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## **Of course it wouldn't be done in Dickson! Why Howard's Battlers Disengaged from the Northern Territory Emergency Response**

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*In the name of Aboriginal children, the Howard Government created the Northern Territory Emergency Response (NTER) and thus began a form of apartheid affecting almost seventy per cent of the Northern Territory's Aboriginal population. The NTER facilitated the quarantining of income support payments, the dismantling of protection against unlawful discrimination and the wholesale acquisition of Aboriginal lands. When announcing the NTER, John Howard denied that it was racially motivated, and suggested that had the same circumstances occurred in the middle class suburb of Dickson, similar action would have been taken. While it is outrageous to suggest that any government would ever seize the property interests of middle class families as a response to allegations of child abuse, the Prime Minister's reference to Dickson was nonetheless instructive. This paper will argue that forces within the electorate, such as an obsession with home ownership and the criminalisation of poverty, provided the real impetus for the NTER, rather than genuine crises within Aboriginal communities.*

Mr Brough's put it to me this way; that if this set of circumstances had been disclosed as taking place in the suburb of Dickson, can you imagine what the local response from police, from medical authorities and from the state government would have been? It would have been horror and immediate action and a demand by the community that something be done (John Howard, 21 June 2007).

Almost two months after the former Prime Minister's now historic announcement on 21 June 2007, the Commonwealth Parliament passed legislation collectively known as the Northern Territory Emergency Response ('NTER'). This legislation would create a form

of apartheid, intruding upon the daily lives of almost seventy percent of the Northern Territory's Aboriginal population. The *Northern Territory National Emergency Response Act 2007* (Cwlth) provided for compulsory acquisition of Aboriginal lands, prohibited alcohol in prescribed areas, and gave the Minister considerable power to intervene in the affairs of community organisations.

The *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cwlth) weakened Aboriginal people's ability to control access to their lands by substantially amending the permit system. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cwlth) introduced an income management regime, under which up to one hundred per cent of welfare payments are quarantined. Finally, one of the few legal sanctuaries from discrimination, the *Racial Discrimination Act 1975* (Cwlth) was suspended.

Both the Howard Government and the former Labor Opposition claimed that the NTER was necessary in order to protect Aboriginal children. Indeed, Howard's announcement on 21 June 2007 followed months of sensationalised media reports of child sexual abuse in remote communities in the Northern Territory. In particular, the ABC television programme, *Lateline* (2006), had publicised graphic allegations.

The former Prime Minister went so far as to imply that the NTER was not racially motivated and had the same set of circumstances been disclosed in the suburb of Dickson, presumably, similar action would have been taken. Dickson is a suburb in the inner north of Canberra, characterised by middle class families and leafy streets. It defies logic to suggest that any government would ever seize the homes of middle class families as a response to allegations of child sexual abuse. This paper takes the position that Howard's reference to Dickson was nonetheless instructive, because it revealed the real drivers behind the NTER.

On the same day as Howard and Brough's joint announcement, research was prepared by the former Government's favoured pollsters, Crosby Textor, in which it was revealed that the Government was losing public support. When interviewed about the nexus between the NTER and the Crosby Textor research, Howard flatly denied any connection:

... the indigenous intervention was announced on the 21<sup>st</sup> June which is the same alleged date of this research; nobody in their right mind can suggest that we intervened in the Northern Territory because our pollster told us to (Laws 2007).

However, in the aftermath of the Coalition's defeat, the former Minister for Foreign Affairs, Alexander Downer, was more candid; suggesting that the opinion polls were indeed a factor behind the NTER:

... As the year wore on there wasn't a very positive public response to a range of different initiatives, for example ... when we intervened in the Northern Territory in the Indigenous communities there again, the actual initiative was very popular with the public but it didn't shift the opinion polls (Graham 2007).

Irrespective of Downer's admission, it is inconceivable that a Government that was lagging in the opinion polls would have introduced the NTER had such measures been unlikely to find popular support. Consequently, it is valuable to study changes within the Australian electorate that gave acceptability to such draconian interventions. Measures such as prohibition, income management and compulsory acquisition of land have only an indirect connection with child protection, if at all. But all such measures evince a desire to assert control. This paper takes the position that the desire to control Aboriginal people 'for their own good' was a response to neuroses within mainstream society, as opposed to genuine crises within Aboriginal communities.

Some of those anxieties were already deeply etched in the Australian psyche. In particular, the belief that white property interests must be protected from Aboriginal claims has long been a powerful force in Australian politics. By way of example, the Coalition's promise to deliver 'bucket loads of extinguishment' of native title was embraced by the electorate in the late 1990s. Therefore, it is unsurprising that the compulsory acquisition of Aboriginal land in the Northern Territory was not greeted with the horror that would presumably accompany an analogous attempt in Dickson.

What was novel about the NTER however, was the almost complete absence of public debate. Across the electorate, there seemed to be a tacit acceptance of authoritarian measures, such as income quarantining. In spite of the efforts of bodies such as Women for Wik and the Combined Aboriginal Organisations of the Northern Territory, and individual activists (Turner & Watson 2007), there was little interest in questioning the lack of an obvious connection between child protection and the suspension of the Racial Discrimination Act. The latter in particular, had the potential to diminish Australia's international reputation and yet it failed to provoke as much as a collective murmur.

This paper will argue that the public's disengagement can be explained, at least in part, by social changes over the past decade that revolved around varying notions of home. In *Affluenza* Clive Hamilton and Richard Denniss (2005) described how Australia's addiction to luxury goods was distorting the country's moral fabric. In

order to fund their insatiable thirst for luxury items, Australians were working the longest hours in the developed world. Heavily in debt and exhausted, the middle classes morphed into Howard's battlers, while the genuine poor were scorned as 'welfare dependent'.

Affluenza found reflection in the widespread desire for ever more grandiose homes. In *Renovation Nation*, Fiona Allon (2008) demonstrated how houses had become the alter ego of their owners, spawning a fixation with renovations. Home ownership also became the marker of morality. Whereas 'responsible' individuals acquired mortgages, those who were reliant upon public housing were also tainted with the moniker of welfare dependency.

Home also became a fortress. In *Advance Australia ... Where?* Hugh Mackay (2007) described a society characterised by inwardness, feelings of powerlessness and the desire for simplicity. Plagued by insecurity and a lack of control over the outside world, Australians retreated into their homes and disengaged from 'big picture' issues. One outcome of these changes was the impoverishment of public debate. In *The Triumph of the Airheads and the Retreat from Commonsense*, Shelley Gare (2006) bemoaned the lack of intellectual rigour in contemporary society.

This paper will explore how such changes provided impetus to the public's disengagement from the NTER. It will be argued that the hardening of attitudes towards the genuine poor and a suspicion of those on the margins of the home-owning classes, gave acceptability to authoritarian measures. The NTER was also buttressed by a tradition of diluting Indigenous property rights in order to comfort the insecurities of non-Indigenous property holders.

This paper will be divided into three parts. Part one will discuss the background to the NTER legislation and its early repercussions. Part two will argue that the compulsory acquisition of Aboriginal lands in the Northern Territory is part of a historical trajectory of soothing the anxieties of white Australian property holders. Part three will examine the nexus between affluence, widespread indifference to the NTER and the neoliberal criminalisation of poverty as self-inflicted. The paper will conclude that the NTER was never about Aboriginal children and all about appealing to deeply rooted fears within the electorate. Until we acknowledge the powerful influence of such fears, Aboriginal communities will continue to be subjected to harmful measures, of which the NTER is but the latest example.

## **Part One: The Northern Territory Emergency Response**

### *Background*

In the past decade numerous reports have revealed the complex junctures between poverty in Aboriginal communities, trans-generational trauma and heightened vulnerability to abuse (Robertson

1999, Aboriginal Child Sexual Assault Taskforce 2001). While such reports provided detailed recommendations, there was seldom political will to commit adequate resources for implementation. More often than not, Aboriginal children were overlooked by both Australian governments and the mainstream press.

This changed dramatically in mid 2006, with the proliferation of voyeuristic media reports. In May the Crown Prosecutor, Nanette Rogers, was interviewed on the ABC programme, *Lateline*, about child sexual abuse in Aboriginal communities in the Northern Territory. During the interview Rogers described the rapes of babies, a father raping his daughter at knifepoint and the brutal rape and drowning of a young girl (*Lateline*, 15 May 2006). Such graphic imagery of violence against children had rarely, if ever, featured on Australian television before. The following evening Mal Brough threw fuel on the flames when he alleged, also on *Lateline*, that paedophile rings operated in Aboriginal communities in the Northern Territory. By the end of the month the issue had become a full-blown moral panic. While Brough responded with an intergovernmental summit, the Chief Minister established the *Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*.

The Inquiry, headed by Rex Wild and Pat Anderson, hit the ground running and conducted more than 260 meetings with stakeholders (Anderson & Wild 2007: 44). Their report, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"*, contains numerous allegations of child abuse (Anderson & Wild 2007). Its 97 recommendations evinced a holistic approach by referring to family support services, community education, employment and housing. The crucial need to consult with Aboriginal communities was explicit:

The thrust of our recommendations, which are designed to advise the Northern Territory Government on how it can help support communities to effectively prevent and tackle child abuse, is for there to be consultation with, and ownership by the communities, of those solutions. The underlying dysfunctionality where child sexual abuse flourishes needs to be attacked, and the strength returned to Aboriginal people (Anderson & Wild 2007: 21).

When Rex Wild and Pat Andersen delivered their report to the Chief Minister at the end of April 2007, they could not have anticipated the Commonwealth's response, which in so many ways was antithetical to their recommendations. In fact, the Federal Minister for Indigenous Affairs, Mal Brough, had not even bothered to consult with them prior to the announcement of the NTER. Rex Wild later reflected that:

Thursday 21 June 2007 was an important day for me. It marked the final episode of a criminal trial in which I had been involved for over four years. I telephoned my wife to tell her the news. She asked, 'Are you near a television?' I

assumed, with some surprise, that the news of this particular case's conclusion in the High Court that day was being announced. 'No,' she said, 'John Howard is taking over the Territory' (Wild 2007: 111).

Indeed, there was no real time for genuine public scrutiny, let alone consultation. On 9 August the NTER legislation was referred to the Senate Committee on Legal and Constitutional Affairs for an Inquiry, whose report was due a mere four days later. The legislation was subsequently passed on 17 August. Brough would later admit that this blueprint for societal transformation was conceived over a mere forty-eight hours (*The 7:30 Report* 2008).

### **The NTER Legislation**

The aim to seize control over Aboriginal communities for 'their own good', resounded in Mal Brough's second reading of the Northern Territory National Emergency Response Bill:

When confronted with a failed society where basic standards of law and order and behaviour have broken down and where women and children are unsafe, how should we respond? Do we respond with more of what we have done in the past? Or do we radically change direction with an intervention strategy matched to the magnitude of the problem?

Six weeks ago, the *Little children are sacred* report commissioned by the Northern Territory government confirmed what the Australian government had been saying. It told us in the clearest possible terms that child sexual abuse among Aboriginal children in the Northern Territory is serious, widespread and often unreported, and that there is a strong association between alcohol abuse and sexual abuse of children.

With clear evidence that the Northern Territory government was not able to protect these children adequately, the Howard Government decided that it was now time to intervene and declare an emergency situation and use the territories power available under the Constitution to make laws for the Northern Territory.

We are providing extra police. We will stem the flow of alcohol, drugs and pornography, assess the health situation of children, engage local people in improving living conditions, and offer more employment opportunities and activities for young people. We aim to limit the amount of cash available for alcohol, drugs and gambling during the emergency period and make a strong link between welfare payments and school attendance (Commonwealth Parliament, House of Representatives, 7 August 2007: 10).

In spite of the Minister's emphasis on children, the NTER legislation does not contain a single reference to child protection. Rather, the legislation attempts to protect children by subjecting their families to various authoritarian measures. It is beyond the scope of this paper to provide a detailed analysis of the NTER legislation. However, this paper will provide some examples of how control has been asserted over Aboriginal people.

The desire to control is manifest in Part Three of the Northern Territory National Emergency Response Act, which imposes requirements in relation to publicly funded computers in prescribed areas, to ensure surveillance of those who use them. Part Five provides broad powers to the Minister to intervene in the affairs of 'community services entities' in 'business management areas'. Both terms are defined so broadly that it is likely that Part Five will apply to most of the community organisations responsible for delivering services in the areas that fall within the NTER. Part 5 Division 2 empowers the Minister to direct a community services entity to provide a service in a specified way, use its assets in a particular way, or even transfer ownership of its assets to a person or entity determined by the Minister.

Finally, the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act introduced an income management regime for Aboriginal welfare recipients, under which, up to 100 percent of payments are quarantined for expenditure on essential items at nominated stores. Those subject to the income management regime do not have recourse to the Social Security Appeals Tribunal.

The legislation makes it clear that such control is in the interest of Aboriginal people, by declaring it to be a 'special measure'. In essence, a special measure is a form of discrimination that has the aim of securing the advancement of a disadvantaged group, and therefore, is permissible under the Racial Discrimination Act.

However, the Parliament must not have been entirely convinced that the NTER legislation could be properly categorised as a special measure, because it also suspended the operation of the Racial Discrimination Act.

### **Early Repercussions**

In June 2008, the Commonwealth appointed a Review Board to assess the first year of the NTER. The Board visited 31 Aboriginal communities throughout the Northern Territory (NTER Review Board 2008: 9) and it received over 200 submissions, the majority of which called for either the dismantling or substantial reform of the NTER. Some of the submissions shed light on the unintended consequences of the NTER. By way of example, the submission of the Australian Indigenous Doctors Association ('AIDA') revealed that the NTER had 'created a feeling of "collective existential despair" ... characterised by

a widespread sense of helplessness, hopelessness and worthlessness, and experienced throughout entire community(s)' (AIDA 2008: [17]).

The Review Board delivered its report in October 2008. The report described a 'strong sense of injustice' on the part of many Aboriginal people who were unfairly painted as the authors of their own poverty (NTER Review Board 2008: 9). One of the report's recurring themes was that inadequate planning and insufficient consultation had led to a waste of resources. A case in point was the use of Royal Wolf steel shipping containers for women's safe houses and men's cooling off places. Many Aboriginal women consulted by the Board expressed reluctance to use such facilities because of their similarity to detention centres; revealing the paucity of prior community consultation (NTER Review Board 2008: 33).

A lack of foresight was also evident in relation to the alcohol and pornography provisions. The new pornography offences were so difficult to enforce that only one matter had ended up in court, and signage about the prohibitions, erected at significant expense, was incomprehensible for people whose first language was not English (NTER Review Board 2008: 25). Likewise, the audit of publicly funded computers, supposedly to protect children from harmful material on the internet, had been delayed because of incompatibility between the software and computer hardware (NTER Review Board 2008: 25).

One of the most significant revelations was that 'most communities reported little or no perceived change in the safety and wellbeing of Aboriginal children as a result of the NTER' (NTER Review Board 2008: 34). Police and community members alike complained of incidents where child protection authorities had apparently failed to respond to reports of child abuse (NTER Review Board 2008: 34). Indeed, Aboriginal children appeared to have gained little from the NTER. Local health service providers reported that child health checks, introduced as a part of the NTER, duplicated existing services and represented a wasted opportunity (NTER Review Board 2008: 36). Access to follow-up treatment was also unreliable. Sixty per cent of the children who received health checks were still waiting for follow-up treatment and up to eighty per cent remained in need of follow-up dental treatment (NTER Review Board 2008: 36-37).

The Commonwealth failed to engage with much of the Review Board's report and in particular, the revelation that many Aboriginal children were apparently no safer than before the NTER. In common with her predecessor, the new Minister for Indigenous Affairs, Jenny Macklin, continued to depict Aboriginal people as being in need of control. In rather cryptic language, Macklin announced that the NTER would continue for a further twelve months, after which there would be a 'long-term development phase' when 'increased levels of personal and community responsibility are demonstrated' (Macklin 2008). This paper takes the position that while the belief that Aboriginal people



must be controlled for their own good is by no means new, it has been rejuvenated by Australia's obsession with home.

## **Part Two: How Australia's obsession with home legitimised the compulsory acquisition of Aboriginal land**

### *The home*

Home ownership is deeply etched into the Australian psyche, so that that it symbolises personal attributes, such as stability and trustworthiness. In *Renovation Nation*, Allon (2008: 66) referred to government literature in 1951, which tied home ownership to the ideal Australian:

What the Australian cherishes most is a home of his own, a garden where he can potter and a motorcar ... as soon as he can buy a house ... he moves to the suburbs. This accounts for the enormous size of Australian cities – and also accounts for the overwhelming middle-class outlook and a way of life ... A person who owns a house, a garden, a car and has a fair job is rarely an extremist or a revolutionary.

Four decades later, Australians' attachment to home was cleverly exploited in the film, *The Castle* (1997). The world of the fictitious Kerrigans revolved around a simple weatherboard house that was filled with dodgy renovations and surrounded by scrawny greyhounds. To an outsider it was an eyesore, but for the family man, Darryl Kerrigan, it was a castle. When the Kerrigans' home was set to be compulsorily acquired for the purpose of an airport, Darryl began a tenacious battle to defend it. His joust with corporate thugs culminated in an appeal to the High Court, where Darryl's mate, Lawrence Hammill QC, successfully argued that the plan to acquire the Kerrigans' home was not on 'just terms', as required by s 51(xxxi) of the Constitution.

Along the way, viewers glimpsed an ideal Australia where differences in class and culture were irrelevant. The Kerrigans were equally at ease with their Lebanese neighbours as they were with their eminent barrister. Darryl's sense of egalitarianism extended to Aboriginal people, and at one point, he compared his predicament to Aboriginal dispossession:

I'm really starting to understand how the Aborigines feel .... Well, this house is like their land. It holds their memories. The land is their story. It's everything. You just can't pick it up and plonk it somewhere else. This country's got to stop stealing other people's land (*The Castle* 1997).

Ironically, Australians were flocking to cinemas to watch *The Castle* at a time when their Federal Government was pursuing a campaign to amend the *Native Title Act 1993* (Cwlth), in order to protect powerful

interests from the very people Darryl Kerrigan empathised with. Howard garnered support for his amendments by conflating the interests of the mining and pastoral sectors with those of 'ordinary' Australians like the Kerrigans. Howard's fear tactics came to the fore when he stood in front of a map of Australia, with large sections coloured brown and lamented that the 'pendulum has swung too far' in favour of Aboriginal people.

Although Howard successfully exploited white fears of Aboriginal rights, he did not create those fears. Long before the Coalition promised 'bucket loads of extinguishment' of native title, the mining industry had turned such vilification into an art form. In the early 1980s the sector appealed to white fears by claiming that Aboriginal land rights represented an assault on Australian egalitarianism. Davis has reproduced the text of a television advertisement broadcast in Western Australia at the time:

Do you think it fair that less than 3 per cent of the population should claim ownership of up to 50 per cent of our land? Do you think it fair that any one group of people should have greater rights than any other group? Do you think it fair that any one group should control the future mineral wealth that belongs to every Western Australian? (Davis 2008: 52-53).

The sector's emotive campaign against land rights subsequently motivated the Hawke Government to abandon its policy of national land rights in 1986. A few years later, the miner, Hugh Morgan, would go on to describe the *Mabo* decision as 'the seeds of territorial dismemberment of the Australian continent and the end of the Australian nation as we have known it' (Davis 2008: 58).

Although the Keating Government recognised the *Mabo* decision, its legislative response, the *Native Title Act 1993* (Cwlth), once again pandered to white fears by stringently containing Aboriginal claims. The extinguishment and validation provisions of the Act gave primacy to virtually all other interests in land over native title. The Native Title Act purports to protect native title by way of s 11(1), which provides that 'Native title is not able to be extinguished contrary to this Act.' However, the protection offered by s 11(1) is meagre in light of the future act regime. A 'future act' is an act that may impact upon the enjoyment of native title. Part Two Division Three prescribes conditions for the validity of future acts, which for the most part, allow only minimal procedural rights for native title holders. It follows that the 'Australian way of life' was never going to be compromised, even slightly, by the belated attempt to recognise Aboriginal interests in land.

After the Native Title Amendment Bill was passed into law, native title largely disappeared from the public sphere. A decade later, it spectacularly resurfaced with the *Single Noongar Claim*. On 19 September 2006, Justice Wilcox of the Federal Court recognised the

Noongar people's native title over parts of Perth. The decision was celebrated by Aboriginal people throughout Australia, not only because it was the first recognition of native title in a metropolitan area, but also out of respect for the long and arduous struggle by the Noongar people to have their native title recognised.

In a separate statement, Justice Wilcox pointed out that the Noongar people's native title could co-exist harmoniously with the rights of non-Indigenous property holders:

It is perhaps important for me to emphasise that a Determination of Native Title is neither the pot of gold for the indigenous claimants nor the disaster for the remainder of the community that is sometimes painted. A Native Title Determination does not affect freehold land or most leasehold land; it cannot take away peoples' back yards. The vast majority of private landholders in the Perth region will be unaffected by this case (*Bennell v State of Western Australia & Ors* [2006] FCA 1243).

Justice Wilcox's considered words were entirely lost on the Howard Government. The day after the decision, the former Commonwealth Attorney-General, Phillip Ruddock, asserted that the Noongar people's native title would result in the loss of public access to beaches and parks (Karvelas 2006). The legal foundation for his claim was dubious given that it had no apparent basis in Wilcox J's judgment. However, the political intent was clear — to exploit fear that land justice for Aboriginal people, even in the most benign form, would jeopardise the security of home and hearth.

As stated earlier, home ownership has become a signifier of personal virtue. Consequently, the collective nature of native title and land rights was also a potential threat to the nation's moral fibre; one cleverly mined by the former Howard Government when it gained control of the Senate as a result of the 2004 election. Poverty in Aboriginal communities suddenly had little to do with decades of government neglect, and all to do with their inability to grasp the holy grail of home ownership. In 2005 John Howard laid out his project:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking more towards private recognition. It's a view that I've held for some time ... I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having 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 differently in this respect (Grattan 2005).

Howard's campaign was buttressed by the support of conservative think tanks and aligned media commentators. Proponents for individual property rights drew a nexus between Aboriginal land rights legislation and *dysfunctional* behaviour. In a controversial book, Helen Hughes of the Centre for Independent Studies argued that communal land tenure and the permit system were the real underlying causes of Aboriginal family violence (Hughes 2007).

By the time that Howard and Brough announced their mission to save Aboriginal children on 21 June 2007, in the public mind, Aboriginal land tenure had become synonymous with violence. It was inconceivable that Aboriginal land holders may have felt the very attachment to their lands that homeowners in suburbs like Dickson held for their block of dirt. For their own good, Aboriginal people had to become homeowners just like the 'battlers' in Dickson. Hence, the tentacles of the NTER legislation extended from Aboriginal people to Aboriginal lands.

### **Aboriginal Lands under the NTER Legislation**

Provision for the compulsory acquisition of Aboriginal lands is contained in the Northern Territory National Emergency Response Act. Section 31 provides that leases over certain lands are granted to the Commonwealth for a period of five years. Although the relationship between the Commonwealth and Aboriginal land holders is that of lessor and lessee, the Commonwealth has considerably more control than lessees would ordinarily enjoy at common law. Conversely, Aboriginal land holders have few of the rights ordinarily enjoyed by lessors at common law, and in particular, the right to terminate a lease.

Aboriginal people's ability to control access to their lands, via the permit system, was also weakened as a result of the enactment of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act. The Act effected various amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) that included a defence for persons entering and remaining on common areas on Aboriginal lands, provided that the purpose of their entering and remaining was not unlawful. Once again, the loss of Aboriginal control over access to their lands was portrayed as being 'for their own good'. In his second reading of the legislation, Mal Brough claimed that:

The current permit system has not prevented child abuse, violence, or drug and alcohol running. It has helped create closed communities which can, and do, hide problems from public scrutiny (Commonwealth, House of Representatives, 7 August 2007: 20)

Like the Kerrigans, a group of Aboriginal landholders pursued an action in the High Court, claiming that they had been denied just terms compensation for the disturbance of their property rights. The decision, *Wurridjal v The Commonwealth* [2009] HCA 2, raised a number of complex issues that are beyond the scope of this paper to examine. Of relevance to this paper is that the Commonwealth demurred to the plaintiffs' statement of claim; arguing that the facts alleged by the plaintiffs did not disclose a cause of action. The majority of the Court allowed the demurrer; thus depriving the plaintiffs of the opportunity to argue their case at a trial.

Crennan J, a member of the majority, considered that the nature of Aboriginal land rights made it susceptible to 'beneficial' adjustments in the nature of those given effect by the NTER legislation:

The challenged provisions ... are directed to tackling the present problems by achieving conditions in which the current generation of traditional Aboriginal owners of the land can live and thrive. They are not directed to benefitting the Commonwealth or to acquiring property for the Commonwealth, as those terms are usually understood, nor are they directed to depriving traditional Aboriginal owners of any prior rights or interests, which are expressly preserved ... The linkage, between the purposes of the Land Rights Act and the purposes of the Emergency Response Act and the FCSIA Act ... sustains the Commonwealth's submission that the challenged provisions are outside the scope of s 51 (xxxi) of the Constitution (*Wurridjal v The Commonwealth* [2009] HCA 2 [445] footnotes omitted).

Even allowing for the complex chain of reasoning that underpinned the judgements of the majority, it is difficult to accept that the imposition of analogous provisions on the interests of property holders in Dickson, would ever fall outside the scope of s 51 (xxxi) of the Constitution. This hypocrisy was not lost on the dissentient Kirby J:

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" (*Wurridjal v The Commonwealth* [2009] HCA 2 [214] footnotes omitted).

The desire to control Aboriginal people's land 'for their own good' has now been legitimised by our highest court, but like other provisions of the NTER legislation, it is difficult to conceive of any tangible benefits that have flown to Aboriginal people as a result of either the compulsory leases, or the amendments to the permit system. This begs the question - if the NTER is not making Aboriginal children any

safer, then who is it protecting? This paper takes the position that in common with other provisions of the NTER legislation, the seizure of control over Aboriginal lands was a response to the insecurities in the electorate. Those anxieties are long standing, but as the next section argues, they have been given new life by recent social changes.

### **Part Three: The nexus between affluence, indifference and the criminalisation of poverty**

In *Affluenza* Clive Hamilton and Richard Denniss (2005) painted a disturbing portrait of Australian society. Although wealthier than ever before, Australians were perhaps the most miserable and wasteful that they had ever been. The diagnosis was affluenza. Hamilton and Denniss drew from Jessie H. O'Neill's definition of the condition:

The collective addictions, character flaws, psychological wounds, neuroses, and behavioural disorders caused or exacerbated by the presence of, or desire for money/ wealth ... In individuals, it takes the form of a dysfunctional or unhealthy relationship with money, regardless of one's socio-economic level. It manifests as behaviours resulting from a pre-occupation with — or imbalance around — the money in our lives (Hamilton & Denniss 2005: 7).

In the main, our incomes were being sucked dry by an addiction to luxury goods, in the misguided pursuit of happiness. This addiction was fed by the bombardment of manipulative advertising, blurring the distinction between wants and needs. In order to feed their 'luxury fever', Australians were working the longest hours in the developed world and suffering a host of deleterious side effects, such as drug dependency and relationship breakdowns.

In spite of earning incomes three times that of our forebears in the 1950s, most believed that they were barely making ends meet (Hamilton & Denniss 2005: 4). Upper and middle class people began to view themselves as the quintessential battlers; which the major political parties capitalised upon:

Hansard, the verbatim record of the Federal Parliament, shows that in the eighteen months from January 2003 to August 2004 politicians referred to 'battlers' 237 times, 'struggling families' 54 times and Australians 'doing it tough' 65 times. This could simply reflect the politicians' propensity to speak in clichés, but their choice of clichés is revealing. One senior minister even referred to battlers who earned more than \$60,000 a year. Another referred to the tax cuts of the 2003 budget - which went overwhelmingly to high-income earners - as rewarding the battlers (Hamilton & Denniss 2005: 133-134).

A corollary of this shift was the hardening of attitudes towards the genuine poor. Whereas government transfers to the middle class were perceived as rewards for hard work, income support for the real poor was condemned as discouraging self-reliance. Although Hamilton and Denniss omitted consideration of Indigenous policy from their work, their thesis nonetheless provides some explanation for the emergence of punitive reforms at the turn of the twenty-first century, such as Shared Responsibility Agreements ('SRA'), which compelled Aboriginal communities to commit to behavioural change in exchange for services and infrastructure. The most widely reported upon was the Mulan SRA, which tied the installation of petrol bowsers to a face washing regimen.

In the years following the publication of *Affluenza* other commentators also expressed their concern that while prosperity had brought many benefits, it had distorted our values. In *Renovation Nation: Our Obsession with Home* Fiona Allon (2008) described how Australians' reverence for their homes had developed into a destructive obsession. Allon cited a study in which 90 percent of respondents indicated that they had either renovated their homes or were intending to do so. Such renovations could hardly be described as modest, with sixty-nine percent of respondents regularly spending more than \$50,000 and the remainder in excess of \$80,000 (Allon 2008: 40). Unsurprisingly perhaps, the most successful television programmes at the turn of the twenty-first century included those dedicated to home renovations. By way of example, in excess of three million Australians watched the final episode of the reality TV home renovation programme, *The Block* (Allon 2008: 25)

Like Hamilton and Denniss, Allon describes how the Howard Government manipulated Australians' fixation with consumption. Initiatives such as the First Home Owner Grant and tax benefits for the middle class enticed Australians into acquiring ever increasing levels of debt. In the process, Howard became the home owner/Aussie battler's best friend. But in spite of their increased wealth, Australians remained immersed in fear. Hence, their further retreat into the sanctuary of home, but that was not enough to allay anxiety of Others, which on occasion spilled out into unneighbourly behaviour against some of the most marginalised people in our society:

At precisely the point when most Australians had never been wealthier, they responded to some of the poorest and most vulnerable in their midst with a meanness that surprised the rest of the world. For the working poor, the unemployed and the homeless on the streets, and for the asylum seekers and refugees in leaky boats, the unprecedented prosperity was something they weren't invited to share in. The affluence of our newly renovated national home became all the more reason to keep its door firmly closed and the welcome mat pulled up (Allon 2008: 210).

In addition to the unemployed, the homeless and asylum seekers, Allon could also have added Aboriginal people, whose dire poverty was met with the NTER. The NTER ensured that Aboriginal people would be so heavily controlled that they would never knock on the door of the newly renovated national home. They wouldn't even make it through the front gate.

In *Advance Australia ... Where?* Hugh Mackay (2007) described the Australian electorate in 1996 as one exhausted by the ambitious reforms of the Hawke and Keating Governments, such as multiculturalism, the pursuit of a market-based economy and Reconciliation. Consequently, the electorate opted for a Prime Minister who celebrated his homeliness. Instead of offering us the recession we had to have, Howard pledged to make us feel comfortable and relaxed. Howard's figurative anaesthetic suited the mood of the electorate like a glove. Increasingly fearful of an outside world, Australians focused on the things that they could control and in particular, their homes. In the process, many slipped into what Mackay describes as a 'Dreamy Period':

So here was a unique combination of factors influencing Australians' attitudes at the turn of the century: a society in flux, with many questions about 'where this is all taking us' still unanswered; a rising tide of prosperity that allowed us the luxury of self-absorption; a background rumble of anxiety about national security. In response, Australians withdrew into a kind of societal trance; they disengaged from the issues that had been preoccupying them; they shut down, or, at least, went into retreat (Mackay 2007: 241).

As they looked inwards, Australians largely disengaged from the bigger picture issues that had come to define the Keating era, such as Reconciliation. Those issues did get our attention however, when it appeared that they could be controlled by simplistic solutions. According to Mackay, the desire for uncomplicated answers explained, to some extent, the electorate's support for the NTER:

The government's approach gained widespread support from the electorate — and, in principle, from the Opposition — partly because it seemed strong and decisive but partly also because it appealed to the desire for simplicity: 'The problem is child abuse? Get more police! Bring in the army!' Such an approach carries the danger of confusing the symptom with the disease. Although alcohol and pornography are likely contributors to the problem, they are themselves symptoms of deeper and more complex cultural and social factors, requiring careful and sensitive consultation, negotiation and resolution. 'Get more teachers, nurses and social workers!' might be a more helpful cry in the long run. But a full-frontal, legalistic attack on the symptom sounds seductively like 'the answer' (Mackay 2007: 273-274).



Arguably, the groundswell in public support for the Prime Minister's Apology to members of the Stolen Generations in 2008 suggests that Australians have neither disengaged from Aboriginal issues, nor lost their compassion. An opinion poll suggested that the apology was supported by almost two thirds of voters in New South Wales (Peatling 2008) and almost 1.3 million television viewers watched the historic event (*The Herald Sun*, 15 February 2008). But as moving as the Apology was, it too appealed to Australians' desire for simplicity. It also lent itself to television. Scenes of older Aboriginal people crying tears of relief, accompanied by Australians from all walks of life, were both heart wrenching and compelling viewing. However, complex issues such as the question of compensation quickly disappeared from the public domain.

The public had been similarly captivated by graphic reports of child sexual abuse, on programmes such as *Lateline*, in the lead up to the NTER. The public could easily engage with such voyeurism, but less so with the shortcomings identified by the NTER Review Board. Indeed, the revelation that there had been 'no perceived change in the safety and wellbeing of Aboriginal children as a result of the NTER', failed to attract any significant interest in the electorate.

This desire for simplicity finds resonance in *The Triumph of the Airheads and the Retreat from Commonsense* (Gare 2006). Public discourse now has to be packaged in teeny-tiny boxes and be highly entertaining. According to Gare, the primary beneficiaries of society's transformation are 'airheads' – individuals who embrace consumerism and quick-fixes in equal measure. While Gare thrashes the celebrity airheads who frequently grace the social columns, they are by no means the worst. According to Gare, the most powerful among this group are the 'process airheads', who offer blueprints to real life problems and in the event of a mismatch, insist that it's reality rather than the blueprint that has to change (Gare 2006: 21-22). Among the process airheads are the management experts, who contribute, well, nothing, to the corporations who hire them.

By its nature, a book dedicated to the study of 'airheads' is satirical. But the normalised absurdity highlighted by Gare finds some resonance in the story of the NTER. From the Howard Government's decision to implement its own hastily developed prescription, in place of the considered recommendations of *Little Children are Sacred*, to the Rudd Government's stubborn refusal to engage with many of the concerns raised by the NTER Review Board, the NTER has been one enormous triumph for process airheads. Furthermore, it appears that there will be no end to the Rudd Government's demand that real life in Aboriginal communities, as distinct from blueprints developed in Canberra, must change. But the NTER is not just a triumph for the process airheads. Rather, it is a victory for all of those obtuse enough to believe that human misery can be alleviated while ignoring human dignity.

## Conclusion

Few would argue that the disturbing allegations contained in *Little Children are Sacred* did not warrant action from all levels of government. But the NTER legislation was never about child safety. Rather, it was about asserting control over Aboriginal people. This desire to control Aboriginal people, 'for their own good', is longstanding, but it has been given new life by recent changes within the Australian electorate. The conflation of needs and wants, the middle class with the genuine poor and consumption with happiness, have hardened our attitudes towards the most marginalised Australians. At the same time, Australians have learnt to crave simplicity, so that most only engage with Aboriginal issues that make for compelling viewing.

Before responding to genuine crises in Aboriginal communities, we must recognise that the societal neuroses identified in this paper have been a far more powerful influence on Aboriginal policy, than the voices of Aboriginal people themselves. Only when we confront this truth, will Aboriginal people stop being subject to harmful and inappropriate policies, of which the NTER is but the latest example.

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