

THE CAPE YORK WELFARE REFORM — CONTINUING ACTS OF PATERNALISM

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The Queensland Government has managed Aboriginal peoples' property since at least 1897. Today, in four predominantly Aboriginal communities in Cape York and Doomadgee in the Gulf of Carpentaria, the Family Responsibilities Commission can direct Centrelink to manage up to 90 per cent of a person's social security payment if they fail to meet one of four 'social responsibilities'. If social security payments could be found to be property, as occurs in European countries, income management of Aboriginal people's social security payments arguably breaches the Racial Discrimination Act 1975 (Cth) and the Aboriginal and Torres Strait Islander (Queensland Discriminatory Laws) Act 1975 (Cth) which require equality for Aboriginal peoples in exercising their right to own and manage property. If social security cannot be found to be property, a court is likely to find income management to be a special measure for the benefit of Aboriginal people.

I INTRODUCTION

In 1975 the *Racial Discrimination Act 1975* (Cth) ('RDA') was enacted to incorporate Australia's international obligations under the *International Convention on the Elimination of all Forms of Racial Discrimination 1966* ('ICERD')¹ into domestic law.² The RDA was enacted to prohibit racial discrimination and to enable 'special measures' to promote the equal enjoyment of human rights, including the right to own property. The *Aboriginal and Torres Strait Islander (Queensland Discriminatory Laws) Act 1975* (Cth) ('ATSI (QDL) Act') was also passed by the Commonwealth to counteract Queensland legislation and practice which enabled discriminatory State Government control over Aboriginal and Torres Strait Islander peoples,³ mainly on Government and church reserves. This control included management of their property, particularly their wages, without their consent.

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¹ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

² The *International Convention on the Elimination of all Forms of Racial Discrimination 1966* ('ICERD') is integrated into the *Racial Discrimination Act 1975* ('RDA') through its attachment as a schedule to the RDA through *Racial Discrimination Act 1975* (Cth) s 3(1).

³ *Aborigines Act 1971* (Qld); *Aborigines Regulation 1972* (Qld); *Aborigines Act and Torres Strait Islanders Amendment Act 1974* (Qld).

Prior to and after the 1975 Acts, the Queensland Government continued to exploit Aboriginal people through the underpayment of wages and mismanagement of their monies.⁴ This policy, administered through its Protectors and administrators of Christian missions, required rural Aboriginal workers in the pastoral industry to request funds or vouchers for local stores, and provide information on what was to be bought. How, and if, the money was distributed was subject to approval.⁵ In *Bligh v Queensland* the complainants argued that up until 1984 they were discriminated against and underpaid by the Queensland Government in their employment on the Palm Island Aboriginal Reserve.⁶ Commissioner Bill Carter found for the complainants, stating that '[b]ecause of their Aboriginality they were dealt with differently; by reason of their race alone they were perceived as lacking an entitlement to the enjoyment of a fundamental human right, namely, the right to equal pay for equal work'.⁷

Today, the Cape York Welfare Reform ('CYWR'), the *Family Responsibilities Commission Act 2008* (Qld) ('FRC Act') and the *Social Security (Administration) Act 1991* (Cth) enable Centrelink to manage a person's social security payment without their consent and to exercise excessive controls over the way in which the payment may be spent. Under this regime up to 90 per cent of a person's social security payments can be income managed and the purposes for which it can be used are extremely limited, with minimal discretionary income available.⁸ Where an income managed person has bills such as rent, automated payments are established, and a 'BasicsCard' is issued, limiting what can be purchased and where money can be spent. The CYWR applies to the predominantly Aboriginal communities of Aurukun, Hope Vale, Coen and Mossman Gorge.

The Queensland and Commonwealth Governments have rationalised income management and the supporting legislation as a special measure under the *RDA*,⁹ discussed below, despite income management impinging on the rights of the social security recipient. This is important due to the discriminatory application of income management and the detrimental impact it can have on Aboriginal and Torres Strait Islander peoples. As well as being a means of controlling Aboriginal people, protectionist legislation has been described as eliminating personal autonomy and forcing

⁴ Tony Fitzgerald, 'Cape York Justice Study: The Situation of Cape York Indigenous Communities' (Interim Report, Vol 2, Queensland Department of the Premier and Cabinet, 2001) 15–17.

⁵ Rosalind Kidd, *The Requirement for Accountability* <<http://www.linksdisk.com/roskidd/tpages/t28.htm>>.

⁶ *Bligh v Queensland* [1996] HREOC 28.

⁷ [1996] HREOC 28, 31, 32.

⁸ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 11. See also Cape York Institute for Policy and Leadership, 'From Hand Out to Hand Up: Cape York Welfare Reform Project, Aurukun, Coen, Hope Vale, Mossman Gorge, Design Recommendations' (May 2007) 19–22, 26, 36, 44, 58, 64–7, 71, 79, 98, 121; Department of Social Services, Families and Children, *What is Welfare Reform?* <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/what-is-welfare-reform>>.

⁹ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 11. This is also the case in regard to the Northern Territory Intervention ('NTI'). Cape York Institute for Policy and Leadership, above n 8, 19–22, 26, 36, 44, 58, 64–7, 71, 79, 98, 121; Department of Social Services, Families and Children, above n 8.

people into demoralised dependence.¹⁰ One of the aims of the CYWR is to ‘normalise’ and change behaviour of Aboriginal people to that of the dominant culture.¹¹

This paper focuses on income management as a breach of the prohibition against managing the property, without their consent, of an Aboriginal or Torres Strait Islander person living under the current Queensland CYWR.¹² Social security payments have been held to be property in overseas jurisdictions, including by the European Court of Human Rights (‘ECHR’).¹³ Domestically, property rights are broadly defined, and to an even greater extent when recognised as human rights. Both property law and human rights law recognise a number of different relationships. Therefore, the use of the term ‘property’ is potentially capable of being interpreted as sufficiently broad to encompass social security payments in Australia.

Judicial reasoning from the High Court case of *Maloney v The Queen* suggests that it is likely that involuntary income management will be found to be discriminatory but excepted from the prohibition of racial discrimination, as a special measure.¹⁴ Special measures take their meaning directly from Art 1(4) of the *ICERD*. The *ICERD* defines special measures to be policy, legislation or programs implemented to assist a racial or ethnic group or individuals who have suffered historical disadvantage caused by racism, to enjoy human rights to the same extent as others. Often these human rights include education, property, employment, social security and safety and wellbeing.

Special measures enable a disadvantaged group to be treated differently, where the treatment occurs in order to secure the enjoyment of human rights on an equal footing. An issue that arises in Australia is that the High Court has held that the goal of the special measure is to be determined by the Parliament, and not by those who are disadvantaged.¹⁵ Therefore its aim may be unclear to its purported ‘beneficiaries’, being based on Government expectations that the disadvantaged group want the same outcomes as the dominant culture. The measure may also be aimed not only at disadvantage, but also at cultural difference.¹⁶

Given the current interpretation of special measures under the *RDA*, a different approach is required in arguing that income management of Aboriginal and Torres Strait Islander peoples’ social security payments is discriminatory. A case can be mounted that income management is discriminatory based on social security as property managed without the consent of Aboriginal and Torres Strait Islander people. This paper explores the applicability of the *RDA* and *ATSI (QDL) Act* as protection against discriminatory and unwanted interference with social security payments.

¹⁰ Shelley Bielefeld, ‘Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?’ (1998) 35(2) *UNSW Law Journal* 522, 534.

¹¹ Department of Social Services, Families and Children, above n 8.

¹² *Racial Discrimination Act 1975* (Cth) s 10(3); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws Act) 1975* (Cth) s 5(1).

¹³ See, eg, *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005); *Abdulaziz v United Kingdom* A94 (1985) 7 Eur Court HR 471; *Kjartan Ásmundsson v Iceland* [2004] ECHR 512; *Gaygusuz v Austria* [1996] Eur Court HR 36; *Moskal v Poland* (2010) Eur Court HR 22.

¹⁴ *Maloney v The Queen* [2013] HCA 28.

¹⁵ *Ibid.*

¹⁶ Jennifer Nielson, ‘Whiteness and Anti-Discrimination Law: It’s in the Design’ (2008) 4(2) *Australian Critical Race and Whiteness Studies Association E-Journal*, 3–5, 9–10

<<http://www.acrawsa.org.au/files/ejournalfiles/52NielsenInthedesignFINAL.pdf>>.

If social security can be characterised as property, both the *RDA* and *ATSI (QDL) Act* preclude the argument advanced by Governments that management of Aboriginal and Torres Strait Islander peoples' social security payments without their consent is a special measure. It is, therefore, important to assess whether social security is definable as property, as this may provide a stronger legal argument upon which to base a challenge to the discriminatory impacts of income management under the CYWR.

II PAST POLICIES AND LEGISLATION FOR MANAGING ABORIGINAL PEOPLES' MONEY AND PROPERTY

The Queensland Government or churches previously controlled the five CYWR communities, with residents required to comply with strict rules governing all aspects of their lives. From 1897, the Queensland Government managed the property of Aboriginal people under its control, as they were considered incapable of doing so. Management included possession, sale or disposal of a person's property.¹⁷ By 1919, the wages of rural Aboriginal workers were paid to the Government and pocket money doled out to the workers. Reserve workers were not paid at all. Requests for funds or vouchers were often rejected depending on the Protector's view of the need for particular goods. There was widespread fraud by Protectors and others relying on poorly kept records and unused withdrawal slips already thumb-printed and witnessed.¹⁸ Aboriginal people often had to travel hours to a Protector. Police acting as Protectors refused requests on the basis that they were too busy or because they considered them unjustified.¹⁹ Despite a stated policy to protect against exploitation, in practice the Government itself exploited Aboriginal people through underpayment of wages and mismanagement of their monies.²⁰ The *Aboriginal Preservation and Protection Act 1939–1946* (Qld) required a percentage of wages to be contributed to a welfare fund for the general benefit of Aboriginal people,²¹ and that all Aboriginal people living on reserves and settlements work without pay on development and maintenance for up to 32 hours a week.²²

While this was occurring, Aboriginal families were living in dire poverty, despite the Queensland Government holding \$16.8 million of Aboriginal peoples' money by the 1960s.²³ The Queensland Government also seized Aboriginal and Torres Strait Islander peoples' child endowment and pensions, leaving only one-third of payments for pensioners,²⁴ and taking 80 per cent of maternity

¹⁷ *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) ss 17, 26(4); See Kathy Frankland, 'A Brief History of Government Administration of Aboriginal and Torres Strait Islander Peoples in Queensland' in *Records Guide Volume 1: A Guide to Queensland Government Records Relating to Aboriginal and Torres Strait Islander People* (Queensland State Archives and Department of Family Services and Islander Affairs, 1994) <http://www.slq.qld.gov.au/__data/assets/pdf_file/0008/93734/Admin_History_Aboriginal_and_Torres_Strait_Islanders.pdf>.

¹⁸ Kidd, above n 5.

¹⁹ Kidd, above n 5.

²⁰ Fitzgerald, above n 4, 15–17.

²¹ Five per cent of gross earnings for a person without dependants and ten per cent from those with dependants. This money was withheld from the wage paid to the person.

²² Loretta de Plevitz, 'Working for the Man: Wages Lost to Queensland Workers "Under the Act"' (1996) 3(81) *Aboriginal Law Bulletin* 4, 37; Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *UNSW Law Journal* 649.

²³ Fitzgerald, above n 4, 15–17.

²⁴ Kidd, above n 5.

allowances for mothers living in settlement dormitories and 50 per cent from those in settlement camps.²⁵ Dr Rosalind Kidd records that child endowment was taken by the Queensland Government as late as 1984.²⁶

The *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) labelled all Aboriginal and Torres Strait Islander peoples living on reserves 'assisted', enabling management of their property by district officers if they were satisfied that it was in the person's best interests.²⁷ When the *Aborigines Act 1971* (Qld) was passed, the term 'assisted' no longer applied. However, Aboriginal people whose property was previously managed continued to be managed unless the Protector of the reserve approved a request that it cease. Despite the *Aborigines Regulation 1972* (Qld) requiring Aboriginal workers to be employed based on award conditions where they existed, Aboriginal workers on reserves continued to be paid under-award wages (if at all), and excluded from award conditions. Others were deemed aged, infirm or a slow worker and paid less.²⁸

In 1974, the *Aborigines Act and Torres Strait Islanders Amendment Act 1974* (Qld) repealed the provision of the 1971 Act pertaining to management of property. Aboriginal and Torres Strait Islander peoples could then manage their own property, although they were required to complete and sign a written notification, witnessed by a Justice of the Peace and give it to the District Officer.²⁹

Despite three of the CYWR communities and Doomadgee being relatively isolated, they have been developed in a manner consistent with forced assimilation. The community members include people who did not belong to the land covered by reserves/missions as well as others from the area who were forced to live there. From being tightly controlled from their inception through so-called protectionist legislation,³⁰ control over three of these communities (Hope Vale, Aurukun and Doomadgee) was suddenly released in the 1980s when power was handed to Aboriginal Councils.³¹

The *RDA* and the *ATSI (QDL) Act* should be able to provide the necessary protection for these communities. Specifically, the aim of s 10(3) of the *RDA* and s 5 of the *ATSI (QDL) Act*, both in strong words and intent, is to prohibit the management of Aboriginal and Torres Strait Islander people's property without their consent, unless such management occurs under a law of general application.³² These provisions are set out in the table below.

²⁵ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006) 35.

²⁶ Kidd, above n 5.

²⁷ *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) s 8(1)(a).

²⁸ Thornton and Luker, above n 22, 649–650.

²⁹ Garth Nettheim, *Victims of the Law: Black Queenslanders Today* (George Allen & Unwin, 1981) 7.

³⁰ *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginal Preservation and Protection Act 1939–1946* (Qld); *Aborigines' and Torres Strait Islanders' Act 1965* (Qld); the *Aborigines Act 1971* (Qld); *Aborigines Regulation 1972* (Qld); *Aborigines Act and Torres Strait Islanders Amendment Act 1974* (Qld).

³¹ Michael Limerick, 'Indigenous Council Capacity-Building in Queensland' (Scoping Paper, Prepared for the Australian Centre for Excellence of Local Government, 2010) 6–7.

³² *Racial Discrimination Act 1975* (Cth) s 10(3); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws Act) 1975* (Cth) s 5(1).

<i>Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth)</i>	<i>Racial Discrimination Act 1975 (Cth)</i>
<p>Section 5 Management of property</p> <p>(1) Subject to subsection (2), any property in Queensland of an Aboriginal or Islander shall not be managed by another person without the consent of the Aboriginal or Islander, and any consent given by an Aboriginal or Islander, whether given before or after the commencement of this Act, to the management by another person of his or her property may be withdrawn by the Aboriginal or Islander at any time.</p> <p>(2) Subsection (1) does not apply to or in relation to the management of property in accordance with any law of Queensland or Australia that applies generally without regard to the race, colour, or national or ethnic origin of persons.</p>	<p>Section 10 Rights to equality before the law</p> <p>(3) Where a law contains a provision that:</p> <p>(a) authorises property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or</p> <p>(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;</p> <p>not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.</p>

This paper explores the applicability of these Acts as protection against unwanted interference with social security payments. It is, therefore, important to assess whether social security is definable as property. If social security is classified as property, these Acts’ provisions preclude the argument advanced by the Governments that management of Aboriginal and Torres Strait Islander peoples’ social security payments without their consent is a special measure.

In 2007, the Commonwealth Government introduced legislation to enable the income management of Aboriginal and Torres Strait Islander peoples social security payments in ‘prescribed communities’ in the Northern Territory and the CYWR communities.³³ In doing so the Commonwealth suspended Part II of the *RDA*, which includes s 10 and deemed income management a special measure. This was to prevent legal challenges against the social security legislation and the operation of the *Family Responsibilities Commission Act 2008 (Qld)* (*‘FRC Act’*).³⁴ To counter criticism against the suspension of the *RDA*, the Commonwealth Government reinstated Part II *RDA* in 2010 and amended the social security legislation so that income

³³ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)* s 4; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* s 4.

³⁴ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)* s 4; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* s 4.

management applied more broadly in the Northern Territory and around Australia.³⁵ Nevertheless the income management component of the CYWR continues to specifically target Aboriginal peoples.

Importantly, s 8(1) of the *RDA* ‘excepts measures in relation to which subsection 10(1) applies by virtue of subsection 10(3)’. Therefore, managing the property of an Aboriginal or Torres Strait Islander person without their consent cannot be a special measure. The existence of this provision acknowledges that Governments have portrayed legislation controlling Aboriginal and Torres Strait Islander peoples’ property without their consent as protectionist and beneficial for Aboriginal and Torres Strait Islander peoples.

However, courts have been reluctant to intrude upon the legislative prerogative of Governments. Judicial decisions also indicate that although the court is unwilling to enter the socio-political sphere, including intervening in political assessments reasonably open to the legislature to make, it will act when it decides a political assessment is unreasonable.³⁶ It may be difficult for the court to find unreasonableness, particularly when some level of policy support for a measure is provided by the Government.

While the court may find that a measure is discriminatory because it treats Aboriginal and Torres Strait Islander people differently to the general population, if the political will states that the differential treatment is necessary to achieve substantive equality for Aboriginal and Torres Strait Islander people, it is likely that the court will find the treatment capable of being captured by the definition of a special measure. Recent judicial reasoning suggests that income management may not breach a person’s right to social security, because it protects the rights of the vulnerable (children and women in particular) to enjoy social security.³⁷ These cases also indicate that the court is likely to decide income management is a special measure promoting the right to social security for children and women.³⁸ If, however, social security is characterised as a proprietary

³⁵ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth); Luke Buckmaster, Diane Spooner and Kirsty Magarey, ‘Income Management and the Racial Discrimination Act’ (Background Note, Department of Parliamentary Services, Parliament of Australia, 28 May 2012) 1-2

<http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1511200/upload_binary/1511200.pdf;fileType=application/pdf>.

³⁶ *Gerhardy v Brown* (1985) 159 CLR 70 [137]–[139] (Brennan J), [161]–[162] (Dawson J); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 [77] (McMurdo P), [210]–[213] (Keane JA), [244] (Philippides J); *Bropho v State of Western Australia* [2008] FCAFC 100; *Maloney v The Queen* [2013] HCA 28.

³⁷ *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Maloney v The Queen* [2013] HCA 28.

³⁸ *ICERD*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(e)(iv); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 9; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1970, 1249 UNTS 13 (entered into force 3 September 1991) arts 11(1)(e), 13(a), 14(2)(c).

right being managed without consent,³⁹ then s 8(1) of the *RDA* may be applied, and income management cannot be found to be a special measure.

Although s 5 of the *ATSI (QDL) Act* and s 10(3) of the *RDA* are worded differently, both are directed at the same end: prohibition of the management of Aboriginal and Torres Strait Islander peoples' property without their consent. However, reliance upon each section may produce different results. This stems not necessarily from the different wording of the provisions, but potentially from the different definitions of 'property' at a domestic and international level, and the rules of statutory interpretation. Thus the *RDA*, through its incorporation of *ICERD* and international human rights principles, potentially gives rise to a wider construction.⁴⁰ Section 10(3) of the *RDA* refers to s 10(1) of the *RDA*, with the practical effect that Aboriginal and Torres Strait Islander people whose property is being managed without their consent will enjoy their right to the property 'to the same extent as persons of other races, colour or national or ethnic origin.'⁴¹ A finding that s 10(3) of the *RDA* applies, eliminates any argument of a measure being a special measure.⁴²

In domestic legislation, including the *ATSI (QDL) Act*, the court may consider itself as restricted to domestic definitions of property, which are broad, but are unlikely to be construed as widely as definitions of property as a human right. However, s 10 of the *RDA* and s 5 of the *ATSI (QDL) Act*, both implemented to target management of wages, indicate a broad definition of property. This is important because payment of wages is normally thought to arise due to a contractual arrangement of employment. Property rights and contractual rights are often contrasted. Property rights include a relationship with an object,⁴³ usually enforceable against all others and contractual rights are enforceable against particular persons.⁴⁴ Property rights may arise from contractual rights, such as exclusive possession under a lease.

Social security being defined as property appears to be imperative for a court to find imposed income management to be racially discriminatory. Otherwise the CYWR income management regime will be held to be a special measure. Based on income management theoretically being implemented to assist to achieve equality for Aboriginal and Torres Strait Islander peoples, it is labelled a special measure by the Queensland and Commonwealth Governments. On the basis of other judicial decisions regarding paternalistic measures, income management is likely to be found to be a special measure by a court,⁴⁵ if social security is not held to be property.

³⁹ *Racial Discrimination Act 1975* (Cth) s 10(3); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth) s 5.

⁴⁰ *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [51] (McMurdo P), [138] (Keane JA), [265] (Philippides J); *Bropho v State of Western Australia* [2008] FCAFC 100, [78]–[79] (Ryan, Moore and Tamberlin JJ); *Maloney v The Queen* [2013] HCA 28, [146] (Kiefel J), [219] (Bell J).

⁴¹ *Racial Discrimination Act 1975* (Cth) s 10(1). Emphasis added.

⁴² *Racial Discrimination Act 1975* (Cth) s 8(1).

⁴³ *Yanner v Eaton* (1999) 201 CLR 351 [365]–[366] (Gleeson CJ, Gaudron, Kirby, Hayne JJ).

⁴⁴ Peter Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths, 1997) 87.

⁴⁵ This is on the basis of judicial reasoning in the following cases: *Maloney v The Queen* [2013] HCA 28; *Morton v Queensland Police Service* [2010] QCA 160; *Aurukun Shire Council v Chief Executive, Office of Liquor, Gaming and Racing in the Department of Treasury* [2010] QCA 37.

III THE CAPE YORK WELFARE REFORM – CONTINUING PATERNALISM

The *Family Responsibilities Commission Act 2008* (Qld) (*FRC Act*) established the Family Responsibilities Commission ('FRC'), a statutory body which is part of the CYWR and is empowered to order that individuals be subject to income management,⁴⁶ where certain social responsibilities are not met (as will be explained below). The FRC was initially implemented in the Aurukun, Coen, Hope Vale and Mossman Gorge communities predominantly consisting of Aboriginal peoples, almost 3000 people in total. Prior to its commencement on 1 July 2008 the then Premier, Anna Bligh, stated that approximately 1800 people who receive social security payments or Community Development Employment Project wages could be subject to decisions of the FRC.⁴⁷ Initially, the FRC was to run for four years and was to cease on 1 January 2012; however, progressive amendments have extended its operation, and now the FRC is permanent.⁴⁸ In 2014 the FRC was extended to the Aboriginal community of Doomadgee in the Gulf of Carpentaria with the intention of increasing school attendance.⁴⁹

The main object of the *FRC Act* is to restore 'socially responsible standards of behaviour and local authority', as well as helping people resume responsibility for themselves, their family and community.⁵⁰ The objects of income management are to direct social security payments to 'priority needs' of the recipient, their children, their partner and any other dependants; as well as to provide budgeting support to meet these needs, to reduce spending on alcohol, gambling, cigarettes and pornography, to reduce harassment associated with others asking for money, to encourage socially responsible behaviour relating to care and education of children and to improve protection provided to recipients and their families.⁵¹

From the commencement of the FRC on 1 July 2008 until December 2014, 665 people in the four Cape York communities had been income managed with 1520 orders, which include extensions and amendments.⁵² This indicates that a number of people had their order extended or received more than one order. Of the FRC's clients, 38 per cent have been subject to income management since its commencement. At the time the FRC did not have the power to income manage people in Doomadgee.⁵³ In 2014, the *FRC Act* extended its jurisdiction to include notifications to the FRC of those living in one of the CYWR communities convicted in District and Supreme Courts and

⁴⁶ *Family Responsibility Commission Act 2008* (Qld) s 69(1)(b)(iv).

⁴⁷ Anna Bligh, The Queensland Cabinet and Ministerial Directory, 'Ground-Breaking Legislation: Family Responsibilities Commission to be Introduced into Queensland Parliament Today' (Media Statements, 26 February 2008) <<http://statements.qld.gov.au/Statement/Id/56680>>.

⁴⁸ It was extended, initially until 31 December 2012, then 31 December 2013, then 31 December 2014 and the Commonwealth extended it until 31 December 2015, *Social Security (Administration) Act 1999* (Cth) ss 123UF(1)(g), (2)(h). Clause 10 of the Family Responsibility Amendment Bill 2014 (Qld), which was passed on 14 October 2014, removes the end date for the scheme to continue indefinitely.

⁴⁹ Family Responsibilities Commission, 'Quarterly Report' (No. 24, April 2014 to June 2014) 8 <<http://www.frcq.org.au/sites/default/files/Final%20FRC%20Quarterly%20Report%20No%202022.pdf>>; Family Responsibilities Commission Amendment Regulation (No 1)(Qld) 2014 1.

⁵⁰ *Family Responsibility Commission Act 2008* (Qld) s 4.

⁵¹ *Social Security (Administration) Act 1999* (Cth) s 123TB.

⁵² Family Responsibilities Commission 'Quarterly Report' (No. 26, October 2014 to December 2014) 8 <<http://www.frcq.org.au/?q=content/quarterly-reports>>.

⁵³ *Ibid.*

for parents or carers of children convicted under the *Youth Justice Act 1992* (Qld).⁵⁴ The aim of referrals when children are convicted is to ‘ensure greater parental/carer responsibility for the young person’s offending behaviour and reduce the current trajectory of Aboriginal and Torres Strait Islander young people from youth detention into the adult criminal justice system’.⁵⁵

The assumption underlying the CYWR is that alcohol abuse and ‘passive welfare dependence’ have caused deterioration of social norms in Cape York communities over the past 30 or 40 years.⁵⁶ However, this period coincides with the rapid departure of longstanding Government and mission control from these communities. That regime from the 1890s to 1970s had prohibited the exercise of traditional Aboriginal authority, although this has never been acknowledged by the Queensland or Commonwealth Governments. As the Commonwealth Government now concedes, conducting tasks which people should be able to manage themselves dissolves personal capacity and responsibility.⁵⁷ However, this fails to explain the willingness of both Governments to further intervene in Aboriginal and Torres Strait Islander peoples’ lives in relation to managing their social security payments. Rather than admitting the deleterious effects of control and past management of individuals’ lives by successive Queensland Governments and missions, and the sudden withdrawal of these processes, focus has been on blaming individuals for their predicament.⁵⁸

The CYWR is essentially based on ideals and controls said to be aimed at achieving ‘social norms’ and ‘social responsibility’. The Commonwealth Government describes it as ‘a process of moving from passive welfare dependence to engagement in the real economy’.⁵⁹ This involves people in these remote Aboriginal communities gaining ‘real jobs’ despite jobs not being available and high unemployment rates,⁶⁰ owning their own homes even though most lack financial capacity and limiting the roles of Government at all levels in Aboriginal peoples’ lives so that they are treated in the same way as ‘mainstream Australia’. These goals are viewed as necessary by both Governments and the Cape York Institute for Policy and Leadership (CYI)⁶¹ on the basis that Cape York is ‘socially underdeveloped’.⁶²

In an attempt to reinstate local authority in each community, elders have been appointed as Commissioners to the FRC. The FRC must sit with at least two local Commissioners from the relevant community and a legally qualified Commissioner,⁶³ unless the legally qualified Commissioner considers it appropriate for three local Commissioners to sit.⁶⁴ The legally qualified

⁵⁴ *Family Responsibility Commission Act 2008* (Qld) s 43.

⁵⁵ Explanatory Notes, *Family Responsibilities Commission Amendment Bill 2014* (Qld) 2.

⁵⁶ Department of Social Services, Families and Children, above n 8.

⁵⁷ *Ibid.*

⁵⁸ Shelley Bielefeld, ‘Compulsory Income Management, Indigenous Peoples and Structural Violence – Implications for Citizenship and Autonomy’ (2014/2015) 18(1) *Australian Indigenous Law Review* 99, 99–105.

⁵⁹ Department of Social Services, Families and Children, above n 8.

⁶⁰ For example, 28.7 per cent of working age people in Aurukun are unemployed, this figure is 32.2 per cent in Hope Vale, while the Queensland figure is 6.1 per cent. Coen has a large population of Aboriginal people, its unemployment rate is 10.1 per cent and the population (100) of Mossman Gorge is considered too small for the Australian Bureau of Statistics to provide this data, Australian Bureau of Statistics, ‘Census QuickStats’ 2011.

⁶¹ Cape York Institute for Policy and Leadership, above n 8.

⁶² Department of Social Services, Families and Children, above n 8.

⁶³ *Family Responsibilities Commission Act 2008* (Qld) s 50.

⁶⁴ *Ibid* s 50A.

Commissioner is required to monitor all decisions.⁶⁵ Six local Commissioners from each community have been appointed to the FRC.⁶⁶

The powers of the FRC are enlivened when it receives notices from Government agencies in relation to community members receiving Centrelink payments who are deemed to not be meeting certain obligations.⁶⁷ Obligations under the *FRC Act* include enrolling children in school and requiring adequate attendance,⁶⁸ caring for children and not having child protection notifications or interventions,⁶⁹ not incurring criminal convictions,⁷⁰ and compliance with tenancy agreements.⁷¹ The FRC decides if the person is required to attend a conference. At a conference the FRC may take no further action,⁷² reprimand the person,⁷³ recommend attendance at a support service,⁷⁴ direct the person to attend support services,⁷⁵ or have Centrelink income manage their payments.⁷⁶ Other Centrelink recipients are generally not required to meet these obligations except for isolated trials around the country.⁷⁷

For example, in the Northern Territory a person may be referred for income management by a social worker, a child protection authority or the Northern Territory Alcohol Mandatory Treatment Tribunal.⁷⁸ However, income management in the Northern Territory is much broader, applying where people have been in receipt of particular types of benefits for certain periods of time. Assumptions are made simply due to a person's circumstance of being on Centrelink payments. Until 2010, income management in the Northern Territory directly targeted residents of prescribed Aboriginal communities, it was then applied more broadly after the reinstatement of the *RDA*,

⁶⁵ Ibid s 50B.

⁶⁶ Department of Social Services, Families and Children, above n 8.

⁶⁷ KPMG, 'Implementation Review of the Family Responsibilities Commission' (Final Report, Department of Families, Housing, Community Services and Indigenous Affairs, September 2010) 152; Noel Pearson, 'There Is Nothing The Government Can Do For You That You Are Unwilling To Do For Yourself' (Sir Robert Menzies Lecture, Cape York Institute for Policy and Leadership, 27 February 2011) 2.

⁶⁸ *Family Responsibilities Commission Act 2008* (Qld) ss 40, 41.

⁶⁹ Ibid s 42.

⁷⁰ Ibid s 43.

⁷¹ Ibid s 44.

⁷² Ibid s 69(1)(a).

⁷³ Ibid s 69(1)(b)(i).

⁷⁴ Ibid s 69(1)(b)(ii).

⁷⁵ Ibid s 69(1)(b)(iii).

⁷⁶ Ibid s 69(1)(b)(iv).

⁷⁷ For example, in Bankstown (NSW), Logan, Rockhampton and Livingstone (Queensland), Greater Shepparton (Victoria), the Northern Territory, Playford, the Greater Adelaide Region, the Anangu Pitjantjatjara Yankunytjatjara ('APY') Lands (South Australia), Metropolitan Perth, Peel Region, Kimberley Region, Ngaanyatjarra Lands ('NG Lands') and Laverton Shire in Western Australia. Australian Government, Department of Human Services, 'Income Management' <<http://www.humanservices.gov.au/customer/services/centrelink/income-management>>.

⁷⁸ *Alcohol Mandatory Treatment Act 2013* (NT) s 13(1) provides: '[a]n income management order to be made in relation to a person who is an eligible welfare payment recipient that a person is required to be subject to income management'; see also s 34 (Tribunal made mandatory treatment order).

ostensibly to make it non-discriminatory, despite its practical operation of continuing to disproportionately affect Aboriginal people.⁷⁹

Before ordering income management, the FRC is required to ‘consider whether it is more appropriate in all the circumstances merely to direct the person to attend an appropriate community support service under a case plan’.⁸⁰ Income management is in practise a punitive measure when used where a person is deemed to not comply with their social obligations, does not attend an FRC conference,⁸¹ or when a person does not conform to a case plan and attend a service.⁸² The FRC does not determine that people are financially incompetent. Importantly, there is no internal right of review, or a right to appeal to the Administrative Appeals Tribunal or the Social Security Appeals Tribunal. The only available avenues if a person disagrees with the process or a decision are to the Ombudsman or to a Magistrates Court on a question of law.⁸³ The FRC decision cannot be stayed pending appeal.⁸⁴

The income managed amount of a person’s payment affects between 60 per cent to 90 per cent of the amount received for regular payments and 100 per cent of one off payments such as Baby Bonus.⁸⁵ Income management orders exist for a period of between three and 12 months. On 1 January 2014, FRC Commissioners gained the power to income manage 90 per cent of a person’s payment where the person failed to comply with case plans and ‘resisted engagement with support services’.⁸⁶ It is, therefore, clearly punitive. In fact, former Assistant Minister for Aboriginal and Torres Strait Islander Affairs in Queensland, David Kempton, views extreme welfare reform measures as ‘punishment’, particularly the ‘healthy welfare card’ suggested by Andrew Forrest.⁸⁷ The proposed ‘healthy welfare card’ would confine the full amount of social security payments, which can only be spent using the card.⁸⁸

In 2014, *The Forrest Review: Creating Parity* was released, noting that the ‘healthy welfare card’ will disproportionately affect Aboriginal and Torres Strait Islander peoples, acknowledging that almost half who are working age rely on social security payments, compared to 17 per cent of all Australians.⁸⁹ Forrest also understands that income management may be considered paternalistic,

⁷⁹ J Rob Bray et al, ‘Evaluating New Income Management in the Northern Territory: First Evaluation Report’ (University of New South Wales Social Policy Research Centre, July 2012) 47.

⁸⁰ *Family Responsibilities Commission Act 2008* (Qld) s 69(2).

⁸¹ *Ibid* s 66.

⁸² *Ibid* s 81.

⁸³ Explanatory Notes, Family Responsibilities Commission Bill 2008 (Qld) 11; *Family Responsibilities Commission Act 2008* (Qld) s 111.

⁸⁴ *Ibid* s 112.

⁸⁵ Department of Social Services, Families and Children, ‘Income Management for Cape York Welfare Reform’ <<http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/cape-york-welfare-reform-fact-sheets/income-management-for-cape-york-welfare-reform>>.

⁸⁶ Cape York Institute for Policy and Leadership, ‘Changes to CIM’ *Cape York News* (December 2013) 11.

⁸⁷ David Kempton, Member for Cook, Assistant Minister for Aboriginal and Torres Strait Islander Affairs, ‘Forrest Recommendations Need to Bring Communities Along’ (6 August 2014) <<http://davidkempton.com.au/forrest-recommendations-need-to-bring-communities-along/>>.

⁸⁸ Andrew Forrest, *The Forrest Review: Creating Parity* (Commonwealth of Australia, 2014) 27.

⁸⁹ *Ibid*.

but fails to see the ‘healthy welfare card’ as derived from the same premise that social security recipients cannot manage their payments. This is despite him saying:

We need to make the necessary changes to Australia’s welfare system to empower individuals to use it as it was intended. Welfare is provided to help people build healthy lifestyles and make the best choices they can for themselves and their families — particularly their children. It is a social safety net of last resort and should never be a destination, or support poor choices.⁹⁰

If the ‘healthy welfare card’ is implemented, there is no discretionary amount and no end date to income management for those receiving social security payments. Income management is a continuation of the historical treatment of Aboriginal people based on the discriminatory belief that they are not capable of managing their property, including money. This fundamentally fails to acknowledge the lack of jobs available and attendant high levels of unemployment in many Aboriginal and Torres Strait Islander communities.

The purpose of most social security payments is to provide a safety net for people who are unable to work for a range of reasons, and to assist people to look for work and to study. At present, these payments are susceptible to income management.⁹¹ This income management allocates a portion of the social security payments that must be spent on ‘priority needs’,⁹² such as bills, rent, groceries, and clothes. Management of these payments precludes a person from ever receiving their entire payment and further restricts where and how it can be spent. Similar to historical control of Aboriginal and Torres Strait Islander communities, where Protectors managed money and allowed spending on ‘priority needs’, in the contemporary context, Centrelink is this ‘Protector’.⁹³ If a person wants to spend their income managed money on non-excluded items not deemed to be ‘priority needs’, they must seek permission from Centrelink to make the payment.⁹⁴ The request will not be approved if payment for ‘priority needs’ has not been met. A compounding issue arising out of this management system of social security, is the presumption that a person understands and can fully navigate the system.

IV HOW CAN SOCIAL SECURITY BE PROPERTY?

In *Health Insurance Commission v Peverill*⁹⁵ McHugh J stated that:

Property ... is not confined to physical things. Under the general law, the term ‘property’ has ceased to describe any res, or object of sense, at all, and has become merely a bundle of legal relations — rights, powers, privileges, immunities.⁹⁶

⁹⁰ Ibid.

⁹¹ Australian Government, ‘Guide to Social Security Law’ (Version 1.197, Department of Families, Housing, Community Services and Indigenous Affairs, 12 August 2013) <http://guidesacts.fahcsia.gov.au/guides_acts/ssg/ssguide-11/ssguide-11.2/ssguide-11.2.5.html>.

⁹² *Social Security (Administration) Act 1999* (Cth) s 123TH.

⁹³ Bray et al, above n 79, 234–235, 254.

⁹⁴ Ibid.

⁹⁵ *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

⁹⁶ Ibid [263]–[264].

The *Butterworths Concise Australian Legal Dictionary* broadly defines property as ‘every type of right (that is, a claim recognised by law), interest, or thing which is legally capable of ownership, and which has a value’.⁹⁷ Property describes a legal relationship with an object, rather than the object itself.⁹⁸ In fact, the character of the object is irrelevant in determining whether a relationship is proprietary in nature.⁹⁹ Ownership also varies, capable of being equitable, legal, beneficial, joint, several, general, or partial.¹⁰⁰

Because property describes a relationship, what may encompass property rights is extremely broad with potential for expansion.¹⁰¹ For example, the relationship may exist in a number of forms including possession, a right to possession, ownership, or a lesser right conferred by common law or legislation,¹⁰² or the right to exclusive physical control of the property.¹⁰³ A right to possession includes possession yet to actualise, or a state where a person has been denied enjoyment of possession, for example where property is stolen.¹⁰⁴ Social security payments are considered by academic writers/commentators to be inalienable.¹⁰⁵ Section 60 of the *Social Security (Administration) Act 1999* (Cth) states that ‘[A] social security payment is absolutely inalienable’; however, this is now subject to income management provisions.¹⁰⁶ Income management can be described as denying a person the right to possess the totality of their social security payment.

It is accepted that despite being legally enforceable, property rights are not absolute. For example, Parliaments and courts can place restrictions on property rights or the way they are exercised.¹⁰⁷ However, restricting property rights of Aboriginal and Torres Strait Islander people, and not others, is fundamentally racially discriminatory. This was clearly recognised in the mid-1970s when the Commonwealth Parliament identified that Aboriginal and Torres Strait Islander peoples’ property rights in Queensland were vulnerable to interference by the Queensland Parliament and legislated accordingly. Despite the race-neutral language of s 69(1)(b)(iv) of the *FRC Act*, which relates to income management and the *FRC Act* generally, its operation and effect render it racially discriminatory, as these provisions only apply to communities that are predominantly Aboriginal.

Even if income management were found to apply generally to all inhabitants in the four Cape York communities and Doomadgee, not just Aboriginal and Torres Strait Islander people, s 10 of the

⁹⁷ Nygh and Butt (eds), above n 44, 321.

⁹⁸ *Yanner v Eaton* (1999) 201 CLR 351 [365]–[366] (Gleeson CJ, Gaudron, Kirby, Hayne JJ).

⁹⁹ Samantha Hepburn, *Principles of Property Law* (Routledge Cavendish, 3rd ed, 2006) 21.

¹⁰⁰ Nygh and Butt (eds), above n 44, 290–291.

¹⁰¹ Hepburn, above n 99, 3.

¹⁰² John Tarrant, ‘Property Rights to Stolen Money’ (2005) 32 *University of Western Australia Law Review* 234, 236.

¹⁰³ *Social Security (Administration) Act 1999* (Cth) s 60(1).

¹⁰⁴ Tarrant, above n 102, 241.

¹⁰⁵ Peter Yeend and Coral Dow, ‘Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007’ *Bills Digest*, No 27 of 2007–2008, Parliamentary Library, 2007, 4–5; Jon Altman and Melissa Johns, ‘Indigenous Welfare Reform in the Northern Territory and Cape York: A Comparative Analysis’ (Working Paper No. 44/2008, Centre for Aboriginal Economic Policy Research, 2008) 22.

¹⁰⁶ *Social Security (Administration) Act 1999* (Cth) s 60(2)(aa).

¹⁰⁷ Hepburn, above n 99, 4. See also *Bropho v State of Western Australia* [2008] FCAFC 100 [80], [83] (Ryan, Moore, Tamberlin JJ); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 [66], [71] (McMurdo P), [158] (Keane JA), [266] (Philippides J); *Maloney v The Queen* [2013] HCA 28.

RDA is directed at the ‘practical operation and effect’ of legislation, not simply its form.¹⁰⁸ This is now well established in case law and is crucial in showing that management of social security as property applies based on race,¹⁰⁹ not as a law of general application.¹¹⁰ However, the provisions of the *FRC Act* indicate that it is intended to apply to Aboriginal and Torres Strait Islander peoples. Being Aboriginal or Torres Strait Islander is an eligibility requirement for appointment as a local Commissioner.¹¹¹ An appropriate understanding of Aboriginal and Torres Strait Islander culture and history is required of the Commissioner, Deputy Commissioner,¹¹² and Registrar.¹¹³ One of the principles for administering the *FRC Act* is the requirement to take into account ‘Aboriginal tradition and Island custom ... in matters involving Aboriginal people or Torres Strait Islanders’.¹¹⁴

In relation to differential treatment of people in Aboriginal and Torres Strait Islander communities in terms of possession of alcohol, French CJ in *Maloney v The Queen*¹¹⁵ stated:

It is not a sufficient answer to the appellant’s complaint about those provisions that she was not deprived of her property and that property rights are frequently qualified by regulation, especially in the case of alcohol. In this case, the impugned provisions had the effect that Indigenous persons who were the Palm Island community, including the appellant, could not enjoy a right of ownership of property, namely alcohol, to the same extent as non-Indigenous people outside that community. The impugned provisions effected an operational discrimination notwithstanding the race-neutral language of s 168B of the Liquor Act, under which the appellant was charged.¹¹⁶

In 1977, Professor Ronald Sackville concluded that, although social security was not property, it was progressing to a greater level of certainty for its beneficiaries in terms of becoming an entitlement. This was in contrast to social security as a privilege, which may or may not be bestowed on a person, based on criteria set by the Government including discretionary terms.¹¹⁷ At that time, broad discretion was provided to the Director or Minister to decide who should receive payments and the level of payment.¹¹⁸ Sackville argued that once legislation provided clarity on eligibility it may create a right to social security. This would provide aggrieved applicants with a legal avenue to claim against incorrectly assessed eligibility criteria.¹¹⁹ However, in the case of *Stec v United Kingdom* the European Court of Human Rights did not find a right to receive social security payments.¹²⁰ It held that a right to social security may only arise where the

¹⁰⁸ *Western Australia v Ward* (2002) 213 CLR 1 [115]; *Gerhardy v Brown* (1985) 159 CLR 70 [97], [99] (Mason J dissenting), [216]–[219] (Brennan, Toohey and Gaudron JJ), [231]–[232] (Deane J).

¹⁰⁹ *Maloney v The Queen* [2013] HCA 28 [38] (French CJ), [84] (Hayne J) with whom [112] (Crennan J) agreed, [197] (Bell J).

¹¹⁰ *Racial Discrimination Act 1975* (Cth) s 10(3); *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws Act) 1975* (Cth) s 5(2).

¹¹¹ *Family Responsibilities Commission Act 2008* (Qld) s 18.

¹¹² *Ibid* s 17.

¹¹³ *Ibid* s 34.

¹¹⁴ *Ibid* s 5(2)(c).

¹¹⁵ [2013] HCA 28.

¹¹⁶ *Ibid* [38] (French CJ).

¹¹⁷ Ronald Sackville, ‘Property Rights and Social Security’ (1977) 2(3) *University of New South Wales Law Journal* 246, 246–266.

¹¹⁸ *Ibid* 254.

¹¹⁹ *Ibid* 254.

¹²⁰ European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005.

recipient has made compulsory contributions.¹²¹ This is similar to insurance schemes covering health issues preventing a person from working.

In preferring to define social security as having the potential to develop into an ‘entitlement’, rather than a property right per se, Sackville stated that:

The notion of entitlement embraces but goes beyond the legal right to enforce a claim to social security. It involves the eligible social security claimant being seen as entitled to the benefit claimed, not only by the legal system, but also by those responsible for administering benefits and indeed the community as a whole. The move from privilege towards entitlement is far from complete and there are many obstacles to the transformation, including the disfavour into which social security appears to fall in times of economic hardship. However, changes in the law and the way in which social security is administered will hasten the process.¹²²

Michael Asimow also argues that where the Government decision to provide a particular benefit is discretionary, it should not be treated as property.¹²³ In *Williams v Commonwealth of Australia*,¹²⁴ Crennan J referred to social security in terms of a personal entitlement.¹²⁵ She also explained that allowances, pensions, child endowment, and benefits of services provided under s 51(xxiiiA) of the *Commonwealth of Australia Constitution Act 1900* (Cth) (*Constitution*) are entitlements to money, goods or services. While these entitlements are not required to be provided in terms of financial assistance,¹²⁶ where they are provided in a different form due to the person’s race, this is clearly discriminatory.

Asimow explains that ‘property’ not only includes traditional forms, such as real estate and money, but also statutory entitlements, which lack traditional elements of property, including assignability.¹²⁷ In *Australian Capital Television Pty Ltd v The Commonwealth*,¹²⁸ Brennan J stated that assignability is not always an essential characteristic of a right of property and that some legislation expresses property as being inalienable.¹²⁹ In *Commissioner of Stamp Duties (NSW) v Yeend*,¹³⁰ Isaacs J said that assignability is a consequence of a proprietary right, not a test.¹³¹

¹²¹ Ibid [43]. Also see, *Andrejeva v Latvia* (European Court of Human Rights, Grand Chamber, Application No 55707/00, 18 February 2009), [91]–[92] where the Court considered complex historical, economic and political issues relating to the cessation of the Soviet Union to assess whether the legal system should have created an expectation to receive the social security benefit.

¹²² Sackville, above n 117, 252.

¹²³ Michael Asimow (ed), *A Guide to Federal Agency Adjudication* (American Bar Association, 2003) 11.

¹²⁴ *Williams v Commonwealth of Australia* [2014] HCA 23.

¹²⁵ Ibid [104], [109] (Crennan J).

¹²⁶ Ibid.

¹²⁷ Asimow, above n 123.

¹²⁸ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, [165]–[166] (Brennan J).

¹²⁹ Ibid.

¹³⁰ *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235.

¹³¹ Ibid.

Therefore, while assignability may indicate a property right, it is not an essential defining element.¹³²

In considering whether social security can be defined as property, it is important to consider that both s 10(3) of the *RDA* and s 5 of the *ATSI (QDL) Act* were implemented to stop management of Aboriginal and Torres Strait Islander peoples' property, which included their wages, without their consent. This situation is similar to the *CYWR* with respect to social security payments, including the right to possession and use of payments.

In *Health Insurance Commission v Peverill*,¹³³ social security in the form of a Medicare benefit and its assignment to a doctor were discussed as property for the purposes of s 51(xxxi)¹³⁴ (compulsory acquisition) of the *Constitution*.¹³⁵ Mason CJ, Deane and Gaudron JJ held that:

It is significant that the rights that have been terminated or diminished are statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognised by the general law. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation. That is particularly so in the case of both the nature and quantum of welfare benefits, such as the provision of medicare benefits in respect of medical services.¹³⁶

The above case draws a distinction between common law property rights and statutory based rights, such as social security due to the vulnerability of the latter to amendment. While this is important in compulsory acquisition cases, a statutory property right for the purposes of a discrimination argument differs where people are treated differently based on race. For the purposes of s 5 of the *ATSI (QDL) Act* and s 10(3) of the *RDA* finding social security as property is possible, irrespective of its vulnerability. Treating Aboriginal people differently by imposing income management of social security payments exceeds any issue of vulnerability, by discriminating solely on the basis of race.

Recent racial discrimination cases also indicate a wide interpretation of property. In *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury*,¹³⁷ President McMurdo explained the common law definition of property as being broad, including 'every type of right or claim recognised by law including any interest which is legally capable of ownership and which has a value'.¹³⁸ President McMurdo said it was appropriate to adopt a broad approach when interpreting a provision such as s 10 *RDA*.¹³⁹ President McMurdo emphasised that

¹³² See, eg, *St Vincent de Paul Society Qld v Ozcare Ltd* [2009] QCA 335, [36] (Muir JA), with whom McMurdo P and Chesterman JA agreed. Relied on in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, [49] (McMurdo P).

¹³³ (1994) 179 CLR 226; (1994) 119 ALR 675; (1994) 68 ALJR 251.

¹³⁴ This placitum requires property to be acquired on just terms.

¹³⁵ *Health Insurance Commission v Peverill* (1994) 179 CLR 226; (1994) 119 ALR 675; (1994) 68 ALJR 251 [6] (Mason CJ, Deane and Gaudron JJ); [9] (Dawson J); [14] (Toohey J); [22], [24] (McHugh J).

¹³⁶ *Ibid* [10] (Mason CJ, Deane and Gaudron JJ).

¹³⁷ *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37.

¹³⁸ *Ibid* [48] (McMurdo P).

¹³⁹ *Ibid* [51] (McMurdo P).

the test to determine whether an interest is property is not an absolute or unqualified test applicable in all circumstances.¹⁴⁰ Similarly the Full Court of the Federal Court in *Bropho v State of Western Australia*,¹⁴¹ held that there is nothing in the *RDA* or the *ICERD*, ‘for concluding that rights to property must be understood as ownership of a kind analogous to forms of property which have been inherited and adapted from the English system of property law or conferred by statute’.¹⁴² This clearly applies to property rights referred to in s 10(1) of the *RDA* by reference to Art 5(d)(v) *ICERD*, but the question is whether the *ICERD* is also applicable to ‘property owned’ within the meaning of s 10(3). Section 10(3) does not, by its words, limit ‘property owned’ to domestic interpretation. For s 10(3) to be invoked it requires a law containing a provision authorising property to be managed or preventing termination of the management of property. Given that the applicable law in relation to “property” will likely be confined in domestic application, it is possible that “property” will be similarly interpreted. The context of the enactment of the *RDA* is designed to implement the *ICERD*, and its historical background to eliminate racial discrimination indicates a wider interpretation is appropriate, especially as the 1975 Acts were targeting wages as property.

In *Maloney v The Queen*,¹⁴³ Bell J acknowledged that because of the legislative restrictions on the Aboriginal community of Palm Island, Aboriginal people on Palm Island enjoy the right to own alcohol to a lesser extent than persons (most of whom are not Aboriginal) elsewhere in Queensland.¹⁴⁴ Justice Bell agreed with McMurdo P, that the relevant right was not the right to own alcohol, but the right to own alcohol in the same manner and extent as non-Aboriginal and Torres Strait Islander people.¹⁴⁵ The emphasis in this reasoning is on a broad interpretation of property rights, focussed on equality. In Hayne J’s view ‘[t]he ambiguity and looseness with which the word “property” can be used is notorious.’¹⁴⁶

In the United States and internationally, in certain circumstances social security has been deemed to be property, generally based on it being an entitlement. The United States Supreme Court case of *Board of Regents v Roth*,¹⁴⁷ held that:

‘[p]roperty interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits’.¹⁴⁸

Based on expectation and reliance on social security, Stewart J held that:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a

¹⁴⁰ Ibid [49] (McMurdo P).

¹⁴¹ *Bropho v State of Western Australia* [2008] FCAFC 100.

¹⁴² Ibid [78] (Ryan, Moore, Tamberlin JJ).

¹⁴³ [2013] HCA 28.

¹⁴⁴ Ibid [224] (Bell J).

¹⁴⁵ Ibid [224] (Bell J).

¹⁴⁶ Ibid [74] (Hayne J).

¹⁴⁷ *Board of Regents v Roth* 408 US 564 (1972).

¹⁴⁸ Ibid [577]–[578] (Stewart J). See also *Arnett v Kennedy*, 416 US 134 (1974); *Bell v. Burson*, 402 US 535 (1971), [539].

legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.¹⁴⁹

In *Goldberg v Kelly*,¹⁵⁰ the United States Supreme Court held that a property interest exists in certain Government entitlements, requiring notice and a hearing prior to a Governmental entity removing them. The court said that welfare benefits are property and enjoy the same legal protections as other property.¹⁵¹ It will be seen below that the European Court of Human Rights ('ECHR') has a similar view of social security as a form of property.

In finding social security to be property the ECHR relies upon Article 1 of Protocol No 1 (A1P1) to the *European Convention on Human Rights*.¹⁵² This provision states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Internationally, in broad terms, two different social security schemes exist. These schemes can be briefly explained as being based on contributions by individuals, or those funded by general taxes (non-contribution). Initially ECHR decisions only protected prior paid contribution social security benefits under A1P1.¹⁵³ However, since its 2005 decision of *Stec v United Kingdom*,¹⁵⁴ ('*Stec*') the ECHR has found that social security payments based on taxes or non-contribution schemes, similar to the scheme in Australia, entail a proprietary right. Since then the court has deemed numerous types of non-contribution based social security payments to be property. Some of the cases combine Article 14 of the *European Convention on Human Rights* which prohibits discrimination, with A1P1. Article 14, only invoked when one or more of the Convention's other articles are invoked,¹⁵⁵ states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

¹⁴⁹ *Board of Regents v Roth*, 408 US 564 (1972), [577] (Stewart J).

¹⁵⁰ *Goldberg v Kelly* 397 US 254 (1970).

¹⁵¹ *Ibid.*

¹⁵² Opened for signature on 4 November 1950 (entered into force 23 September 1953).

¹⁵³ *X v the Netherlands*, Eur Court HR, Application No 5763/72, 18 December 1973 (dec); *G v Austria*, European Court of Human Rights, Application No 10094/82, 14 May 1984 (dec).

¹⁵⁴ (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005).

¹⁵⁵ *Abdulaziz v United Kingdom* A94 (1985) 7 Eur Court HR, [71].

There is no right to acquire property under A1P1 and the state is free to decide on whether a social security scheme exists and its nature. However, where a state creates a social security scheme, it must be compatible with Article 14, regardless of whether it is contributory or non-contributory.¹⁵⁶

The ECHR cases generally address a change in criteria resulting in a substantial and unacceptable reduction of payment to people receiving social security payments,¹⁵⁷ or a discrepancy between men and women in relation to the age of eligibility, or nationality. While none of these cases appear to include the state managing recipients' payments, the characterisation of social security payments as property is relevant.

In *Stec*, the United Kingdom offered a social security payment called a Reduced Earnings Allowance ('REA') which compensated loss of earnings for employees who had suffered a work related injury. Entitlement to a REA expired when the recipient reached the statutory age for pension entitlement. Some recipients receiving a REA were changed to a Retirement Allowance ('RA') which was of a lesser amount, when they reached retirement age. While the statutory retirement age in the UK was at the time 60 for women and 65 for men, the retirement age for women is gradually increasing to 65 by the year 2020. Five individuals in receipt of a RA or a REA applied to the ECHR for a decision on whether the differing payments received by men and women in similar circumstances were discriminatory.¹⁵⁸ In particular, Mrs Stec argued that the measures of reducing payments were discriminatory (Art 14) breaching her right to property (A1P1).¹⁵⁹

The Government argued that non-contributory benefits were not covered by A1P1 as A1P1 did not provide a right to receive benefits from the state. It also said that the state had discretion in terms of provision it made for its citizens, there being no right under the *European Convention on Human Rights* to acquire possessions. However, a distinction was made by the Government in relation to contributory benefits, acknowledging that because individuals made contributions they had a proprietary claim.¹⁶⁰

The applicants' argument was that REA and RA payments fell within A1P1 of the *European Convention on Human Rights*. They relied on the ECHR reasoning in *Gaygusuz v Austria*.¹⁶¹ In that case, the ECHR said that the statutory right to emergency assistance was a pecuniary right under A1P1 without it 'being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions"'.¹⁶²

¹⁵⁶ *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005) [54]–[55].

¹⁵⁷ *Ásmundsson v Iceland* (European Court of Human Rights, Chamber, Application No 60669/00 12 October 2004) [42]–[45].

¹⁵⁸ *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005) [3]–[20], [33].

¹⁵⁹ *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005).

¹⁶⁰ *Ibid* [34].

¹⁶¹ *Ibid* [36].

¹⁶² *Gaygusuz v Austria* [1996] Eur Court HR 36 [41].

In *Stec* the ECHR held that:

In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid — subject to the fulfilment of the conditions of eligibility — as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No 1 to be applicable.¹⁶³

Unfortunately, the Court did not provide analysis of social security as a property right, rather it is portrayed as being intrinsically capable of definition as a proprietary interest due to fulfilment of eligibility criteria established by statute. It was explained that if a state has legislation in place ‘providing for the payment as of right of a welfare benefit — whether conditional or not on the prior payment of contributions — the legislation must be regarded as generating a proprietary interest falling within the ambit of A1P1 for persons satisfying its requirements’.¹⁶⁴ This was reaffirmed in *Luczak v Poland*.¹⁶⁵ By 2007, social security complaints which combined A1P1 and Art 14 were automatically accepted by the ECHR as entailing a property right at issue.¹⁶⁶ These cases do not restrict decisions of the state as to whether it creates a social security system or the type of system; however, where the state decides to create a system it must do so without discriminating (Article 14).¹⁶⁷ Non-discrimination appears to be inextricably linked to the ECHR’s interpretation of social security as property, with an absence of explanation of its defining characteristics.¹⁶⁸

Ingrid Leijten identified that the ECHR provides a broader interpretation of A1P1 in non-discrimination cases than otherwise. Cases are brought within the ambit of property despite there being no possession. This appears to be because the focus has shifted to the importance of prohibition of discrimination, requiring the state to provide non-discriminatory social security benefits.¹⁶⁹

In *Moskal v Poland*,¹⁷⁰ Ms Moskal complained that a pension to look after her sick son that she had been erroneously receiving for ten months had been revoked. Despite the pension being lawfully revoked the court found that ‘a property right was generated by the favourable evaluation of the applicant’s dossier attached to the pension application which had been lodged in good faith and by the Social Security Board’s recognition of the right’.¹⁷¹ In making the decision the court

¹⁶³ *Stec v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 65731/01, 6 July 2005) [51].

¹⁶⁴ *Ibid* [54].

¹⁶⁵ *Luczak v Poland* (European Court of Human Rights, Chamber, Application No 7782/01, 27 March 2007).

¹⁶⁶ *Stummer v Austria* (European Court of Human Rights, Chamber, Application No 37452/02, 11 October 2007); *Stummer v Austria* (2012) 54 Eur Court HR 11.

¹⁶⁷ Ingrid Leijten, ‘Social Security as a Human Right Issue in Europe — Ramaer and Van Willigen and the Development of Property Protection and Non-Discrimination under the ECHR’ (2013) 73(2) *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 177, 190.

¹⁶⁸ *Ibid* 195.

¹⁶⁹ *Ibid* 190.

¹⁷⁰ *Moskal v Poland* (2010) 50 Eur Court HR 22.

¹⁷¹ *Ibid* [45], [68].

considered both that Ms Moskal had resigned from employment of 20 years in reliance on the decision that she was able to receive the pension, and the effects of the decision on Ms Moskal and her family.¹⁷² This case was decided based on interference with a proprietary right, not on non-discrimination and an order was made for pecuniary damages.¹⁷³ The decision highlights the importance of certainty for people relying upon representations that they are eligible for social security. However, this decision goes beyond finding social security as property based on eligibility criteria.

These cases demonstrate that changes to social security policies can be found to interfere with existing property rights or legitimate expectations. It is understandable that the proprietary nature of social security requires protection when social security forms a person's basic means of living and the effects of disproportionate interference are considered.¹⁷⁴ Therefore, interferences must be lawful, comply with the principle of non-discrimination, be in the public interest and proportionate to their aim.¹⁷⁵ This is similar to the approach used at international law and by some countries when assessing the validity of limitations of particular human rights by the state.

V INCOME MANAGEMENT IN CAPE YORK

Examples of judicial findings of social security payments as property are important to the argument that s 10(3) of the *RDA* and s 5 of the *ATSI (QDL) Act* prohibit another person managing the property of an Aboriginal or Torres Strait Islander person without their consent. The only exception to non-consensual management of property is when it is in accordance with legislation of general application and, therefore, does not discriminate, directly or indirectly, against Aboriginal and Torres Strait Islander people. It is unlikely that the *FRC Act* would be found to be legislation of general application due to the predominant Aboriginal population of the four communities, the tailoring of the legislation for Aboriginal people, including Aboriginal and Torres Strait Islander authority figures as Local Commissioners and its application. Previous legislation, with provisions not explicitly aimed at a racial group, has been held to have the operation and effect of targeting a specific group based on their race and this is racial discrimination.¹⁷⁶ The broad definition of property in Australia and the flexibility of its defining elements, along with international judicial support, suggest that an argument for social security payments as property could be mounted in Australia. While there is limited guidance in domestic case law on the chance of success of such a legal argument, it appears to present the best avenue in challenging income management of Aboriginal and Torres Strait Islander peoples. Post *Maloney v The Queen*,¹⁷⁷ it is likely that income management would be held to be a special measure. Therefore s 10(3) of the *RDA* and s 5 of the *ATSI (QDL) Act* are integral to the argument to challenge the discriminatory nature of income management in Cape York. Reference to the history

¹⁷² Ibid [68].

¹⁷³ Ibid [99], [105].

¹⁷⁴ Leijten, above n 167, 197.

¹⁷⁵ Ibid 179.

¹⁷⁶ *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland [No 1]* (1988) 166 CLR 186; *Ward v Western Australia* (2002) 213 CLR 1; *Maloney v The Queen* [2013] HCA 28 [11], [17] (French CJ), [202] (Bell J), [338] (Gageler J).

¹⁷⁷ [2013] HCA 28.

of this legislation, as acknowledged by the Commonwealth Parliament when debating and enacting these Acts, may also support social security being defined as property.¹⁷⁸

Section 69(1)(b)(iv) of the *FRC Act* gives the FRC the power to notify the Centrelink Secretary that a person's social security payment is to be income managed. Section 10(3) of the *RDA* by reference to s 10(1) enables Aboriginal and Torres Strait Islander people whose property is being managed without their consent to enjoy their right to that property to the same extent as persons of other races, colour or national or ethnic origin. Section 10(1) applies where even only some members of a particular race do not enjoy a particular right to the same extent as members of another race.¹⁷⁹ It is, therefore, arguable that s 69(1)(b)(iv) of the *FRC Act* is inconsistent with s 10(3) of the *RDA* and s 5 of the *ATSI (QDL) Act*. If either or both of s 10(3) of the *RDA* or s 5 of the *ATSI (QDL) Act* apply, their operation will prohibit what the state law permits, therefore, s 109 of the *Constitution* is enlivened and s 69(1)(b)(iv) of the *FRC Act* is invalid to the extent of the inconsistency,¹⁸⁰ and the *Social Security (Administration) Act 1999* (Cth) will not be engaged.¹⁸¹

If there is a real need for a person's social security or other property to be managed legitimately, then an application can be made for an administrator to be appointed under the *Guardianship and Administration Act 2000* (Qld). Under this process, the Public Trustee is appointed to administer payment; however, this can only occur if the criteria relating to diminished capacity under the legislation applies. This legislation does not distinguish between people based on race or other characteristics associated with race, but is based on need.

Even though income management under the CYWR is triggered when certain obligations are deemed not to be met, rather than through a blanket approach, colonial concepts of the way in which Aboriginal people should behave and need to be managed remain embedded in the *FRC Act*. The paternalistic protectionist process is punitive, racial and continues to be based on a policy of assimilation, rather than understandings of difference. The early 1970s provided a crucial window of opportunity to deal with these attitudes. The Commonwealth Labor Government took the important step of legislating to stamp out Queensland provisions which discriminated against Aboriginal and Torres Strait Islander people. The fact that specific legislation was aimed at Queensland and similar provisions exist in current legislation suggest that special protection is required due to the entrenched historical and legislative regime in Queensland. The income management component of the CYWR indicates that this special protection remains necessary. This reveals a lack of reflection by Governments on the effects of previous paternalistic legislation on Aboriginal and Torres Strait Islander peoples and that similar legislation will not achieve a different outcome.

¹⁷⁸ Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1977 (Lionel Murphy); Commonwealth, *Parliamentary Debates*, Senate, 27 November 1974, 2833, 2835 (James Cavanagh); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1975, 3249 (Kep Enderby).

¹⁷⁹ *Western Australia v Ward* (2002) 213 CLR 1, [106]-[107] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁸⁰ *Ibid.*

¹⁸¹ This requires s 69(1)(b)(iv) of the Queensland *FRC Act* to apply in order to direct the Centrelink Secretary to implement income management; *Social Security (Administration) Act 1999* (Cth) s 123UF(1)(b).