsroom/a/2008/Pages/171208-Intervention-urban-drift.aspx>; Australian Broadcasting Corporation, ‘Qld Health rejects intervention influx claims’, ABC News (online), 2 December 2008 <http://www.abc.net.au/news/stories/2008/12/02/2435097.htm>.

NTERRB, above n 7, 93.

Additionally, the Government has relied upon evidence adduced from its own public servants and interested stakeholders, such as Government Business Managers and community storeowners to discount the negative perceptions held in relation to the NTER, which lacks impartiality. See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, 2009 Survey of Government Business Managers relating to the Impact of the Northern Territory Emergency Response (2010); Northern Territory Government, Strategic Plan 2008-2011 (2008) <http://www.dcm.nt.gov.au/strong_territory/Government_vision/strategic_plan_2008-2011>.


Habibis et al, above n 80, 124.
misconstruction of the concept. As the Australian Housing and Urban Research Institute so aptly describes, ‘Indigeneity is associated with culturally specific forms of mobility, but as forms of lived experience they necessarily escape neat conceptual frameworks’.

Casting the threshold question of displacement in terms of a logically planned movement not only undermines the reported confusion and resentment felt by affected communities but also downplays the fact that Indigenous people have ‘enduring ties to ancestral lands’, which has a significant effect on the rate of return to country.

Although the NTER has purported to focus primarily on the rights of the child, the United Nations human rights system recognises that human rights are indivisible, interdependent and universal by nature, meaning that one set of rights cannot take precedence over, or necessitate the deferral of another. In other words, it is no justification to discriminate against one class of rights on the basis that it promotes or furthers another right. Moreover, the system is built upon a foundation of principles such as liberty, non-discrimination, empowerment and participation in the processes that affect one’s existence. This is inherent in the right to self-determination itself or the ‘idea that all segments of humanity, individually, and as groups, have the right to pursue their own destinies in freedom and under conditions of equality’.

By denying freedom of choice or the right to participate in the design of the measures, the NTER has inadvertently compelled individuals to leave their home communities to escape the prohibitions, thus causing widespread homelessness, individual and communal stress. As the Senate Select Committee on Regional and Remote Indigenous Communities (‘the Committee’) reported, the movement of people into town or to drinking camps has raised significant concerns about the safety of children who are either left without their primary care givers or forced to travel with them for extended periods of time. In the absence of consultation and supplementary support programs, the NTER has failed to reduce alcohol related harm and family dysfunction – the very thing it purportedly set out to achieve.

94 Ibid.
96 See Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). This point is made clearly by L Pounder, above n 39, 4-5.
97 ICCPR, art 5. See also Australian Human Rights Commission, Social Justice Report (2007) pt 3. For a counterview see S Jarrett, ‘Minority Rights Harm Aboriginal Women and Children’, The Bennelong Society Occasional Paper (2006) in which Jarrett contends that there is a place for the liberal-democratic State to effect law enforcement measures to secure the safety of women and children (the most vulnerable groups in society) so that their individual rights are no longer subordinated to cultural rights claims.
In conclusion, rather than enabling Indigenous communities to take responsibility for social dysfunction by cooperatively developing culturally appropriate solutions, the NTER functions to undermine the political processes, which ‘constrain, guide and empower’ the inter-relationship between the Government and Indigenous Australia. Maddison further illustrates this point stating that:

Despite the growing international evidence that more, rather than less, autonomy is the pathway to improved Aboriginal life chances, the former Australian Government initiated the most blatant threat to Aboriginal autonomy yet seen in the post-assimilation period: the Northern Territory ‘intervention’.101

In doing so, the Government has undermined a number of the guiding principles enshrined in UNDRIP, including the right to non-discrimination102 and the right to self-determination.103 The alcohol prohibitions specifically infringe the right not to be subjected to any form of forced population transfer104 and in conjunction with the rest of the NTER measures; the imposition of the alcohol measures has breached various other rights.105

### 4.2 Dismantling the Community Development Employment Project scheme

Additionally, a key part of the original NTER was to abolish the Federal Government’s Community Development Employment Projects (CDEP) scheme in the Northern Territory, which provided some 7 500 people with a culturally appropriate ‘work for the dole’ type program.106 Essentially, the purpose of dismantling this scheme was to encourage Indigenous people to engage with the ‘real’ economy by prompting welfare recipients to seek employment and training through mainstream sources.107 However, given evidence which suggested that without alternative employment options or access to social security benefits, individuals living in remote communities would not be able to sustain an adequate standard of living and this would lead to further socio-economic disadvantage,108 the Rudd Government reinstated the program one year after the moratorium was imposed.109 Nevertheless, the implicit intention of mainstreaming

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102 UNDRIP arts 2, 15(2). See also ICESCR art 2(2); ICCPR art 2(1); ICERD art 1.
103 UNDRIP art 3. See also ICCPR art 1; ICESCR art 1; ICERD arts 2, 5(c); Committee on the Elimination of Racial Discrimination, *General Comment XXI on the Right to Self-Determination* (1996).
104 UNDRIP art 8.
105 See, eg, the right to autonomy in the matters relating to their local affairs (UNDRIP art 4), the right to participate in the political life of the State (UNDRIP art 5), the right to physical and mental integrity, liberty and security of the person (UNDRIP art 7).
Indigenous people by compelling further ‘urban drift’ features prominently in the Government’s approach to overcoming socio-economic disadvantage and social dysfunction.\(^{110}\)

The neo-liberal policy agenda was formally advocated by former Prime Minister John Howard upon his election to Government in 1996.\(^{111}\) In response to a backlash from mining and pastoral lobbyists, Howard sought to ‘normalise’ Indigenous land rights thereby turning the policy focus away from restoring substantive equality, cultural identity and practical reconciliation.\(^{112}\) This represented a significant departure from the ‘self-determination’ or ‘self-management’ era that characterised 30 years of government policy preceding Howard. The current ALP Government has largely retained the policy of economic integration and formal equality implemented by the conservative Coalition Government.\(^{113}\) It appears that eliminating difference and modifying individual and communal behaviour through the welfare mechanisms of the state has once again became a major part of the political agenda in Indigenous affairs.

For example, Johns argues that Aboriginal culture ‘has been used to veil or excuse bad behaviour’ and that ‘choosing culture is to choose poverty’.\(^{114}\) Hughes and Warin further contend that ‘education, health, life expectancy, housing, employment and income gaps between the remote community dwellers and other Australians have widened’ as a direct consequence of the self-determination, ‘socialist experiment’ in which the Government funded unsustainable ‘living museums’.\(^{115}\) While Pearson recognises the importance of Aboriginal culture, he too adopts the neo-liberal mantra, citing CDEP as a cause of welfare dependency and the lack of employable skills that keep remote Indigenous community members living in conditions of poverty.\(^{116}\) While the former Minister for Indigenous Affairs, Mal Brough, advocated the Government’s policy of ‘stabilise, normalise and exit’, highlighting the perceived pressure on Indigenous communities to alter their way of living.\(^{117}\)

The effect of relocating remote community residents to urban centres in order to mainstream employment in the NT not only had major implications for housing and social services by heightening overcrowding and homelessness,\(^{118}\) but also exposed transient Aboriginal people to


\(^{111}\) Markus, above n 21, ch 2.


\(^{113}\) See Altman, ‘NT Intervention three years on’, above n 37.

\(^{114}\) G Johns, ‘The Northern Territory Intervention’, above n 21, 68.

\(^{115}\) H Hughes and J Warin, ‘A New Deal for Aborigines and Torres Strait Islanders in Remote Communities’ (2005) 54 *Issue Analysis* 1, 1.

\(^{116}\) See, eg, Noel Pearson, ‘Stuck on the Welfare Pedestal’, above n 110. See also Brendan Darcy, above n 110.


\(^{118}\) Taylor, above n 21.
increased levels of racism and discrimination in city centres. While creating training and employment opportunities in the real economy is a worthwhile approach to alleviating conditions of poverty, this must be done in a non-coercive, culturally appropriate and non-discriminatory way. Creating conditions in which individuals are compelled to leave their homelands, only to find themselves living in overcrowded dwellings or 'staying in the long grass', only serves to further perpetuate the marginalisation and stigmatisation faced by Indigenous people in the wider community. This engenders a sense of powerlessness and disengagement from an administration, which creates a situation of welfare dependence at one point in time and then proceeds to deprive the individual of the only means of independence at another juncture. As Calma notes, 'The greatest irony of this is that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of Government services'.

It is conceivable that by providing for the abolition of CDEP, the NTER in its original form had the effect of forcing individuals to move from their lands and assimilate into mainstream society. This potentially breaches a number of fundamental rights contained in UNDRIP, namely the right to self-determination, non-discrimination and autonomy, freedom from assimilation, cultural destruction and forced relocation from land the right to maintain traditional connection to, and ownership of, land and territories, in addition to the right to freedom of movement. Furthermore, the right of Indigenous peoples to the improvement of their economic and social conditions, including employment and training, is clearly breached by this measure. Therefore, it is clear that the dismantling of CDEP and encouragement of urban drift could potentially cause deleterious, intergenerational effects on the culture, physical and psycho-social wellbeing of Australia’s first peoples.

4.3 Quarantining of Social Security Benefits
Another measure contained in the NTER legislation that raises concerns under various human rights treaties is the income management regime. This regime provides for the compulsory quarantining of 50% of welfare payments and 100% of lump sum payments in order to ensure


121 This term is categorised as primary homelessness. See Holmes and McRae-Williams, above n 80.


123 UNDRIP arts 1-6.

124 Ibid arts 7-10.

125 Ibid arts 25-32.

126 ICCPR art 12; ICERD art 5(d)(i).

127 UNDRIP art 21.

that money is spent on basic needs and to prevent spending on prohibited materials.\textsuperscript{129} This is intended to promote responsible income management and to overcome issues such as child neglect, malnutrition, substance abuse and 'humbugging' or pressure to give away money.\textsuperscript{130} Although there is evidence that income management has positively increased children's nutrition and health,\textsuperscript{131} this is offset by costly administrative difficulties and concerns that tying welfare to school attendance puts women at further risk of domestic violence due to increased financial stress, while also disadvantaging communities that have inadequate access to appropriate schooling facilities.\textsuperscript{132} Further, the Review Board heard reports that Aboriginal people 'suffered frustration, embarrassment, humiliation and overt racism' as a direct consequence of this measure.\textsuperscript{133}

In its original form, income management applied on the basis of residence, was mandatory and was not subject to external merits review. Therefore, this measure had the consequence of unduly affecting Indigenous people in a racially discriminatory way. Further, the aim of improving the social and economic capabilities of Indigenous individuals through negative reinforcement without adequate support services to help deliver results proved ineffectual.\textsuperscript{134} Evidence suggested that income management perpetuated rural to urban drift as people had to travel long distances to shop at approved stores and to attend compulsory Centrelink appointments.\textsuperscript{135} The Committee also heard reports that due to less discretionary income, people were often unable to return home after their visits into town or travel for a variety of other reasons including access to services, ceremonial and cultural reasons such as 'sorry business'.\textsuperscript{136}

In response to these issues of concern, the former Rudd Government introduced the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth)\textsuperscript{137} to provide for the reformation of certain measures so that

\textsuperscript{129} \textit{Social Security (Administration) Act 1999 (Cth)} s 123.

\textsuperscript{130} Department of Families, Housing, Community Services and Indigenous Affairs, \textit{Future Directions for the Northern Territory Emergency Response Discussion Paper} (2009), 10.

\textsuperscript{131} It is a concern that the Government has relied upon statements made by community storeowners who have a vested interest in the program being successful. This point was made by A Vivian and B Schokman, 'The Northern Territory Intervention and the fabrication of special measures' (2009) 13 \textit{Australian Indigenous Law Reporter} 1, 86, 89.


\textsuperscript{133} NTERRB, above n 7, 20.

\textsuperscript{134} D Campbell and J Wright, 'Rethinking Welfare School Attendance Policies' (2005) 79(1) \textit{Social Service Review} 2.


\textsuperscript{136} On the right to live in freedom and the right to liberty of movement see \textit{UNDRIP} arts 7, 10; \textit{ICCPR} art 12; \textit{ICERD} art 5(d)(i). See also Central Land Council, above n 84, 19-31; 'The NT Intervention and the new politics of assimilation', \textit{Solidarity} (online), June 2008 <http://www.solidarity.net.au/3/the-nt-intervention-and-the-new-politics-of-assimilation/>.

\textsuperscript{137} The Act prospectively repeals the sections excluding the operation of State and Territory anti-discrimination legislation.
‘they are more sustainable and more clearly special measures under the Racial Discrimination Act’.\(^{138}\) It was intended that income management be rolled out nationally to encapsulate all disadvantaged groups on welfare and not just Aboriginal people in the NT, thereby removing the race-based aspect of the measures. Unfortunately, the 1 July 2010 roll out was set to occur in the NT only, which continues to be an issue due to the large proportion of Aboriginal people in the NT.\(^{139}\) Furthermore, under the amendments, the Minister has power to declare an area an ‘income management area’.\(^{140}\) It appears that the scheme remains, to a large extent, mandatory and non-discretionary, applying on the basis of location and thereby disproportionately affecting Indigenous people.\(^{141}\)

Furthermore, the scheme has not been formed on a consensual basis and may potentially threaten the right to social security\(^{142}\) and self-determination\(^{143}\) by effectively depriving individuals of their autonomy or self-government in matters relating to their internal or local affairs.\(^{144}\) Indeed, surrendering one’s human rights in exchange for welfare undeniably results in a loss of autonomy and control.\(^{145}\) This is also evidenced by the implicit intention on the part of the Government to create behavioural change by denying individual liberty and choice and forcing welfare recipients to adopt a course of action.\(^{146}\) This suggests that the NTER causes dispossession of one’s rights to participation, consultation and consent in the processes that affect one’s life.\(^{147}\)

The Government’s initiative under the NTER is not a new approach to overcoming the problems faced by Aboriginal groups, but is rather a fresh attempt at assimilation through social engineering. This approach is characteristic of the assimilation era from the 1930s, when the policy focus turned to training Aboriginal people for life as members of ‘civil society’. During this


\(^{139}\) According to the ABS, almost one in three people in the NT (32%) were estimated to be of Indigenous origin. In all other states/territories less than 4% of people were estimated to be of Indigenous origin. See Australian Bureau of Statistics, ‘4705.0 - Population Distribution, Aboriginal and Torres Strait Islander Australians’ (2006) <http://www.abs.gov.au>.

\(^{140}\) The Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth) sched 2, pt 2, ss 123TA – 123UGA. There is also concern that this exemption option is reminiscent of past Governmental policies, which have caused profound emotional wounds. See Gregory Marks, Race Discrimination, Special Measures and the Northern Territory Emergency Response (Amnesty International, 2009) 12: ‘this is highly offensive to a number of Aboriginal people, given the invocation of schemes throughout Australia in the early 1900s that allowed for mixed blood Aboriginal people to Protection Acts and regulations. The exemption certificates were commonly known as dog tags.’


\(^{142}\) ICESCR art 9; ICERD art 5.


\(^{144}\) UNDRIP art 4.

\(^{145}\) Neville, above n 59.

\(^{146}\) UNDRIP arts 5, 7.

\(^{147}\) Ibid arts 5, 19.
time, the Government used social security legislative schemes as incentives to encourage Indigenous people to dispense with their nomadic and primitive lifestyles by providing benefits only to those deemed socially responsible. Altman and Sanders offer the following description of the Government’s welfare scheme:

During the 1940s the child endowment (family allowance) payment made for the care of dependent children became payable in respect of all Aboriginal children, except the nomadic. The provisions of the social security legislation relating to the more substantial pension and benefit payments were also amended during the 1940s from wholesale exclusion of Aborigines to a formulation which allowed eligibility to individuals who were either exempt from State or Territory laws relating to the control of Aboriginal natives or whose character, standard of intelligence and social development made it reasonable to grant such eligibility.148

Yet again, it appears that the provision of welfare has been used to encourage Aboriginal people to adopt life pathways more acceptable to the ruling majority. Indeed, the hegemony of ‘Western-style economic development initiatives’149 coupled with the prominence of Government intervention aimed at encouraging convergence in social and cultural value systems throughout Australia’s history, is in large part to blame for the current disengagement of Indigenous people from the mainstream economy and the social dysfunction that pervades remote communities.150

5. Compulsory Acquisition of Aboriginal Land and Leasing of Town Camps

Under the _NTNERA_, the Federal Government is empowered to take possession and control of Aboriginal communities through the compulsory acquisition of five year leases over Aboriginal land and community living areas held in fee simple by land trusts and associations.151 The Act additionally provides for broad discretionary powers to be exercised by the Commonwealth over town camps and suspends native title rights insofar as they are inconsistent with areas designated by the NTER.152 At the time of implementation, there were sixty-four leases in effect set to expire in 2012. The Government’s intention to extend the leases for additional terms was, however, clearly expressed from the outset.153 The rationale behind the acquisition of leases and unconditional access to land was that it was ‘crucial to removing barriers so that living conditions [could] be changed for the better in these communities in the shortest possible time frame’.154

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148 Altman and Sanders, above n 43.
150 Taylor, above n 21.
151 _NTNERA_ s 31.
152 The Act suspends the future act provisions of the _Native Title Act 1993_ (Cth). See _NTNERA_ pt 4 div 1.
Prior to the intervention, Aboriginal land was held for the benefit of traditional Aboriginal owners.\(^{155}\) Subsequent to the intervention, however, the Commonwealth Government acquired rights as a tenant in possession with broad discretionary powers.\(^{156}\) Although the pre-existing titles and interests in land were preserved, the terms of the leases were dictated by the Commonwealth and were terminable at will by it, with no requirement to obtain consent from community residents.\(^{157}\) This created a situation of power imbalance, in which Aboriginal control over Aboriginal affairs was significantly undermined.\(^{158}\) Additionally, the original measures contained no clearly expressed liability on the part of the Government to pay 'just terms' compensation for the acquisition of land as required by s 51 (xxxi) of the Constitution.\(^{159}\)

The Board reported distrust of the government's intentions, incomprehension of the link between land reforms and child protection, uncertainty and a perception of ill-treatment on the basis of race.\(^{160}\) However, the former Rudd Government ignored the Board's findings and continued with these measures on the basis that they 'are providing the foundation for better housing services which are crucial to the future viability and sustainability of remote communities'.\(^{161}\) Remarkably, after two years, only eleven houses had been built at a cost of over $200 million.\(^{162}\) There is little doubt that this failed to meet the Government's promise of providing a housing solution for the protection of children.\(^{163}\) Further, it was not until May 2010


\(^{156}\) NTNERA s 35 provides exclusive possession and quiet enjoyment of the land to the Commonwealth with power vested in the Minister to vary the terms and conditions of the leases and/or underlying rights and interests pertaining to them with no similar power of Aboriginal landowners and councils. This creates a situation akin to the relationship between a lessor and lessee, except that the Commonwealth has power similar to that of a landlord.

\(^{157}\) To be consistent with the *RDA*, the measures relating to the compulsory acquisition, use and occupation of land under the lease regime must be undertaken with the consent of the landowners (without exception). See ss 10(3), 8(1). As the Human Rights Commission explains, 'The need for consent is clearest in the context of the laws that make provision for the management of property owned by Aboriginal people. The *RDA* excludes from the ‘special measures’ exemption laws that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them.'

\(^{158}\) As MacGillvray explains, ‘The combination of compulsory five-year leases, Commonwealth powers over Aboriginal townships, and the suspension of the Native Title Act has weakened Aboriginal property rights in the Northern Territory. Commonwealth leases, for instance, create a legal relationship of lessor and lessee. However, within this arrangement Aboriginal people are not afforded the rights normally enjoyed by a lessor: the Commonwealth has unilateral power to dictate and control the terms of the lease (including the termination of any rights, titles and interests)’: MacGillvray, above n 143.

\(^{159}\) The requirement is clearly expressed as, 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

\(^{160}\) NTERRB, above n 7, 39.

\(^{161}\) Jenny Macklin, 'Compulsory Income Management', above n 153.


\(^{163}\) Ibid. See also D Moss, *Crying out for a healthy home* (11 August 2010), Health Habitat <http://www.healthabitat.com/newsPDFs2010/CryingOutFor%20HealthyHome.pdf>.
that the Government started paying rent to only forty-five communities and began the transition to voluntary leases as recommended by the Board in 2008.\textsuperscript{164}

The constitutional validity of the compulsory lease measures has been challenged in the High Court. In \textit{Wurridjal v Commonwealth}\textsuperscript{165} the majority of the Court found that although the five year leases amounted to an acquisition of property, the NTER provided for just terms compensation. The High Court challenge was therefore unsuccessful. Interestingly, Kirby J in dissent attributed particular significance to the indigeneity of the traditional land owners:

\begin{quote}
If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no ‘property’ had been ‘acquired’. Or that ‘just terms’ had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected.\textsuperscript{166}
\end{quote}

Indeed, the right to own, control and develop traditional lands and resources is central to the cultural and physical wellbeing of Indigenous peoples.\textsuperscript{167} To deny Indigenous peoples the right to exclusive possession and communal ownership of their traditional lands is to deny their fundamental human rights.\textsuperscript{168} It is arguable that by arbitrarily displacing Aboriginal land rights, the five year lease measures are in breach of Australia’s international legal obligations including the right to own property,\textsuperscript{169} the right to redress or equitable compensation,\textsuperscript{170} the right to maintain cultural ties to traditional lands,\textsuperscript{171} the right to use, own, develop and control those lands,\textsuperscript{172} the right to consultation and consent\textsuperscript{173} and importantly the right to self-determination.\textsuperscript{174}

\begin{footnotes}
\item \textsuperscript{165} (2009) 237 CLR 309.
\item \textsuperscript{166} Ibid, 394-5.
\item \textsuperscript{169} ICERD art 5(d)(v).
\item \textsuperscript{170} UNDRIP art 28.
\item \textsuperscript{171} Ibid art 25.
\item \textsuperscript{172} Ibid art 26.
\item \textsuperscript{173} Ibid art 19, General Recommendation 23. See Committee on the Elimination of Racial Discrimination, ‘General Recommendation No XXIII on Indigenous peoples’, Fifty-first session, 18 August 1997. The Committee on the Elimination of Racial Discrimination established under ICERD has called upon States party to CERD to ‘ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.’
\item \textsuperscript{174} UNDRIP art 3, General Recommendation 21. This is consistent with the \textit{International Covenant on Civil and Political Rights} (art 1) and the \textit{International Covenant on Economic, Social and Cultural Rights} which state: ‘[i]ndigenous peoples have the right to self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.’ Note however, various commentators have argued that the Federal Government abandoned Aboriginal self-determination prior to the intervention in order to pursue policies likened to those of the assimilationist era. See, eg, Thalia Anthony, ‘Aboriginal self-determination after ATSIC:
\end{footnotes}
The manner in which States may adhere to and fully implement the right to self-determination is elucidated through Articles 31-36 of UNDRIP. Of particular importance is the responsibility to take effective measures and ensure the implementation of this right by developing strategies in good faith for the development of Indigenous peoples’ culture, identity and use of land. Furthermore, General Recommendation 23 provides that it is the duty of all States to promote the right to self-determination by enabling Indigenous peoples to freely determine their political status on an equal footing without outside interference. This is consistent with the Indigenous understanding of self-determination which is considered more than mere independence and seen as the ‘right to be in control of their lives and their own destiny’ in conditions of ‘freedom and under conditions of equality’.

While the Australian Government’s objective of providing better housing and a safe and healthy living environment for children is a legitimate and worthy cause, that aim must be achieved in a culturally appropriate manner consistent with international legal obligations. Put simply, the NTER has drawn criticism for leading to a ‘breakdown of culture and the disempowerment of Aboriginal communities’ and ‘appears to further destroy the control that communities have over their own lives’. This further contributes to the structural inequality and socio-economic disadvantage of Indigenous peoples. Additionally, these land reform measures impose considerable pressure on Indigenous people to adopt individualised or privatised forms of land reappropriation of the “original position”, (2005) 14 Polemic 1; Brennan, above n 52; Human Rights Law Resource Centre, Submission to the Northern Territory Emergency Response Review Board: Practical Implications of the Northern Territory Emergency Response (2008) 19.

In particular see UNDRIP arts 31, 32, 33, 36.

It is important to note this right is not unlimited. The Committee notes at Part 6 of General Recommendation 21 that international law has not recognised a general right of peoples unilaterally to declare secession from a State. Therefore any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States is not authorised or encouraged at international law. See Committee on the Elimination of Racial Discrimination, ‘General Recommendation No XXI on the Right to self-determination, Forty-eighth session, 23 August 1996.

Xanthaki, above n 167, 152. Note there is a divide in the commentary between what is known as external and internal or minimalist and maximalist notions of self-determination, however, essentially it is tied to the political status of Indigenous minority groups within a colonised State. See also, T Calma, ‘Indigenous peoples and the right to self-determination’ in Human Rights and Equal Opportunity Commission, Indigenous Peoples: Issues in International and Australian Law (Martin Place Papers No. 6, International Law Association (Australian Branch), 2006) 35 where Calma notes that there are two aspects to self-determination, firstly the right to participate and negotiate and secondly, the right to and protection of a distinct culture and society.


Although note that some have expressed concern about the Government’s intentions, describing compulsory acquisition of land under the five year leases as a ‘land grab’. See, eg, ‘Compulsory Acquisition ‘theft’ of land’, ABC News (online), 2 September 2010 <http://www.abc.net.au/news/stories/2010/09/02/3000296.htm>. Cf P Gibson, ‘Intervention motives more serious than mining’, Solidarity (online), November 2009 <http://www.solidarity.net.au/19/intervention-motives-more-serious-than-mining/> where Gibson explains that the Labor party has planned to ban mining on Aboriginal land acquired through the intervention to disarm such claims.

Short, above n 27, 499.
ownership and encourage people to move into more economically viable communities. The neo-liberal agenda of the Government is highlighted by the following remarks of former Prime Minister Howard:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking towards private recognition. ... I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having the title to something is the key to your sense of individuality; it’s the key to your capacity to achieve, and to care for your family and I don’t believe that Indigenous Australians should be treated any differently in this respect.

By denying Indigenous peoples’ legal entitlement to their land, the choice to freely determine residence and the opportunity to participate in the affairs that shape their existence, the Government has failed to protect these peoples ‘against all forms of internal displacement’.

6. Remote Service Delivery and Homeland Communities

When the Howard Government implemented the NTER in 2007, it also negotiated the cessation of Commonwealth funding for over 500 remote communities, called homelands or outstations, through the relinquishment of responsibility for the delivery of essential government services to the NT Government. This was achieved under the Memorandum of Understanding on Indigenous Housing, Accommodation and Related Services, which stipulated that no further funding would be provided to support homelands/outstations or to improve or construct houses, despite evidence that 10 000 people (one quarter of the Indigenous population) resided in those areas of concern. In 2008 the Council of Australian Governments (COAG) agreed to the National Partnership Agreement on Remote Service Delivery, prioritising only fifteen sites in the NT for the delivery of services. This was done in conjunction with the NT Government’s headline policy

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182 See Gibson, above n 179, in which the author contends that through the land measures the Government seeks to eliminate the ‘Aboriginal problem’ by mainstreaming public housing in the NT. See also N Watson, ‘Privatisation versus Communal Lands’ (2005-6) 10 Arena Magazine 80 in which Watson explains that the Federal Government’s proposal to privatise land ownership one year prior to the intervention was an attack on self-determination. For a further interesting article on this point see J C Altman, ‘The Howard Government’s Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?’ (2007) 16 Centre for Aboriginal Economic Policy Research 2.

183 Department of Parliamentary Services, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Bills Digest No 158, 2005-06, 19 June 2006) 6. Note however, that international evidence does not demonstrate that individual title leads to better economic outcomes. See, eg, J Altman, C Linkhorn and J Clarke, Land rights and development reform in remote Australia (Oxfam Australia, 2005).

184 Human Rights Committee, General Comment XXVII, Freedom of movement (1999) UN Doc CCPR/C/21/Rev.1/Add.9 [7].

185 Memorandum of Understanding in Respect of Indigenous Housing, Accommodation and Related Services between the Australian Government and the Northern Territory Government (September 2007). Note this was a turnaround from the Memorandum of Understanding in Respect of Financial Arrangements between the Commonwealth and a Self-Governing Northern Territory (1978) available at under which the Northern Territory gave responsibility for Aboriginal affairs and homelands to the Commonwealth.


statement on homelands/outstations released in 2009, entitled Working Future: fresh ideas/real results,\textsuperscript{188} which supported the new Federal initiative.\textsuperscript{189} Critically, the latter policy implements what is known as a ‘hub and spoke’ model of service delivery, whereby urban centres provide service ‘hubs’ for remote community ‘spokes’. Under this policy, many residents will be forced to travel to the nearest hub town in order to access basic services such as education, health and food supplies.

Further, the NT Government’s policy requires homelands to meet various preconditions for ongoing financial support including population and infrastructure thresholds.\textsuperscript{190} There appears to be very little consistency between the Federal and NT Governments’ remote service delivery models and its commitment under the NTER to invest in public housing in remote communities. The NT Government claims that this approach will ‘improve transparency of service delivery and introduce a new disbursement model based on a more realistic framework for the allocation of limited Government resources’.\textsuperscript{191} Through the funding arrangements, it is intended that Indigenous socio-economic disadvantage be alleviated by policies that promote Indigenous self-sufficiency and the adoption of mainstream economic opportunities. However, the effect and perhaps the purpose of those policies are to forcibly displace Aboriginal people from their homelands by necessitating rural to urban migration.

Indeed, neo-conservative commentators such as Hughes contend that homeland communities are not economically or socially viable and that the support of such communities has contributed to welfare dependency, social dysfunction and break down in family welfare.\textsuperscript{192} Pearson envisages the solution for Aboriginal people is to ‘orbit between two worlds’. This requires increased individual mobility into large regional towns so as to engage in the real economy, with the ‘economically integrated’ returning to traditional homelands temporarily in order to maintain cultural diversity.\textsuperscript{193} It is these views that have informed the Government’s most recent

\textsuperscript{188} Northern Territory Government, Outstations/homelands policy, above n 48.

\textsuperscript{189} In announcing the Working Future policy in May 2009, NT Chief Minister, Paul Henderson and former Minister for Indigenous Policy Alison Anderson described the policy as a visionary six part plan that will develop twenty large service towns, set a new path for homelands and outstations, and focus and coordinate the delivery of infrastructure, services and development in the remote Territory. See, Northern Territory Government, A Working Future: Real Towns, Real Jobs, Real Opportunities (Media Release, 20 May 2009) <http://www.newsroom.nt.gov.au>.

\textsuperscript{190} Ibid. For example, the outstation must be an existing outstation (no new outstations will be funded), the outstation must be the principal place of residence for community members, they must have an adequate water supply and residents must have firm commitments in place to increase their self-sufficiency and contribute toward services in order to receive continued government funding. There is concern that this threshold is difficult to meet and with limited resources many homelands communities will not be viable in the future.

\textsuperscript{191} Ibid.

\textsuperscript{192} Hughes, above n 47. See also G Johns, ‘Aborigines Must Move with the Times’, above n 47. For an interesting description of the emergence of the neo-liberal or neo-paternal agenda see Altman, ‘The Howard Government’s Northern Territory Intervention’, above n 182.

\textsuperscript{193} Noel Pearson, ‘A People’s Survival’, The Australian (Sydney), 3 October 2009.
attempts at overcoming the problem of 'Third World housing in the homelands' rather than a community driven, cooperative and culturally sensitive approach. 194

Poor housing outcomes are key contributors to Indigenous poverty and disadvantage due to the flow-on effects in areas such as health, education, employment, family safety and criminal justice. 195 The current unilateral solution, based largely on the government's economic interests and paternalistic rhetoric will not improve Indigenous social well being and such policies may result in many years of continued disadvantage and poverty, exacerbate the demographic drift to regional towns and ultimately impact negatively on Australia's international reputation. 196

In fact, evidence suggests that homelands provide a healthy living environment for Aboriginal people, whereas life in urban townships only serves to perpetuate the social exclusion and poor life outcomes that further entrench Indigenous socio-economic disadvantage. For example, a study conducted by Utopia Homelands in the NT over a ten year period reported that outstation living had 'attendant benefits for physical activity and diet and limited access to alcohol, as well as social factors, including connectedness to culture, family and land, and opportunities for self-determination'. 197

The House Standing Committee on Aboriginal Affairs in its report on the inquiry into the Aboriginal homelands movement in Australia, entitled Return to country: the Aboriginal homelands movement in Australia, described the homelands movement which emerged in the 1970s as a response to past assimilation policies that had displaced Indigenous people onto reserves, stations and missions:

The homelands movement has been very much an Aboriginal initiative, distinguishing it from many other residential situations of Aboriginal peoples which have been the result of direct or indirect government influence... It is a clear statement by the Aboriginal people involved of the sort of future they wish for themselves and their children, a future on land to which they have spiritual and economic ties and a future over which they have much greater control. 198

Historically, policies aimed toward creating a 'monolithic and homogeneous Australia', such as those employed during the period of assimilation, which were aimed toward 'cultural indoctrination via behaviour modification' in order to improve the material conditions of the Aboriginal 'Other', further perpetuates Indigenous socio-economic disadvantage. 199 As Anthony

194 This was recommended by the Little Children are Sacred Report, above n 3 (the impetus for the intervention) and the NTERRB, above n 7.
195 Dillon and Westbury, above n 100, ch 6.
196 Ibid.
198 House of Representatives Standing Committee on Aboriginal Affairs, Parliament of Australia, Return to Country: The Aboriginal Homelands Movement in Australia (1987) 257. Note that the homelands movement was also bolstered by a shift to self-determination in Federal Indigenous policy with direct funding provided to Indigenous communities for housing and other infrastructure, and the introduction of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
199 McRae et al, above n 43, 40.
notes, these policies made it increasingly difficult for Aboriginal people to maintain their traditional ways of life in remote areas, compelling them to relinquish their lands and move into towns where they were faced with heightened discrimination and conditions of poverty.²⁰⁰

The only basis for the outstation policy is ideological: to push indigenous people into the mainstream and engender assimilation. It operates hand in hand with the Northern Territory intervention that focuses funding priorities on a limited number of prescribed communities.²⁰¹

The Government’s failure to recognise the importance of homelands not only resonates with colonial forms of coercive governance, but also runs counter to Australia’s international legal obligations. Arguably, the Government’s remote service delivery policy functions to compel the movement of people away from their traditional lands into ‘mainstream society’ and potentially breaches Australia’s international legal obligations under UNDRIP in relation to the right not to be subjected to forced assimilation or destruction of culture,²⁰² the right to maintain cultural ties to traditional lands,²⁰³ the right to use, own, develop and control those lands,²⁰⁴ the right to consultation and consent²⁰⁵ and the right to self-determination.²⁰⁶

By denying people the opportunity to live on traditional homelands, the Government is in effect denying them the fundamental right to self-determination, autonomy and the freedom to choose one’s residence. The prioritisation of service delivery to hub towns not only undermines the development of sustainable Indigenous homelands but also causes the ‘internal displacement’ of Indigenous peoples by compelling community residents to travel long distances and temporarily relocate to access basic services.²⁰⁷ It is an unfortunate reality that the Government’s policy of ‘economic integration’ and ‘normalisation’ cannot be disconnected from assimilation policies of the past. This will undoubtedly have deleterious intergenerational effects on the culture, health and wellbeing of this group of peoples.

7. Conclusion

Since 2007, several Federal and NT Government policies that have been introduced have had a significant negative impact on Aboriginal people’s self-determination, autonomy, culture and control, including the introduction of the NTER and the NT Government’s Working Future policy. These policies have potentially breached a number of Australia’s international legal obligations, principally in relation to certain provisions of UNDRIP, ICCPR and ICERD, which raises significant concerns about the purpose and effect of the Federal Government’s ‘emergency intervention’ legislation. Of particular concern is that various provisions including the alcohol prohibitions, dismantling of CDEP and quarantining of social security benefits function to compel the

²⁰² UNDRIP art 8.
²⁰³ Ibid art 25.
²⁰⁵ Ibid art 19, General Recommendation 23.
movement of Indigenous people away from their homelands into ‘mainstream society’ and cause dispossession and ‘internal displacement’. The policies of remote service delivery and the compulsory acquisition of Aboriginal land have further contributed to this rural to urban drift.

Moreover, various breaches of human rights such as the right to self-determination, freedom from assimilation, freedom of movement and the right not to be forcibly relocated from land, has obliged many Indigenous peoples to leave their homes and further perpetuated this ‘internal displacement’. Therefore, the Commonwealth Government’s race-based response to complex socio-economic problems in regional and remote parts of the NT has arguably led to a throwback to forcible integration, characteristic of the assimilation era, albeit in a modified ‘neo-liberal’ form.

Although the Indigenous population has historically been highly mobile due to customary familial and cultural forces, the movement documented in this instance is arguably of a different nature as it is attributable to the policies of the state. While mobility or internal migration occurs irrespective of the Governments’ policies, the NTER has contributed to an increase in displacement of an involuntary nature. At first blush it appears that this picture of Indigenous affairs is quite similar to the period from British colonisation up to the self-determination era, in which Aboriginal people were dispossessed from their homelands through forced settlement on reserves, stations and missions.

Indeed, by portraying Aboriginal people and their culture as passive subjects responsible for the socio-economic problems they face, the current and former Government was able to pick up the lexicon of assimilation once more. In doing so, the suite of paternalistic and discriminatory measures aimed toward ‘normalising’ Indigenous Australia was justified as a benign attempt at overcoming the break down in social norms, community dysfunction and family violence. By ‘encouraging remote Aboriginal people to adopt social habits generally evident in non-indigenous society’, the Government’s ‘decision to jettison racial neutrality has ushered in a new

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210 The policies herein referred to are those of the Federal and NT Governments.
211 The United Nations reports that there is a global trend toward urbanisation and this affects the migratory patterns of Indigenous peoples worldwide. However, forced or involuntary population movement is a cause for concern, often resulting from factors beyond the internal locus of control of affected individuals. For instance, environmental degradation, inadequate legal and land rights protection, poverty, dispossession and discrimination. Internally displaced Indigenous persons are commonly subjected to further marginalisation and poverty in urban centres, as they are met with overt racism, barriers to access services, little opportunities for employment, overcrowding and or homelessness. As visible subjects in urban areas, the stigmatisation attached to their culture and self-identity is further engendered thereby perpetuating the structural factors leading to their disadvantage and discrimination. See Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, The State of the World’s Indigenous Peoples (2009) ST/ESA/328, 231-2.
212 Taylor and Bell, above n 209.
era of race relations in Australia, in which race has openly and formally been re-established as a marker of legal inferiority.\textsuperscript{214}