Friday, 10 August 2007

Jackie Morris
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra
ACT 2600_Australia

RE: Inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills

Dear Jackie,

I hereby submit the attached legal opinion from Brian Walters SC regarding the compensation provisions of the legislation concerning the "National Emergency Response" in the Northern Territory for the consideration of the Senate Legal and Constitutional Committee.

Regards,

Bob Brown
Leader of the Australian Greens
Senator for Tasmania

Legislation concerning the "National Emergency Response" in the Northern Territory

Memorandum of Advice

I have been asked to consider the legislation introduced into the Commonwealth Parliament in relation to the so-called "national emergency response" in the Northern Territory.

Due to the very substantial size of the legislation, which comprises several Bills[1], and the complexity and novelty of its provisions, and the short notice available for its consideration, only a brief and provisional advice is currently possible.

I focus for the purpose of this advice on one aspect of the legislation: the compulsory acquisition of property.

Several provisions of the Bills (I will not list them all) provide for the acquisition by the Commonwealth of property. I do not propose to set out in this advice the extended meaning that concept has in the Australian *Constitution.* However, there are constitutional limits to the power of the Commonwealth to acquire property.

It seems to me, without going into the detail, which is voluminous, that several of the rights in question are properly to be characterised as property rights, and that the legislation purports to authorize the acquisition by the Commonwealth of those rights.

Section 122 of the *Constitution* provides:

> *The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.*

Section 51 (xxxi) of the *Constitution* provides:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-*
>
> …
>
> *(xxxi) 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:*

In 1969 the High Court, in *Teori Tau v Commonwealth*[2], unanimously held that

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[1] *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill*; *Northern Territory National Emergency Response Bill*; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill.* These Bills in turn refer to and amend many other pieces of legislation.

[2] (1969) 119 CLR 564

section 51(xxxi) did not fetter the plenary terms of section 122, and that no limitation applied to the Commonwealth's power to acquire property in the Territories.

Almost 30 years later, in *Newcrest Mining v Commonwealth*[3] the majority held that s 51(xxxi) provided a "constitutional guarantee" in relation to the acquisition of property, and that this applied in Territories as well as in the States.

After a detailed analysis, Gummow J held:

> *Neither the identification of s 122 as conferring "plenary power" nor the absence from the section of a phrase such as "subject to this Constitution" supplies the necessary contrary intention to displace what otherwise, upon a textual analysis of the Constitution as a whole, is the operation of the constitutional guarantee upon laws made for the government of the Northern Territory.*

His Honour went on to consider the decision of the High Court in *Teori Tau v Commonwealth*[4].

Following a detailed critique of that decision, his Honour held:

> *Leave to reopen Teori Tau is sought by the appellants who are supported in this by the Northern Territory. Leave should be given. Teori Tau did not rest upon any principle carefully worked out in a succession of cases. Rather, it is contrary, at least as regards this tenor, to the reasoning which underlay Lamshed v Lake and Spratt v Hermes. Where the question at issue relates to an important provision of the Constitution which deals with individual rights, such as s 51(xxxi) or s 117, the "Court has a responsibility to set the matter right". Ultimately, it is the Constitution itself which must provide the answer.*
>
> *Reference has been made to Teori Tau in discussion in subsequent decisions of this Court of the scope of s 51(xxxi), but in contexts where neither its correctness nor its direct application was in issue. As I have indicated, Teori Tau does not appear to have been significantly acted upon by the Parliament or territorial legislatures. It did not represent a fully considered decision which was reached after full argument by both sides. It has been overtaken by subsequent developments.*
>
> *Once leave be given, it follows that Teori Tau should no longer be treated as authority denying the operation of the constitutional guarantee in par (xxxi) in respect of laws passed in reliance upon the power conferred by s 122.*

Gaudron and Kirby JJ agreed, and added their own reasons.

Toohey J did not see it necessary to overrule the decision in *Teori Tau v Commonwealth* (1969) but made clear that the Commonwealth did not have unfettered power to acquire property in the Territories:

> *Indeed, it seems almost inevitable that any acquisition of property by the Commonwealth will now attract the operation of s 51(xxxi) because it will be*

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[3] (1997) 190 CLR 513
[4] (1969) 119 CLR 564

> *in pursuit of a purpose in respect of which the Parliament has power to make laws, even if that acquisition takes place within a Territory. It will only be if a law can be truly characterised as a law for the government of a Territory, not in any way answering the description in par (xxxi), that Teori Tau will constitute such an obstacle. And that is an unlikely situation on the view I take of the operation of the paragraph. If that be right, any implications overruling Teori Tau would have would likely be for the past rather than the future.*

More recently, in a judgment of the Full High Court in *Bennett v Commonwealth*[5] (a case concerning the franchise in Norfolk Island) Kirby J made reference to these cases. His Honour held:

> *The grant in s 122 is not expressed as a "power" to make laws "with respect to" particular and specified subject matters. Instead, the subject of permissible law-making is nothing less than "laws for the government of any territory". Because of its language and purpose, the width of that power has been repeatedly described as very broad. Thus in* Teori Tau v The Commonwealth, *which survived a challenge to its authority* in Newcrest Mining (WA) Ltd v The Commonwealth, *the whole Court said:*
>
> > *"Section 122 of the Constitution of the Commonwealth of Australia is the source of power to make laws for the government of the territories of the Commonwealth. In terms, it is general and unqualified ... The grant of legislative power by s 122 is plenary in quality and unlimited and unqualified in point of subject matter."*
>
> *These words have been repeated many times.*

In *Bennett* Callinan J also referred to these cases, but did not express a view on them. No other judge found it necessary to refer to *Teori Tau* or *Newcrest.*

It is true that *Teori Tau* was not expressly overruled by *Newcrest*, but nevertheless the majority clearly upheld the principle that s 122 was subject to the provisions of s 51(xxxi). Nothing that either Kirby J or Callinan J said in *Bennett* is to the contrary effect.

No subsequent decision of the High Court has doubted or overruled *Newcrest.*

Accordingly, as the law currently stands, acquisition of property by the Commonwealth in the Northern Territory must be on "just terms".

Although some provisions in the legislation do require acquisition of property on "just terms", several provisions in the legislation refer to the acquisition of property but subject to the payment of "a reasonable amount of compensation", as distinct from "just terms".

For example, proposed subsection 60(2) of the *Emergency Response Bill*, dealing with the acquisition of leases, states:

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[5] [2007] HCA 18; (2007) 234 ALR 204; 81 ALJR 950 (27 April 2007)

> *However, if the operation of this Part, or an act referred to in paragraph (1)(b) or (c), would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.*

No substantial guidance is contained in the legislation in respect of what is "reasonable" compensation.

In some cases there is limited guidance, but this is quite confused. For example, clause 61 of the Bill requires the court to take into account certain things in determining a reasonable amount of compensation payable in relation to land - including rent paid by the Commonwealth, amounts of compensation paid under the Special Purposes Leases Act or the Crown Lands Act and any improvements to the land funded by the Commonwealth, including improvements to buildings or infrastructure. However, when the Valuer-General is to determine what is a reasonable amount of rent to be paid by the Commonwealth the Valuer-General must not take into account the value of any improvements in the land (clause 62(4)).

In public statements, the Minister has referred to "in kind" compensation, including by way of education grants, and renovation to buildings. This novel concept is quite distinct from what has normally been regarded as "just terms", but whether or not it would be considered "just terms" must depend on the content, which at present is not clearly set out in the legislation.

A litigant challenging the compensation in the courts would be confronted with the legislative term "a reasonable amount of compensation" but would not be able to call in aid "just terms". In some cases, "a reasonable amount of compensation" probably would, in terms of content, amount to "just terms", but much will depend on factual detail. For example, the provision of educational services – which normally are available to all Australians of learning age – is unlikely to be seen as something which satisfies the requirement of "just terms". Native title rights are of particularly profound significance to the holders, and the acquisition of those rights – often over land of little commercial value – is unlikely to be on just terms if the compensation offered is the mere payment of the monetary value of the real estate, in circumstances where there is no viable real estate market for the land in question in any event.

Dixon J held in *Grace Bros v Commonwealth*[6] that the inquiry as to whether "just terms" have been afforded should not be directed just to the question of whether the individual owner is placed in a situation in which in all respects he will be as well off as if the acquisition had not taken place.

> *The inquiry must rather be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country. I say "the individual" because what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual.*

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[6] (1946) 72 CLR 269 at 290

In *Georgiadis* Brennan J held:

> *In determining the issue of just terms, the court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it is shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.*[7]

The present legislation in some places uses the expression "just terms", but in other places, in contradistinction to that expression, deliberately chooses to use the term "a reasonable amount of compensation" rather than "just terms". This evinces a drafting intention to provide protection other than the constitutional guarantee of "just terms".

In my opinion the legislation purports to authorize the acquisition of property on terms other than the "constitutional guarantee" of just terms.

In those circumstances, the courts would not have a role of correcting the legislation by inserting just terms. Rather, the legislation purporting to authorise the acquisition of the property would be struck down as void.

In my opinion all of the provisions in the legislation providing for acquisition of property other than on "just terms" would be struck down as void *ab initio* if they were enacted into law in their present form.

Brian Walters SC
Flagstaff Chambers

10 August 2007

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7 *Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6; (1994) 179 CLR 297 at 310–1.