In the Absence of Treaty

Warning: This book may contain photos of people who have passed into the Spirit world.

First published in December 2013 by 'concerned Australians'

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INTRODUCTION

The four books that have been produced by 'concerned Australians' over the last few years cover important events that occurred during the Northern Territory Emergency Response of 2007, otherwise known as the Intervention. These events included recordings of what Aboriginal community residents had said during the Consultations of 2009 and 2011, as well as the stated views of Elders and their input into the Senate Inquiry into the proposed Stronger Futures Bills of 2012.

We know now that the views of Aboriginal peoples from Communities and of those representing Aboriginal organisations in the Northern Territory were given little attention and that the Stronger Futures legislation was passed with few amendments.

From the time the legislation passed through the Senate on 29 June 2012 up until the end of the Gillard/Rudd Government there were a number of consequences that warrant recording. The first of these is the change to regulations in the Community Living Areas and secondly the Report of the Parliamentary Joint Committee on Human Rights. Recording these events is the purpose of this book.

The background to these events reflects the deeply spiritual relationship of Aboriginal peoples to the land, and the importance of their direct engagement in the processes that may impact upon it.

In order to provide the 'story' of the events, reliance upon quotations from pertinent documents has been essential. This provides a somewhat 'dry' account of what has taken place but

it hopefully simplifies and condenses a rather extensive amount of information.

It also highlights the missing link. That is, the absence of any officially agreed ‘terms of engagement’ between Aboriginal Peoples and Government. This needs to change.

LAND

The imposition by Government of five-year leases on Aboriginal land in the Northern Territory in 2007 was just one more alert to Aboriginal people. In a statement made by seven Elders from different areas of the Northern Territory in 2011, the concern is clear:

We are the people of the land. The land is our mother. For more than 40,000 years we have been caring for this land. We are its natural farmers.

Now after so many years of dispossession, we find once again we are being thrust towards a new dispossession. Our pain and our fear are real. We are again being shamed.

Under the Intervention we lost our rights as human beings, as Australian citizens, as the First peoples of the Land. We feel very deeply the threats to our language, our culture and our heritage. Through harsh changes we have had taken from us all control over our communities and our lives. Our lands have been compulsorily taken from us. We have been left with nothing.[1]

When the 2006 amendment to the Aboriginal Land Rights Act allowing the Commonwealth to take five-year leases over land was validated by the High Court, there is little doubt that Aboriginal people would have been struck by the words of Michael Kirby QC,

If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases ... it is difficult to believe that a challenge to such a law would fail as legally

unarguable on the ground that no 'property' had been acquired, ...[2]

The case had been launched by members of the Dhukurrdji clan from the area of Maningrida in Arnhemland. Aboriginal people were deeply affronted by the Government's action and 'land grab' was a common cry. Pat Turner, from the Aboriginal Organisations in Alice Springs said,

We believe that this Government is using child sexual abuse as the Trojan horse to resume total control of our lands.[3]

These notions were reinforced when the Government's intention to empty homelands became clear. A Memorandum of Understanding between Federal and Territory governments that no new housing would appear on homelands or outstations (September 2007) gave support to this. Also under consideration by Government was whether funding for basic services would be renewed to homelands.

The changes added to the sense of overwhelming fear and uncertainty. As Rosalie Kunoth-Monks, Elder from Utopia, said,

... take away from me my language, take away from me my responsibilities for the land, take away from me my land, and I am nothing.[4]

By the end of 2011 Rosalie Kunoth-Monks was speaking more broadly regarding her concerns about the land. She said,

This is a tragedy that is unfolding through the policies of an uncaring Government. It seems sentimental and – I can't find the other word in English – about attachment to the land. It's not attachment to the land, it's survival of a cultural practice that is still alive in spite of what has been thrown at it.[5]

Rosalie Kunoth-Monks OAM

Deni Langman, a sovereign owner of Uluru, is struggling with similar foreboding. She asks what would happen if land were taken over,

What would our children learn from the schools ... they would gain a profession if lucky enough but what would they learn about Nature, which is our schools, it is our knowledge ... all that will be abolished in a very short time and what are we left with, without Nature and Mother Earth. Personally I would be empty inside, because I feel so close to Nature and caring for her. I just cannot imagine my world without Nature, without Mother Earth ... If we give it over to the Government it will not survive and we will be the ones who gave Mother Earth to the Government and miners and investors to make a quick buck, but nothing more than that.[6]

During recent discussions on foreign investment and the Indonesian Government's interest in buying cattle grazing country in the Northern Territory, Maurie Ryan, Chair of the Central Land Council warned,

The Northern Territory is not yours to sell to anybody. The land we're talking about is for Aboriginal people, we've had it for 40,000 to 60,000 years, passed down.[7]

In the Territory, Government has coerced communities to lease land to it on the basis that no houses will be provided without the agreement to what are called 'voluntary' leases, most often of 40 years duration. Gradually, the majority of the hub towns, as they were first called, have signed leases in order to provide some relief to the oppressive shortage of community housing.

The fear of losing control over that land is very palpable. During the recent fiftieth Anniversary of the giving of the Bark Petition

Deni Langman

in Yirrkala, the chair of the Northern Land Council, Wali Wunungmurra, expressed a desire to protect land rights. He said,

I think we need to go further and I know some people may disagree with me, but I'd like to see the Land Rights Act itself becoming inserted into the Constitution of Australia; to protect it from people watering it down and tearing it apart.

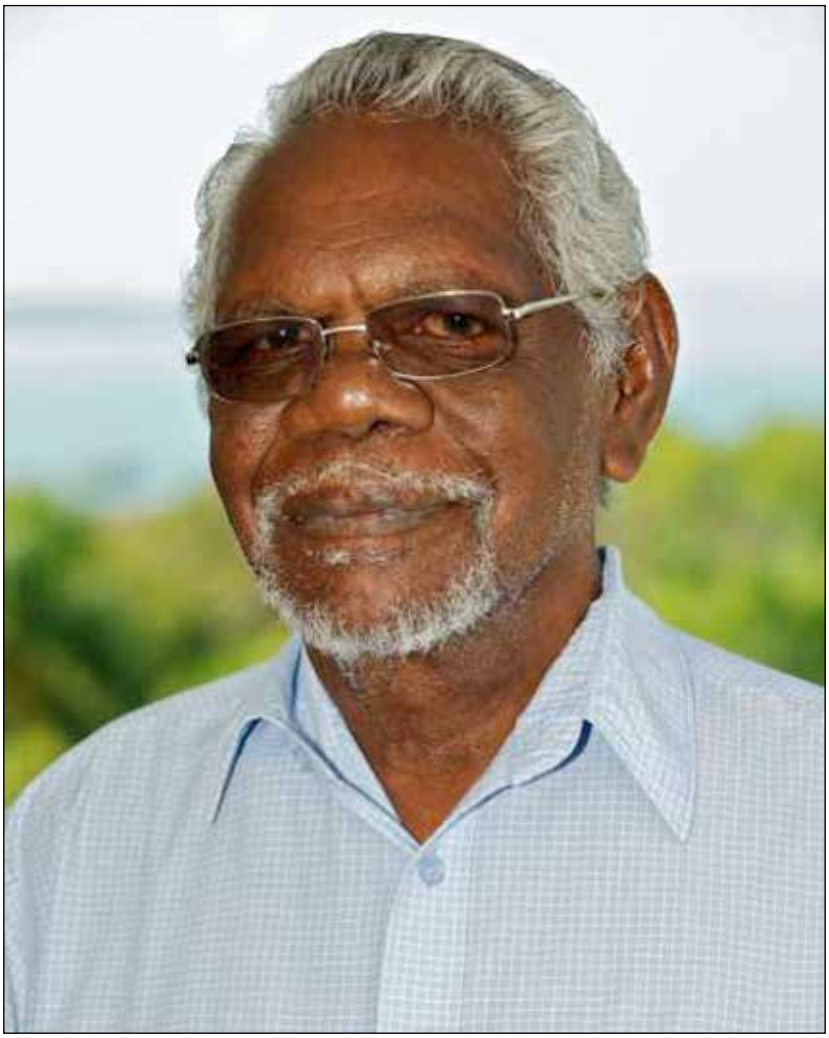
I personally think that that would be a safe place (for it).[8]

For Aboriginal peoples, keeping safe their rights to their land is not proving easy. The 2006 amendment to the Aboriginal Land Rights Act (NT) did away with communal ownership of certain parcels of lands previously vested as parts of inalienable Aboriginal Land Trusts. At the same time the amendments to the Act make changes to the way in which corporations are able to negotiate with Aboriginal communities. These changes are a way of speeding up the process by minimising the role of the Land Councils to act on behalf of the land owners.

The then Commissioner for Aboriginal and Torres Strait Islander Social Justice, Tom Calma, expressed his concern regarding the legislation and the government process which ignored the need for consultation and consent from the land owners. He said,

My concerns are threefold:

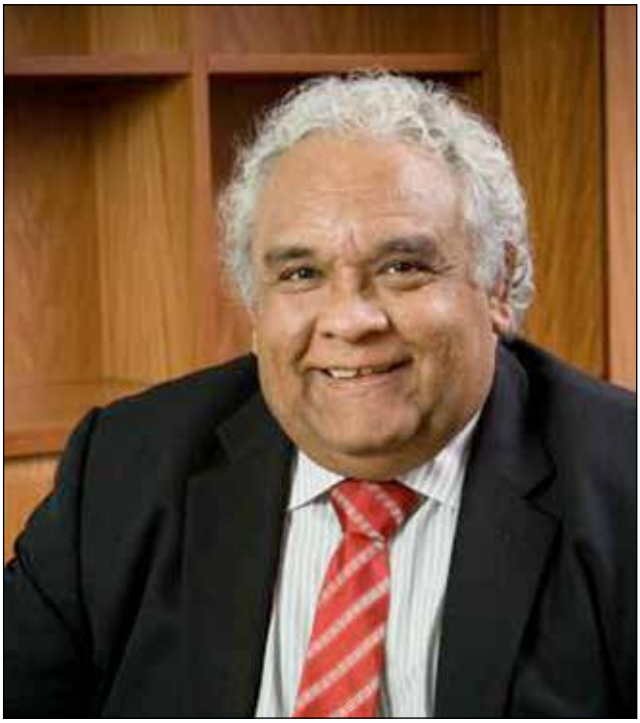
- *Firstly, I am concerned that the ALRA amendments have been made without the full understanding and consent of traditional owners and Indigenous Northern Territorians.*
- *Secondly, I am concerned that the very intention of the amendments is to reduce the capacity for Indigenous people to have decision making influence over their lands.*



Wali Wunungmurra

- *Thirdly, my research demonstrates that if implemented there is a high probability that the amendments will have a range of negative impacts on Indigenous peoples' rights and interests to their land.*[9]

It was a further blow then when the Stronger Futures legislation of 2012 introduced the Land Reform section which directly targets Community Living Areas. Again, this legislation, presented as a 'special measure', neither guarantees consultation nor consent. In fact it specifically denies consent and only offers consultation if requested by land owners.



Tom Calma AO

COMMUNITY LIVING AREA

What are Community Living Areas? Greg Marks, in his paper *Toehold on Country*, provides this background:

Community Living Areas (CLAs) in the Northern Territory are the areas that have, generally, been excised from pastoral leases for the benefit of Aboriginal people.

Whilst granted on a living needs rather than a traditional ownership basis, they nevertheless largely reflect traditional ownership and connection to country in the pastoral areas of the Northern Territory. In the pastoral districts there was little or no reservation of land for Aboriginal purposes when leases were allocated. Aboriginal communities were left landless and Government had no means to provide housing and infrastructure. The basis for the excision response to this land deprivation is found in the 1971 Gibb Committee Report, which recommended that:

> *... in appropriate areas land be obtained by excision, or by sub-lease from the pastoralists for Aboriginal communities for limited village, economic and recreational purposes to enable Aborigines to preserve traditional cultural ties and obligations and to provide the community with a measure of autonomy.*

CLAs are perceived by Aboriginal people as small pieces of land that have been returned to them out of the totality of the land that they lost with the advent of pastoralism. Pastoralism came quite late to some parts of the Territory, as recently as the 1920s and even later.

Before that, the quiet possession and enjoyment of their lands by the Aboriginal owners, at least in some parts of the Territory, had often been largely undisturbed. With pastoralism they lost heavily. The CLAs granted since the 1970s represent at least a modicum of return of ownership and control for the traditional owners of the country concerned. They are a toehold on their former territories.[10]

Changes to CLA Regulations

Changes to regulations in Community Living Areas were flagged by Government in 2011. The changes were considered by Government to be necessary because leases were seen to be restrictive for development. The reforms relied on the Land Reform section of the Stronger Futures legislation - Subsections 35(4) and 35(5), and are set out as follows:

> Subclause 35(4)
>
> provides that a regulation cannot be made in relation to a community living area without prior consultation with: the Northern Territory Government; the owners of the land that is the community living area (**on request** from the relevant owners); the Land Council in whose area the community living area is located; and any other person the Commonwealth Minister for Indigenous Affairs considers appropriate to consult, including, for example, the Northern Territory Cattlemen's Association. It is intended that a public notification will be made to enable owners of community living areas to request to be consulted.
>
> Subclause 35(5)
>
> provides that a failure to consult as required under

subclause 35(4) will not affect the validity of the regulations.

It is clear that the legislation provided no guarantee of consultation nor are there any guaranteed avenues by which owners may object to changes. It is the Minister who has control over decision-making. At the time the Hon Alastair Nicholson made the following point,

The effect of this legislation is to give the Minister almost *unlimited control over the uses of town camps and community living areas and in particular to enable their development for private purposes, presumably for profit.*[11]

The Senate Inquiry into the Stronger Futures Legislation

It is useful to look at what was said by the members of the Senate Inquiry Committee and witnesses with regards to this particular section of the legislation. It is clear from both the Majority Report as well as from the Australian Greens' Dissenting Report that there was general agreement that the Northern Territory Government should be allowed to progress any changes to the Community Living Areas regulations.

The Chief Minister, Paul Henderson was very clear regarding the intention of the Northern Territory Government to progress the legislation. He stated,

We will do the amendments. Of course, when we are amending legislation that impacts on Aboriginal people, we need to consult. The consultation process has started with the NLC and, in particular, the CLC, about those amendments. ... but we have started those discussions. I do not want to ram legislation

Stronger Futures Senate Inquiry Committee
Senators Crossin, Moore, (staff), Siewert, Boyce and Scullion

into the house that would affect community living areas without the support of the land councils to say that the legislation is appropriate.[12]

Mr Henderson went on to say,

I think those provisions [Stronger Futures] are redundant, given the Territory's commitment to actually doing that. That is a commitment we have made. The legislation is not in the house yet because we are still trying to get agreement, in the same way that, if the Commonwealth were going to legislate, I would hope that the Commonwealth minister would consult with the land councils about appropriate amendments before, once again, legislating for the Northern Territory and affecting Aboriginal people.[13]

The Senate Committee View, however, is expressed as follows:

The committee acknowledges the regulation making power for the Commonwealth as outlined in clause 34 and 35 of the bill is broad, however based on the evidence provided, considers these powers will only be drawn on should the Northern Territory Government not progress amendments. Based on advice provided by the Northern Territory Government, the committee understands they will continue to progress the necessary amendments.[14]

And, the Dissenting Report:

... the Australian Greens support this section of the Bill, on the basis that it is only used as a last resort and that the NT Government is given time to proceed with the reform before the Minister takes action. We seek commitment from the Minister in this regard.[15]

This commitment, it would appear, was never given.

One is obliged to ask the question as to why the Committee was prepared to pass this section of the legislation since it appears that none of the members of the Committee express an expectation of these particular provisions being used. In fact the Committee appeared to give its support to the Northern Territory Government progressing this section of the legislation.

Concerns were also expressed during the Senate Hearings regarding the delegation of such unlimited power to the Minister.

The Central Land Council stated,

The delegation of such extensive power over an important reform agenda to the executive creates difficulties because it requires the Aboriginal land owners and the land councils to unreservedly trust the executive to devise an appropriate reform agenda at an unspecified point in time over the next 10 years.[16]

These statements appear to have made little impact on the Commonwealth. Clearly the Commonwealth Government had no intention of allowing the Northern Territory Government to progress the changes and this was made easier by a change of Government within the Territory in August 2012.

Discussion Paper

By March 2013, the Commonwealth Government presented a Discussion Paper on Community Living Area Land Reform and called for submissions by April from land owners, residents and stakeholders to be made within a four-week period.

The Discussion Paper committed to *working with Aboriginal Peoples and stated that all reforms will be subject to consultation to ensure strong local involvement.*

However, the Discussion Paper also stated that the *Australian Government officials will be visiting selected CLA communities to talk about these reforms.*

There is no explanation as to why only 'selected' communities would be consulted or on what basis communities will be selected.

It is understood that,

The average population of a CLA is quite small. Many are referred to as Family Outstations and can be in quite isolated locations. Overall there may be only as many as a dozen CLAs with populations of 200 or more people. Literacy levels are low and when English is spoken it is often as a third or fourth language.[17]

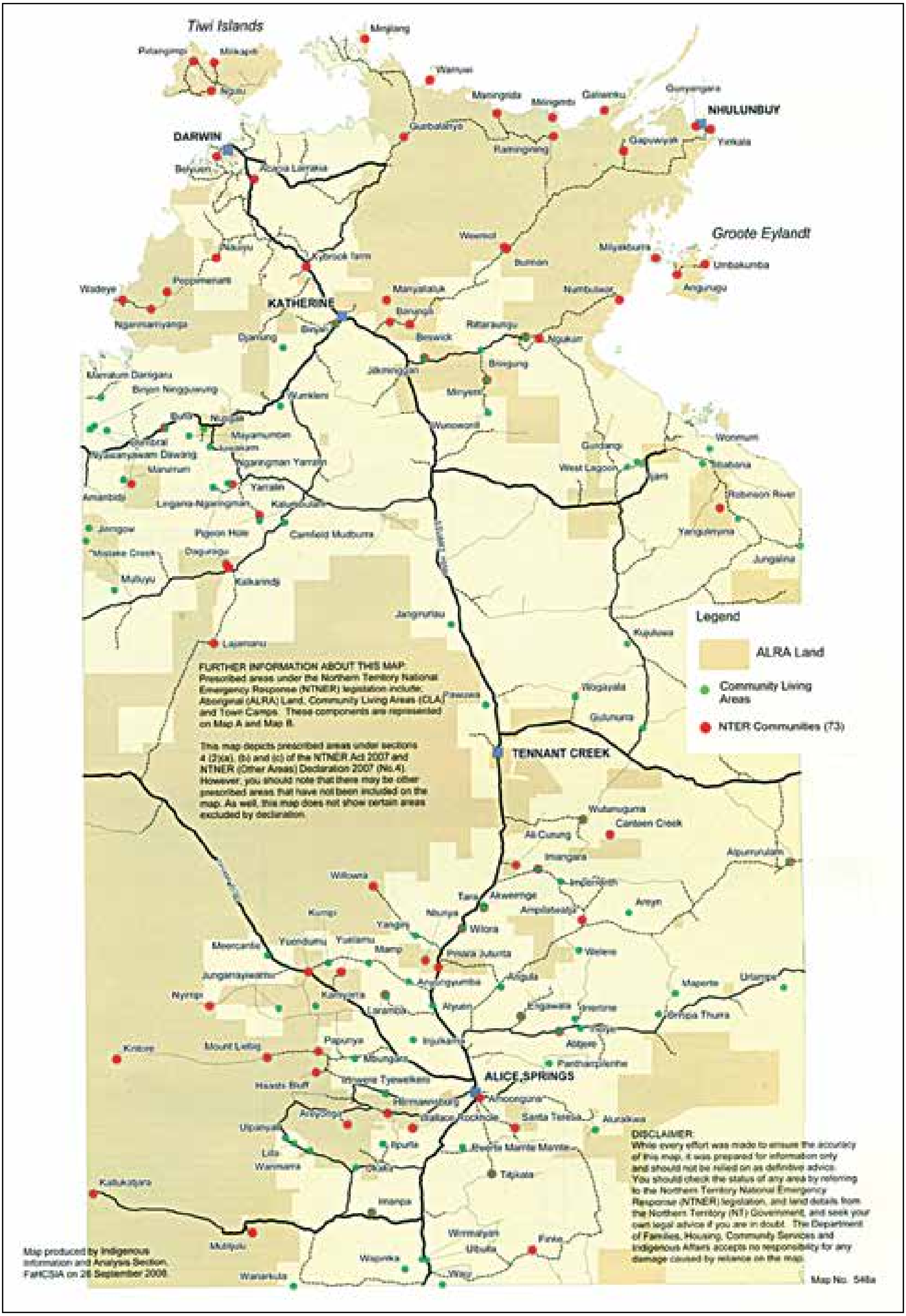
Furthermore, there is the concern that residents on Community Living Areas are unlikely to be in a position where they can make informed choices about their futures without access to independent legal advice.

The following questions were asked of the CLA Land Reform Office at FaHCSIA:

Will the provision of information to land owners be in their own language?

Will the material be provided with enough time for people to discuss the content in the community before the consultation?

Will the consultations be recorded and the transcripts made available to the public?



Tiwi Islands
DARWIN
KATHERINE
Groote Eylandt
NHULUNBUY
TENNANT CREEK
ALICE SPRINGS
Legend
ALRA Land
Community Living Areas
NTER Communities (73)
FURTHER INFORMATION ABOUT THIS MAP:
Prescribed areas under the Northern Territory National Emergency Response (NTNER) legislation include: Aboriginal (ALRA) Land, Community Living Areas (CLA) and Town Camps. These components are represented on Map A and Map B.
This map depicts prescribed areas under sections 4 (2)(a), (b) and (c) of the NTNER Act 2007 and NTNER (Other Areas) Declaration 2007 (No.4). However, you should note that there may be other prescribed areas that have not been included on the map. As well, this map does not show certain areas excluded by declaration.
DISCLAIMER:
While every effort was made to ensure the accuracy of this map, it was prepared for information only and should not be relied on as definitive advice. You should check the status of any area by referring to the Northern Territory National Emergency Response (NTNER) legislation, and land details from the Northern Territory (NT) Government, and seek your own legal advice if you are in doubt. The Department of Families, Housing, Community Services and Indigenous Affairs accepts no responsibility for any damage caused by reliance on the map.
Map produced by Indigenous Information and Analysis Section, FaHCSIA on 28 September 2008.
Map No. 546a

Will there be qualified interpreters available during the consultations?

Will those officers running consultations have been trained as to how to work with interpreters?

Will arrangements be made for land owners to have access to free independent legal advice?

The last of these questions was particularly relevant as this issue had recently been discussed during the Stronger Futures Senate Hearing in Darwin and summed up by Olga Havnen as follows:

... any proposals about land tenure reform really have to be premised on the basis that land owning groups need to be properly resourced and provided with the necessary financial, professional and technical expertise in order to make free, prior and informed decisions about their land.[18]

Outcomes Paper

With the publication of FaHCSIA's Community Living Area Land Reform in the Northern Territory Outcomes Paper of mid-June 2013, we learn that there were seventeen submissions received by CLA Land Reform Section of the Department. These included submissions from both the Northern Land Council and the Central Land Council, as well as from the Cattleman's Association. One only was from a Community Living Area. We are advised that:

Submissions were also received from other interested organisations and individuals.

- *A number of these submissions broadly support CLA land reform.*

- *A number of these submissions broadly oppose CLA land reform, and criticise the adequacy of the consultation process.*[19]

Our analysis shows that of the seventeen submissions at least eleven expressed grave reservations concerning the manner in which the process was being undertaken. A couple of others offered support with reservations and offered suggestions of improvements to the process.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda offered support but urged Government,

to ensure that negotiations about moving to voluntary leases afford Aboriginal communities with options and control over their land rather than imposed changes which lack community support.[20]

He also urged the Government to,

adhere to the features of a meaningful and effective consultation process when working with the Aboriginal communities in the Northern Territory.[21]

In general, the eleven points that appear in the Guidelines for Consultations referenced by the Commissioner cover the concerns expressed through the submissions. These can be found in Appendix A of this book.

Mr Gooda also sought to address issues of development and home ownership stating,

... the discussion paper assumes that reforming land tenure to clarify leases will establish opportunities for economic development and home ownership. For example, the paper

states 'the legislative and administrative framework that currently applies to CLA land has contributed to uncertainty for CLA land owners in dealing with their land, particularly for commercial development and the provision of key government services.[22]

He notes that land tenure on its own will not create development and quotes from the Aboriginal Peak Organisations Northern Territory (APO NT),

No evidence exists that economic development or even home ownership will necessarily flow from secure leasing alone. Community cohesion, capacity to engage in wider society, issues of community control and decision-making have to be addressed in conjunction with a leasing policy.[23]

The Outcomes Paper does, however, answer a number of the questions that had been asked in the April submissions. We are advised that in advance of meetings, materials were circulated in Plain English to community members, but not in local languages. These materials were used throughout the meetings. This is the same pattern as was followed in community consultations of 2009 and 2011.

On thirteen separate days the consulting team(s) criss-crossed the Northern Territory visiting 15 communities and 7 cattle stations. This allows for consultations of three to four hours on average, much as happened during earlier consultations.

Consultation with Community Living Areas:

- Engawala 8 April 2013
- Atitjere 9 April 2013
- Bulla 23 April 2013
- Laramba 29 April 2013
- Wilora (including participants from Tara) 30 April 2013
- Titjikala 1 May 2013
- Imanpa 7 May 2013
- Kings Canyon Outstations (Lila and Ulpanyali) 8 May 2013
- Wutunugurra 14 May 2013
- Imangara 15 May 2013
- Alpurrurulam 22 May 2013
- Binjari 28 May 2013
- Jilkminggan 28 May 2013
- Minyerri 29 May 2013
- Urapunga 29 May 2013

Meetings with Cattle Stations:

- Auvergne Station 23 April 2013
- Napperby Station 29 April 2013
- Stirling Station 30 April 2013
- Kings Creek Station 8 May 2013
- Palmer Valley Station 8 May 2013
- Epenarra Station 14 May 2013
- Lake Nash Station 22 May 2013

We are told that there were interpreters attending a majority of the community meetings – conversely, this means that there were not interpreters at every consultation.

We are given to understand that there were no recordings made of the meetings. While there are no transcripts, we are provided with information as to the focus of the meetings which were on community leasing provisions and NT Ministerial Consent provisions. The information is quite complex and considerable pre-consultation work would have been required for the audience to have any chance of understanding the content or its implications.

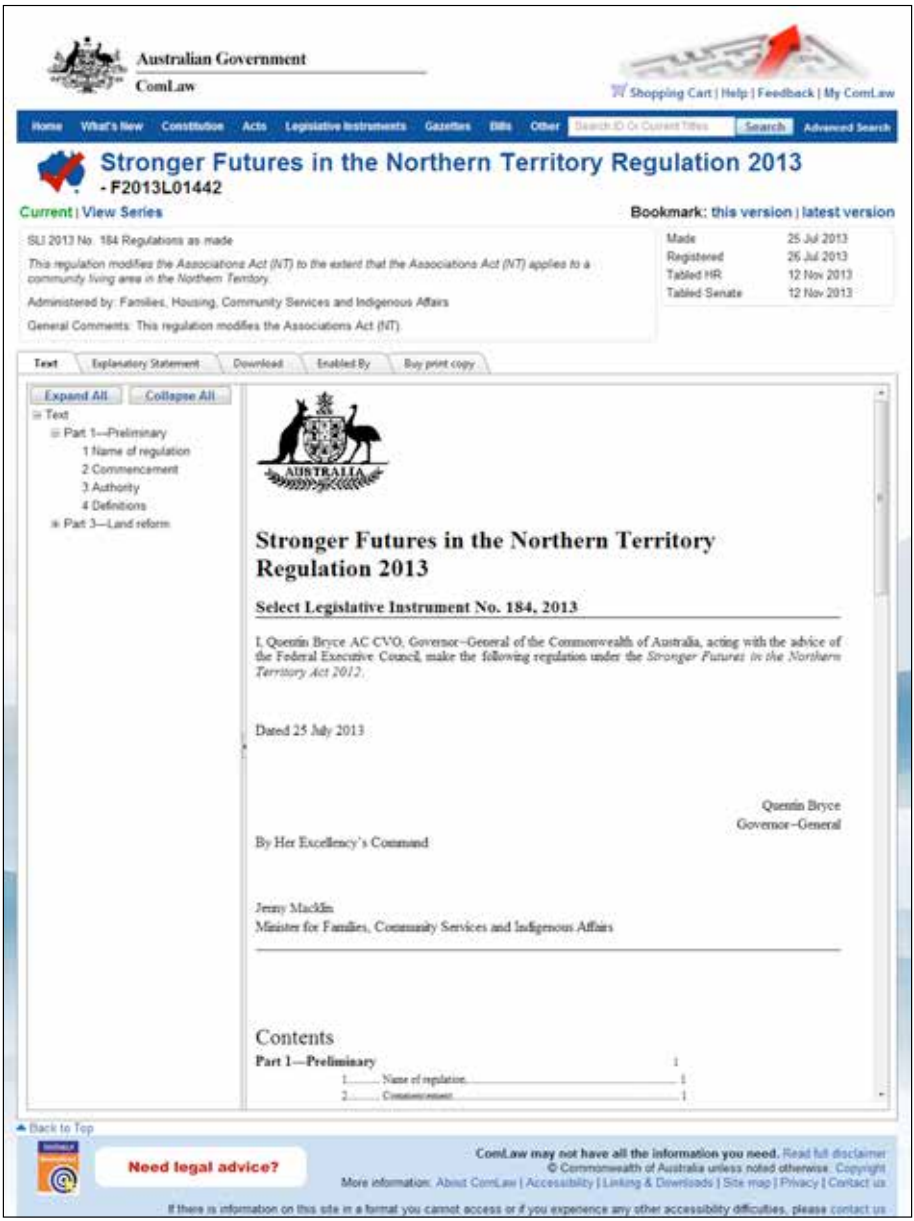
It, therefore, seems most unlikely that the proposals could have been explained, understood and discussed to the point where decisions could have been made during a short visit.

There is considerable concern at the speed in which this process has progressed and that communities have not been given the opportunity to discuss the implications of actions with independent advisers. This, of course, was one of the original questions - Will arrangements be made for land owners to have access to free independent legal advice?

The Regulation

On 26 July 2013 the following information was provided by FaHCSIA via its website:

After considering written feedback received on the Draft Regulation the Australian Government has made the Stronger Futures in the Northern Territory Regulation 2013. The form of the Regulation is consistent with the Draft Regulation provided for comment.[24]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Stronger Futures in the Northern Territory Regulation 2013
- F2013L01442
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SLI 2013 No. 184 Regulations as made
This regulation modifies the Associations Act (NT) to the extent that the Associations Act (NT) applies to a community living area in the Northern Territory.
Administered by: Families, Housing, Community Services and Indigenous Affairs
General Comments: This regulation modifies the Associations Act (NT)
Made 25 Jul 2013
Registered 26 Jul 2013
Tabled HR 12 Nov 2013
Tabled Senate 12 Nov 2013
Text Explanatory Statement Download Enabled By Buy print copy
Expand All Collapse All
Text
Part 1—Preliminary
1 Name of regulation
2 Commencement
3 Authority
4 Definitions
Part 3—Land reform
AUSTRALIA
Stronger Futures in the Northern Territory Regulation 2013
Select Legislative Instrument No. 184, 2013
I, Quentin Bryce AC CVO, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the Stronger Futures in the Northern Territory Act 2012.
Dated 25 July 2013
Quentin Bryce
Governor-General
By Her Excellency's Command
Jenny Macklin
Minister for Families, Community Services and Indigenous Affairs
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The Regulation

- allows community living area title holders to grant leases and licences for a broad range of purposes, including for commercial, infrastructure and public purposes; and
- changes the arrangements in relation to Northern Territory Ministerial consent for leases on community living area land to only require Ministerial consent for leases with a term greater than ten years, rather than 12 months as was previously the case. This consent provision will also apply to licences.[25]

The Regulation is registered on the Federal Register of Legislative Instruments.

The change to the Community Living Area regulations, under the Associations Act, will of course affect all one hundred or so CLAs even though our understanding is that only fifteen of them have been engaged in discussions with the Government.

What are the Long Term Concerns about these Changes?

Whilst CLA communities may legitimately want to provide leases or licences over their land, there are potential threats to Aboriginal land rights in these changes.

The goal must be to ensure that such land holdings are protected and serve the community's requirements. The importance of Aboriginal owners having independent legal advice before engaging in such agreements has never been more important.

Leases and licences, especially to outsiders and especially for

commercial purposes, could alienate much of the land from community use and control for the duration of the lease. A lease is a powerful instrument conferring strong rights on the lessee. The integrity of a small holding can be easily destroyed if it is cut up between various parties.

Once land is leased or licensed, it may not come back into community use and control. Experience from other countries, such as the USA, has shown us that facilitating individual titles to communally held land eventually can lead to significant loss of land from Indigenous ownership and control.

Further, there may be unintended consequences, for example some uses may be incompatible with community living, or be environmentally destructive.

Under this new regulation there is little protection for Aboriginal people with the only safeguards being the requirement for the Minister's consent for any leases or licences that communities might wish to provide for periods longer than ten years.

And what of Consent?

In respect of Aboriginal agreement to the changes involved with the Regulation, this process appears to fall far short of the requirements for informed consent.

The Government undertook a consultation process with a relatively small number of CLA communities. We do not know the views of the majority of CLA communities.

The Government claims this Regulation to be a 'special measure' and so not racially discriminatory. However, it is a

highly complex legislative measure. There are potential threats to Aboriginal land rights in the pastoral areas of the Northern Territory. It is difficult to see that there has been adequate consideration of the Regulation by affected Aboriginal parties, or that this Regulation can safely be considered a 'special measure'.

This change of regulation has not yet been before the Parliamentary Joint Committee on Human Rights. In fact at this point in October 2013, even though operational, it awaits the return of the new Government before it can be passed through the House.

While many communities may benefit from, and support these changes, there are most likely a majority of Community Living Areas that have no knowledge yet of the changes nor have they had the opportunity to discuss them with the Commonwealth Government representatives.

The failure to respect the rights of owners to participate in genuine consultation, to be provided with independent advice and to have a real input to decision-making processes is highly questionable. It is this attitude that had dominated since 2007 and has led to a belief that:

What we have been watching since June 2007, with the support of both major parties, has been the imposition of coercive tactics aimed at removing peoples from their homelands and that is still the case. Aboriginal people have lost their rights to consent and control over the very factors which directly affect their lives. Their rights have been whittled away by changes to legislation and dishonest notions of consultation.[26]

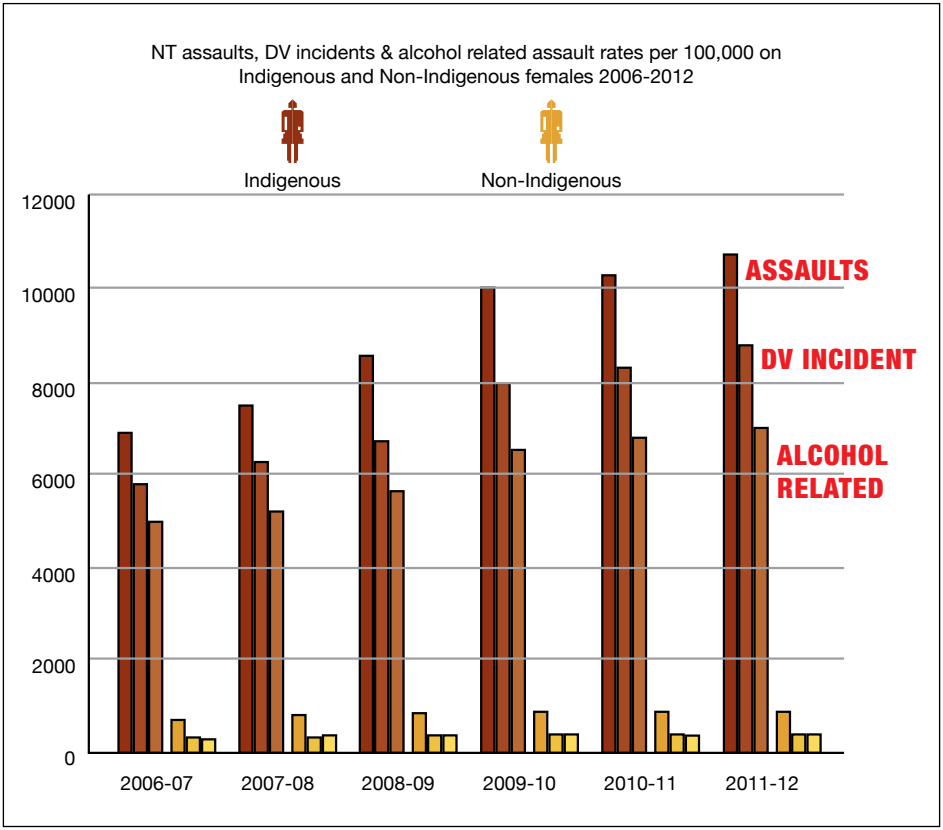
In fact the changes to the CLA regulation was the last

cast of the dice of the Labor Government. Entrenched in the philosophy of a previous Government, it followed unwaveringly a determined strategy of systematically transferring power from local community control to Government. The opportunity to increase the certainty of land ownership for those living in Community Living Areas seems to have never been truly considered.

For all the so-called consultations, none had the power to divert Labor from its agenda. Lack of evidence, appeals from community members, the enormous sums of money expended – all concerns were overridden by a driving force to implement a Canberra policy that was believed to be based on a reform agenda. Never at any stage did Government even come close to understanding the essential need for real partnership with the people themselves. Unless the people were owners of the changes they were destined to fail and in very many cases this has happened. This has been a one-way street.

The Intervention was, we were told, set up to improve the lives of children and women. The graph by Burdon Torzillo & Associates Pty Ltd shows the increase in assault on women since the beginning of the Intervention. There are numerous other measures that show the negative social impact of the Intervention. As Rosalie Kunoth-Monks has been telling us for some time,

People are more traumatised now that they have been for a very long time.



Courtesy:
Burdon Torzillo & Associates Pty Ltd
Data Source: NT Department of Justice

THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS (PJCHR)

The Parliamentary Joint Committee on Human Rights was established on 13 March 2012 when the Senate agreed to a resolution from the House of Representatives, passed on 1 March 2012.

The committee is established by the *Human Rights (Parliamentary Scrutiny) Act 2011.* Section 7 of the Act sets out the functions of the committee as follows:

The Committee has the following functions:

a. to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

b. to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;

c. to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and report to both Houses of the Parliament on that matter.

During the 43rd Parliament the following were appointed to the Committee:

Mr Harry Jenkins MP - Australian Labor Party, Vic

Mr Ken Wyatt AM, MP - Liberal Party of Australia, Hasluck, WA

Senator the Hon Kim Carr - Australian Labor Party, Vic

Mr Graham Perrett MP - Australian Labor Party, Moreton QLD

Senator Anne Ruston - Liberal Party of Australia, SA

Senator Dean Smith - Liberal Party of Australia, WA

Senator the Hon Ursula Stephens - Australian Labor Party, NSW

Mr Dan Tehan MP - Liberal Party of Australia, Wannon Vic

Senator Penny Wright - Australian Greens, SA

Mr Tony Zappia MP - Australian Labor Party, Makin SA

Harry Jenkins on Human Rights Compatibility

Harry Jenkins, Chair of the Committee, points out in a speech to the NSW Bar Association in February 2013 that,

The committee recognises that questions of human rights compatibility are not answered solely by reference to international law and jurisprudence. At heart they are about the practical impact of legislation and the extent to which a proposed limitation on rights is justifiable. The key questions to ask are:

Does the legislation address some compelling social purpose?

Is there a rational connection between the proposed limitations and the objectives of the legislation?

Can we be confident that the proposed limitation will be implemented in a way that is reasonable, necessary and proportionate?

These are questions that parliamentarians, and public servants, are very well positioned to answer. The committee therefore

Harry Jenkins

hopes to facilitate the evaluation of human rights issues by discussing rights in clear language that is meaningful to both lawyers and non-lawyers alike.[27]

Mr Jenkins went on to say that,

some legislation raises human rights concerns of such significance or complexity that the committee may decide to examine it more closely, either individually or as part of a package of related legislation.

The committee has adopted this approach to its examination of the Stronger Futures in the Northern Territory Act 2012.[28]

Request from the National Congress

In June 2012, Harry Jenkins received a request from the National Congress of Australia's First Peoples:

Congress requests the Committee conduct a full and independent examination of the Stronger Future Bills for compliance with human rights obligations under Section 7 of the Act, addressing each of the concerns raised in this statement [below], and utilising the United Nations Declaration on the Rights of Indigenous Peoples as the relevant interpretative instrument through which human rights compliance is assessed.[29]

As pointed out, the

Adherence to human rights is neither a casual nor discretionary undertaking. If the parliamentary scrutiny processes for human rights established through the Human Rights (Parliamentary Scrutiny) Act are to have a purpose and legitimacy, it is imperative that the Bills procedurally be seen

to comply with parliamentary procedures for good democratic practice.[30]

The request from Congress calls on the Parliamentary Joint Committee on Human Rights to scrutinise the Bills and Acts and to exercise its mandate as follows:

(i) to examine the Stronger Futures in the Northern Territory Bills (2011) ('the Bills') for compatibility with human rights under Section 7(a) of the Act and to report on that issue prior to further debate or enactment of the Bills into legislation; or

(ii) in the event the Bills pass into law without the Committee's scrutiny, to examine the consequent legislation, under Section 7(b) of the Act.

Congress specifically asks the Committee to consider three key issues:

- Legislative integrity and proper debate of human rights in Parliament;
- Compliance with the International Instruments on Human Rights;
- Human Rights pertaining to Indigenous Peoples

The full text of this statement can be found on the Congress website. See Appendix C at the end of this book.

Not long after receiving this request, Harry Jenkins made reference to it in his speech to the House of Representatives. He said,

The second piece of correspondence is from the National

Congress of Australia's First Peoples and asks the committee to examine the Stronger Futures in the Northern Territory Bills. Before determining how it will proceed with this request, the committee has written to the Minister for Families, Housing, Community Services and Indigenous Affairs seeking her advice on the compatibility of the bills with human rights. These bills were introduced prior to the requirement for a statement of compatibility. The committee would like to afford the Minister the opportunity to provide her assessment of the policy objectives of the bills against Australia's human rights obligations and clarify for the committee the justification for any limitations on rights that the bills will impose.[31]

A number of other organisations and individuals also made submissions and sent requests to the Committee asking for the legislation to be scrutinized. These included, Aboriginal community organisations, reconciliation and religious groups, academics and members of the legal profession including two retired judges.

A Response from the Minister, Jenny Macklin

A response from the Minister, Jenny Macklin, came very quickly (27 June 2012). In her letter to Mr Jenkins, the Minister acknowledges the extreme harm and distress that has been caused to the Aboriginal peoples of the Northern Territory as a result of how the Intervention was introduced.

Congress of Australia's First Peoples

The Minister also acknowledged that,

... this has caused distrust between the Government and Aboriginal people. Further, the lack of consultation and suspension of the Racial Discrimination Act by the previous Government were major human rights objections to the Northern Territory Response.[32]

The Minister goes on to point out the Racial Discrimination Act was reinstated in the Northern Territory in December 2010. This was considered to have taken place on the basis that the discriminatory practices of the Intervention were categorised as 'special measures'.

A 'special measure' under the Racial Discrimination Act allows for a measure to be discriminatory under human rights treaties in order for a group that is disadvantaged to gain a benefit.

James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, expanded and added to this:

As already stressed, special measures in some form are indeed required to address the disadvantages faced by indigenous peoples in Australia and to address the challenges that are particular to indigenous women and children. But it would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.[33]

In addition, the Minister in her letter drew attention to the importance of consultations with the people, saying that the Government had held extensive consultations with Aboriginal people in the Northern Territory, and that

The Government recognises that even after our extensive consultations, not everyone will agree with what the Government is doing. It is highly unlikely in any circumstances for there to be unanimous agreement with any Government policy.[34]

The PJCHR report states:

... the question of proper consultation with Indigenous groups and other affected communities is relevant for a number of human rights. It is of particular relevance to the enjoyment by Indigenous people of the right to self-determination guaranteed by articles 1 of the ICCPR and the ICESCR. This is also recognised in the general statement in article 19 of the Declaration on the Rights of Indigenous Peoples that:

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*[35]

Very serious concerns were expressed by many organisations and legal practitioners at the time as to the acceptability of the manner in which the consultations had been conducted. No transcripts were made by the Government.

Of the 2009 NT consultations, Alastair Nicholson said,

... the Government's consultation process is an attempt to get support from the communities for the retention of some features of the Intervention which would be designated 'special measures'.[36]

But he says given the flaws he and his colleagues have identified in the consultation process, the meetings can't be considered evidence of consent to 'special measures' under the Act.

In the report by Jumbunna Indigenous House of Learning at University of Technology in Sydney, on the consultations of 2011 we find they reach a number of conclusions including:

- The Stronger Futures consultation process did not comply with Australia's obligations to meaningfully consult with Aboriginal and Torres Strait Islander Peoples
- The Stronger Futures consultation process does not justify classification of the measures in the proposed legislation as special measures[37]

The full report can be found on the Jumbunna Website, details of which can be found at the end of this book.

Minister Macklin provided to the Parliamentary Joint Committee on Human Rights a detailed assessment of the legislation showing how the Government had met its obligations under both domestic and international law with regard to human rights.

The Assessment makes reference to the Convention on the Elimination of All Forms of Racial Discrimination (CERD):

CERD provides that special measures are deemed not to be

discrimination. Special measures are designed to 'secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms[38]

While there is no argument presented or suggestion made as to the non-discriminatory nature of the measures, their reliance on being categorized as 'special measures' underlies the assessment.

The conclusion to the Assessment acknowledges, however, that some rights may be limited by the legislation:

The policy objectives of the Bills are compatible with human rights because they advance some rights, and to the extent that they may limit any rights, these limitations are reasonable, necessary and proportionate.[39]

While much detail had been provided by the Minister, a strong level of doubt remained as to the validity of the 'special measures' and the adequacy of the consultations. Calls continued for the legislation to be scrutinized. Links to the Assessment can be found at the end of this book.

Response from Nicola Roxon, Attorney-General

In the intervening period there had also been calls on Nicola Roxon, the Attorney General, to make the scrutiny decision but she too was most reluctant to oblige. She wrote in response to a request from Greens Senator, Rachel Siewert,

Given the level of Parliamentary scrutiny and debate that has already occurred in relation to the Stronger Futures legislation, I do not consider that further examination by the Parliamentary Joint Committee is necessary.

I note that the Parliamentary Joint Committee also has functions under the Human Rights (Parliamentary Scrutiny) Act to examine Acts for compatibility with human rights. If the Stronger Futures is passed by the Parliament, it would be open to the Parliamentary Joint Committee to review the operation and impacts of the legislation into the future and report to Parliament on any issues of compatibility with Australia's Human Rights obligations.[40]

The legislation did pass through the Senate on 29 June 2012 and the Joint Parliamentary Committee did follow-up by reviewing the Bill(s) under Section 7(b) of the Act.

The Report

The Parliamentary Joint Committee's report was released to the public in June 2013. In a speech to Parliament Harry Jenkins referred to it in this way,

The committee's Eleventh Report of 2013 sets out the committee's examination of the Stronger Futures in the Northern Territory Act and related legislation ...

The committee decided not to hold public hearings or formally invite submissions as part of its examination of this legislation. The committee noted that the Senate Community Affairs Legislation Committee had already examined the legislation in detail and had received over four hundred submissions during that inquiry. After considering these submissions, the committee determined that this body of evidence provided it with a solid basis from which to carry out its examination of the human rights compatibility of the legislation ...

The committee has approached its consideration of the human

rights implications of the policies implemented through this package of legislation using the same analytical framework that it consistently applies to the assessment of limitations of rights in any bill or instrument that comes before it.

Throughout its consideration of the measures in this legislation, the committee has focussed on the same three key questions: firstly, are the measures aimed at achieving a legitimate objective; secondly, is there a rational connection between the measures and that objective; and thirdly, are the measures proportionate to that objective.

The package of legislation implements a range of measures. However, the committee has focussed on three measures: the tackling alcohol abuse measures; the income management measure and the school attendance measure and has indicated that it considers that these measures require careful monitoring and has observed that the committee could usefully perform an ongoing oversight role in this regard. The committee has recommended that in the 44th Parliament the committee should undertake a 12 month-review to evaluate the latest evidence in order to test the continuing necessity of these measures.

This Report has not specifically addressed issues such as: the food security measures relating to the licensing regimes for food stores in certain areas; land reform measures and amendments relating to customary law issues. However, the committee considers that any future monitoring of the implementation of this legislation by this committee would take these issues into account.[41]

The Report gives considerable attention to the background of the Stronger Futures legislation as well as to previous parliamentary inquiries that have already taken place. The

Committee discusses its own mandate and the key rights engaged by the Stronger Futures package of legislation.

The specific human rights issues give focus to 'special measures' and the criteria for their use under human rights law. The ultimate finding in this regard is:

The Committee is not persuaded by the material put before it by the government that the Stronger Futures legislation can properly be characterised as 'special measures' under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or other relevant human rights treaties.[42]

If these measures are not 'special measures' but are discriminatory, then Government is required to prove that there is *a rational connection between the measure and the achievement of the goal, and that the measures adopted are reasonable and proportionate to the achievement of that goal.*[43]

Further to this, Government must be able to show through regular evaluation of the measures that improvements are being made as a result of these measures in achieving their goals. Many believe that, to date, there is no evidence of such improvements and that the removal of rights over such a lengthy period has simply resulted in disempowerment.

As summarised by James Anaya, the UN Special Rapporteur in 2010,

... any government measures that discriminate on the basis of race must, in order to comply with Australia's human rights obligations service the highest scrutiny and be found to be proportional and necessary to advance valid objectives. ... The discriminatory measures of the NTER cannot be found necessary to the legitimate objectives they are intended to

James Anaya

serve, if the discriminatory treatment is not shown to actually be achieving the intended results.[44]

In its concluding comments the Committee identifies critical areas of importance, including:

... the *critical importance of ensuring the full involvement of affected communities, in this case primarily Indigenous communities, in the policymaking and policy implementation process. The right to self-determination guaranteed by article 1 of each of the International Covenants on Human Rights, as well as the UN Declaration of the Rights of Indigenous Peoples, require meaningful consultation with, and in many cases the free, prior and informed consent of, Indigenous peoples during the formulation and implementation of laws and policies that affect them. This means ensuring the involvement of affected communities in decisions as to whether to adopt particular measures, in their implementation, and in their monitoring and evaluation. To do otherwise risks producing the disempowerment and feelings of exclusion and marginalisation that were revealed in the evidence presented to the Senate Community Affairs Legislation Committee and which are fundamentally at odds with the principles of respect for the dignity and autonomy of persons recognised in the human rights treaties and the UN Declaration on the Rights of Indigenous Peoples. The committee recognises the significant steps that the government has taken in this regard, but considers that more needs to be done.*[45]

It is therefore fortunate that the Committee plans to take an oversight role and has recommended that there be a 12-month review which will consider the latest evidence. It will be upon this that further recommendations will be made as to the necessity for the continuity of any of the Stronger Futures measures.

CONSULTATIONS

Consultations as Discussed in the Report

In the report, the Parliamentary Joint Committee on Human Rights (PJCHR) gave considerable attention to the issue of community consultations. It states:

... the question of proper consultation with Indigenous groups and other affected communities is relevant for a number of human rights. It is of particular relevance to the enjoyment by Indigenous people of the right to self-determination guaranteed by articles 1 of the ICCPR and the ICESCR. This is also recognised in the general statement in article 19 of the Declaration on the Rights of Indigenous Peoples that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them[46]

However, the report points out that both major parties, through the Senate Community Affairs Legislation Committee, had reservations about the adequacy of the consultations that had been conducted during the Inquiry and the Senate majority report stated:

Nevertheless, the committee is concerned that there remains misunderstanding of the stronger futures bills in the Northern Territory and that the committee has heard complaints raised about the manner in which the consultations were undertaken. The committee notes with serious concern the degree of

confusion, and frustration expressed in relation to the Stronger Futures consultations. There appears to be a discrepancy between the level of consultation undertaken, as reflected in FAHCSIA's evidence and the consultation evaluation report, and the level of understanding within communities.

While the committee appreciates that the Commonwealth government made significant efforts to consult with people on the changes, and to inform them of the impact, more needs to be done to ensure that these processes are effective. The committee notes the development of the framework for engaging with Aboriginal and Torres Strait Islander Australians, but emphasises that the success of such a framework lies in commitment to implementation by agencies. It notes also the concern of the Australian Human Rights Commission that the capacity of communities has declined since the introduction of the Northern Territory Emergency Response, and that this could make effective consultation more difficult.

The committee agrees with the Australian Human Rights Commission that the criteria should guide the way that governments and agencies engage with Aboriginal and Torres Strait Islander communities. Consultations should also build on the cultural competency principles advocated by the Australian Human Rights Commission.[47]

The PJCHR Committee therefore concluded that it endorsed,

... the recommendation of the Senate Community Affairs Legislation Committee that the framework articulated by the Australian Human Rights Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner for meaningful and effective consultation with Indigenous communities should be adopted by government.[48]

The aim is, of course, to ensure that Aboriginal and Torres Strait Islander peoples are provided with the opportunity to give their informed consent to the measures which will directly affect them.

Consultation on Community Living Areas

The endorsement by the PJCHR Committee of the consultation criteria was made before consultations were undertaken by Government with the Community Living Areas. Additionally, in his submission on Community Living Areas, the Aboriginal and Torres Strait islander Social Justice Commissioner for Human Rights, Mick Gooda, attached a copy of the criteria for meaningful and effective consultations with Indigenous communities, offering further discussion if requested.

Once again Government chose not to follow advice offered to it. Again, despite requests, no transcripts of the consultations were made available. More critical was the failure to provide access for owners to independent advice, as set out under the criteria for an effective and meaningful process by the Australian Human Rights Commission.

In an interesting article, "Ensuring Indigenous Consent," Paul Howorth makes the point:

If the Australian Government does adopt the recommended framework and its objective of obtaining consent, there still remains the question of what standard of consent should apply. ... That standard ought to be free, prior and informed consent.

The standard of free, prior and informed consent deliberately places an emphasis upon the quality of consent. Questions about the quality of consent are not foreign to law. In contract

law, for example, agreements can be struck out because a person's consent was tainted when gained. Free means free from forces like coercion, duress and undue influence. Prior means before actions are carried out. Informed means the person consenting has the capacity and capability to make a choice based on sound knowledge and understanding of the consequences of consent. One can reflect upon the history of Indigenous and non-Indigenous engagement in Australia since European settlement and ask whether a different history might have been written if this standard had applied to the laws and policies of our country.[49]

Howorth continues by saying,

In my view, the standard would apply to all measures and actions that by intent or effect would affect any land held under the various forms of Indigenous title; to all measures and actions that by intent or effect would primarily impact upon Indigenous people; and negotiation of consent would occur directly with Indigenous people and / or legitimately determined representative groups. The consent negotiation process would be formally and transparently documented, and where necessary independent support would be provided to Indigenous people to balance the unequal power relations that favour the vastly resourced state and other private interests.[50]

There seems to be great merit in advancing these ideas. It is very clear that there is a desperate need to formalise the consultation processes which have such huge impact on the lives of Aboriginal peoples. The lack of any formal standards for consultation processes has plagued all attempts to reach genuine agreements over the period of the Intervention and now into that of the Stronger Futures legislation.

Howorth suggests that a further step is required as a way of strengthening these requirements:

... the standard should be established by a stand-alone federal law, one that is not embedded within and cannot be changed by the parade of legislation packages that accompany the new Indigenous policy whims of incoming federal and state governments. The standard would be enforceable by courts.[51]

Such ideas are very valuable. They draw to attention just how little has been done in the absence of a treaty to address the power imbalance between Aboriginal peoples and Government.

In the Northern Territory, the one piece of legislation that has brought some comfort has been the Aboriginal Land Rights Act of 1976. We have already heard, however, from the Chair of the NLC, Wali Wunungmurra, of his desire to protect this legislation from further amendments and from the whims of Government.

It is well and truly time for a government with strong leadership to sit down with Aboriginal peoples from across the country to negotiate the real terms of engagement. The symbolism of the past few years, of the Apology and the Welcome to Country, can never, on their own, be more than hollow offerings. Underlying them is the need to negotiate the just terms of a working relationship, a legally binding contract, to provide Aboriginal peoples with the certainty required to move forward to true self-determination.

We should not forget that Australia is the only Commonwealth country that does not yet have a treaty with its First Peoples.[52]

Appendix A: Features of a Meaningful and Effective Consultation Process

1. The objective of consultations should be to obtain the consent or agreement of the Aboriginal and Torres Strait Islander peoples affected by a proposed measure

In all cases, States should engage in '[a] good faith effort towards consensual decision-making. Consultation processes should therefore be framed *'in order to make every effort to build consensus on the part of all concerned'*.

2. Consultation processes should be products of consensus

The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on indigenous peoples. A consultation process should itself be the product of consensus. This can help ensure that the process is effective.

3. Consultations should be in the nature of Negotiations

Governments need to do more than provide information about measures that they have developed on behalf of Aboriginal and Torres Strait Islander peoples and without their input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set. Governments need to be willing and flexible enough to accommodate the concerns of Aboriginal and Torres Strait Islander peoples, and work with them in good faith to reach agreement. Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on the rights of Aboriginal and Torres Strait Islander

peoples, and that the affected peoples do not agree to the measure.

4. Consultations need to begin early and should, where necessary, be ongoing.

Aboriginal and Torres Strait Islander peoples affected by a law, policy or development process should be able to meaningfully participate in all stages of its design, implementation and evaluation.

5. Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance

The capacity of Aboriginal and Torres Strait Islander communities to engage in consultative processes can be hindered by their lack of resources. Even the most well-intentioned consultation procedure will fail if Aboriginal and Torres Strait Islander peoples are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to their communities or access appropriate expert advice, Aboriginal and Torres Strait Islander peoples cannot possibly be expected to consent to or comment on any proposal in a fully informed manner.

6. Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision

Aboriginal and Torres Strait Islander peoples should be able to participate freely in consultation processes. Governments should not use coercion or manipulation to gain consent.

In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes.

7. Adequate timeframes should be built into the consultation process

Consultation timeframes need to allow Aboriginal and Torres Strait Islander peoples time to engage in their decision-making processes and cultural protocols. Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner.

8. Consultations should be coordinated across government departments

Governments should adopt a 'whole of government' approach to law and policy reform, pursuant to which consultation processes are coordinated across all relevant departments and agencies. This will assist to ease the burden upon Aboriginal and Torres Strait Islander peoples of responding to multiple discussion papers and reform proposals.

9. Consultations need to reach the affected communities

Government consultation processes need to directly reach people 'on the ground'. Given the extreme resource constraints faced by many Aboriginal and Torres Strait Islander peoples and their representative organisations, governments cannot simply expect communities to come to them. Governments need to be prepared to engage with Aboriginal and Torres Strait Islander peoples in the location that is most convenient for, and is chosen by, the community that will be affected by a proposed measure.

10. Consultations need to respect representative structures and decision-making processes

Governments need to ensure that consultations follow appropriate community protocols, including representative and decision-making mechanisms. The best way to ensure this is for governments to engage with communities and their representatives at the earliest stages of law and policy processes, and to develop consultation processes in full partnership with them.

11. Governments must provide all relevant information, and do so in an accessible way

To ensure that Aboriginal and Torres Strait Islander peoples are able to exercise their rights to participate in decision-making in a fully informed way, governments must provide full and accurate information about the proposed measure and its potential impact. This information needs to be clear, accessible and easy to understand. Information should be provided in a plain-English format, and, where necessary, in language.

Appendix B: Community Living Areas

(from the FaHCSIA Website)

Community Living Areas on freehold land under the Northern Territory Lands Acquisition Act.

Community Living Area	Community Living Area Locations
Akwerrnge	Neutral Junction
Alatyeye	Alcoota
Alpurrurulam	Lake Nash
Aluralkwa	Loves Creek
Alyuen	Aileron
Angula	Woodgreen
Angula (Mulga Bore)	Woodgreen
Anyungyumba	Pine Hill
Areyn	Derry Downs
Atitjere	Mount Riddock
Binjen Ningguwung	Keep River
Bringung	Roper Valley
Bulla Goorbidjim	Auvergne
Camfield Mudburra	Camfield
Djarrung	West Mathison
Dumbral	Newry

Engawala..... Alcoota

Gulunurrau..... Alroy Downs

Gurdangi..... McArthur River

Ijarri..... Tawallah Downs

Ilpurla..... Henbury

Imangara..... Murray Downs

Imanpa..... Mount Ebenezer

Imperrenth..... Elkedra

Inelye..... Huckitta

Injulkama..... Amburla

Irrerlirre..... MacDonald Downs

Irtnwere Tyewelkere..... West MacDonnell N P

Iuwakam..... Gregory N P

Jangirurlau..... Powell Creek

Jibabana..... Spring Creek

Jilkminggan..... Elsey

Jirrngow..... Mistake Waterloo Creek

Jungalina..... Wollogorang

Jungarrayiwarnu..... Newhaven

Kalumbulani..... Camfield

Karriyarra..... Central Mount Wedge

Kujuluwa..... Brunette Downs

Kurripi ..... Mount Denison

Laramba ..... Napperby

Lilla ..... Watartka N P

Lingarra-Ngaringman ..... Humbert River

Mamp ..... Coniston

Maperte ..... Lucy Creek

Marralum Darrigaru ..... Legune

Marurrum ..... Rosewood

Mayamumbin ..... Gregory N P

Mbungara ..... Narwietooma

Meercantie..... Mount Doreen

Menge ..... West MacDonnell N P

Minyerri ..... Hodgson Downs

Mistake Creek ..... Mistake Creek

Mulluyu..... Kirkimbie

Ngaringman Yarralin..... Victoria River Downs

Nungali Jaminjung..... Fitzroy

Nyawanyawam Dawang ..... Keep River

Orrtipa Thurra ..... Jervois

Pantharrpilenhe ..... Ambalindum

Pawuwa..... Phillip Creek

Pwerte Marnte Marnte ..... Orange Creek

Rittaraungu..... Urapunga

Tara ..... Neutral Junction

Titjikala ..... Maryvale

Ukaka ..... Tempe Downs

Ulbulla..... Umbeara

Ulpanyali..... Tempe Downs

Urlampe..... Tobermorey

Waju ..... Mount Cavenagh

Wanarkula ..... Mulga Park

Wanmarra ..... Watarrka N P

Wapirrka..... Victory Downs

Welere ..... Derry Downs

West Lagoon ..... McArthurRiver

Wilora..... Stirling

Wirrmalyanya..... Umbeara

Wogayala..... Rockhampton Downs

Wonmurri ..... Manangoora

Wunoworill ..... Hodgson River

Wurrkleni ..... Willeroo

Wutunurrgurra..... Epenarra

Yanginj ..... Anningie

Yangulinyina ..... Calvert Hills

Appendix C:

Statement to the Parliamentary Joint Committee on Human Rights on the Parliamentary Scrutiny of Human Rights as applied to the Stronger Futures in the Northern Territory Bills (2011)

NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES JUNE 2012

1. Request for Examination of Parliamentary Scrutiny of Bills and Acts

Congress calls on the Parliamentary Joint Committee on Human Rights to exercise its mandate:

(i) to examine the Stronger Futures in the Northern Territory Bills (2011) ('the Bills') for compatibility with human rights under Section 7(a) of the Act and to report on that issue prior to further debate or enactment of the Bills into legislation; or

(ii) in the event the Bills pass into law without the Committee's scrutiny, to examine the consequent legislation, under Section 7(b) of the Act.

Congress specifically asks the Committee to consider three key issues:

- Legislative integrity and proper debate of human rights in Parliament;
- Compliance with the International Instruments on Human Rights;
- Human Rights pertaining to Indigenous Peoples.

2. Legislative integrity and proper debate of human rights in Parliament

The stated purpose of a Statement of Compatibility is to inform Parliamentary debate on human rights[1].

The Government has not prepared a Statement of Compatibility allegedly because the Bills were introduced into Parliament on 23 November 2011, thus preceding the commencement date for the *Human Rights (Parliamentary Scrutiny)* Act on 4 January 2012.

[1] Clause 8, *Explanatory Memorandum to the Human Rights (Parliamentary Scrutiny) Act*

The Human Rights (Parliamentary Scrutiny Act) makes explicit reference to both Bills and Acts in granting the Committee broad powers of examination (Sections 7(a) and 7(b) respectively). Parliament therefore did not intend for the stage of parliamentary procedure which legislation has reached to be the basis to determine whether or not human rights implications should be under scrutiny. Clearly, the Parliament intended that all laws be examined as may be possible or required.

A technical reliance on timing as a reason to deny proper debate of human rights obligations may be contrary to the spirit of the *Human Rights (Parliamentary Scrutiny) Act.* Congress cannot accept, in the circumstances, that sufficient reason exists for the Government to refuse to present a Statement of Compatibility.

It certainly implies a disregard of the interests of the public and, in this case, the interests of the intended beneficiaries of the legislation.

Congress expects that the Government will give due regard to the disadvantaged political status of the Aboriginal and Torres Strait Islander population in Australia and, as a consequence, pursue a high standard for the preparation, design and implementation of laws which relate to the First Peoples of Australia.

Congress expects in this case that proper parliamentary procedures be implemented that meet public demands for transparency and accountability in the legislature. The human rights implications of the Bills are well understood by Aboriginal community groups. The frustration shown in the community at the failure to properly account for the human rights impact of the Bills should serve as a clear signal to

the parliament. The Yolngu Nations Assembly, representing 8000 people in west, central and east Arnhem Land, have already demanded the laws be scrapped or they would refuse participation in land lease negotiations or approving exploration licences.

The United Nations Office of the High Commissioner for Human Rights is aware of the current status of the Bills, and advocates to the Government an examination by the Parliamentary Joint Committee:

> *"There is a path that the Government can take to reassure its critics that it wants the Stronger Futures to comply with human rights standards. Putting it up for review by the Parliamentary Joint Committee on Human Rights would be a strong signal". (Matilda Bogner, United Nations Human Rights Office Regional Representative in the Pacific, 22 May 2012).*

3. Compliance with the International Instruments on Human Right

3.1 Relevant International Instruments

Congress considers there are at least three international instruments, to which Australia is a signatory, that have relevance to the Bills:

(i) The International Convention on the Elimination of all Forms of Racial Discrimination;

(ii) The International Covenant on Economic, Social and Cultural Rights ; and

(iii) The International Covenant on Civil and Political Rights.

3.2 Self-Determination

The right of peoples to self-determination is established in the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights.*

Aboriginal peoples and Torres Strait Islander peoples have the right of self-determination in accordance with these instruments. The right of Indigenous Peoples to self-determination was clarified by the General Assembly when the Declaration on the Rights of Indigenous Peoples was adopted in 2007.

The preambular paragraphs of the Declaration affirm that Indigenous peoples are equal to all other peoples and acknowledges that "the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Program of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

The Human Rights Committee acknowledges the right of Indigenous Peoples to self-determination has bearing under the Covenant on Civil and Political Rights.

Consistent with the right to self-determination the Declaration goes on to instruct that "States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

Congress has realistic expectations that the Government will participate in good faith negotiations to find acceptable solutions to the challenges confronting the Northern Territory communities.

Congress observed expert testimony to the Senate Standing Committee that the consultation process for the Bills was flawed and that the Aboriginal communities of the Northern Territory have not been not given enough opportunity and support to find and implement their own solutions to their situations.

The Bills can be seen to be an improvement upon the *Northern Territory Emergency Response* (2007) (NTER). However the Bills will, if enacted, inevitably extend many provisions commenced under the NTER. Aboriginal people of the Northern Territory potentially face over 15 years of interventionist laws that restrict their freedoms and impinge upon their right to equality and non-discrimination. Congress recognises the risk of further institutionalising the people under restrictive laws and the ever-increasing powers of Government.

The passage of the Bills through the House of Representatives without acknowledgement or recognition of the concerns raised by Aboriginal people and community groups is a breach of good faith referred to in Article 18 of the Declaration.

3.2 Special Measures

The Government has asserted the Bills are 'Special Measures' within the meaning of the *Racial Discrimination Act 1976.*

Special Measures are defined under Article 1.4 of the *International Convention on the Elimination of all Forms of Racial Discrimination* as measures taken "for the sole purpose

of securing adequate advancement of certain racial or ethnic groups or individuals".

Congress has sought the Government's response to the criteria of 'Special Measures' outlined by the International Convention on the Elimination of all Forms of Racial Discrimination[2]. In being informed by the Convention and by the Australian Human Rights Commission, Congress understands Special Measures must:

- Have the sole purpose of ensuring equal human rights.
- Obtain the prior, informed consent of the people affected.
- Be designed and implemented through prior agreement with the people concerned.
- Have clarity in regard to the results to be achieved from the special measures.
- Have accountability to the people concerned.
- Be appropriate to the situation to be remedied and grounded in a realistic appraisal of the situation to be addressed.
- Have justification for the proposed special measures including how they will obtain the perceived outcomes.
- Be temporary and only maintained until disadvantage is overcome.
- Have a system for monitoring the application and results of special measures.

[2] United Nations Committee on the Elimination of Racial Discrimination (2009) *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*.

4. Human Rights pertaining to Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* is a platform for engagement between Governments, Aboriginal and Torres Strait Islander peoples and their representative bodies.

The Declaration was endorsed by the Australian Government on 3 April 2009 but is yet to be implemented into Australian law and practice. Congress expects the definition of 'human rights' under Section 3 of the *Human Rights (Parliamentary Scrutiny) Act* will ultimately include the Declaration as an interpretive instrument to complement the formally recognised international instruments.

The Government has indicated it wishes to "reset its relationship with Indigenous peoples based on genuine consultation, engagement and partnership"[3]. An acknowledgement of the Declaration both formally and in practical application is a fundamental pillar of this relationship.

Accordingly, Congress calls on the Committee to:

(i) Utilise the Declaration as a principal interpretative instrument in examining the Bills' compatibility with human rights; and

(ii) Make a specific recommendation for the amendment to the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act* to include the *United Nations Declaration on the Rights of Indigenous Peoples* as a formally recognised international instrument in human rights scrutiny.

[3] Commonwealth (June, 2011) *Stronger Futures in the Northern Territory: Discussion Paper*, p 4.

5. Conclusion

Adherence to human rights is neither a casual nor discretionary undertaking. If the parliamentary scrutiny processes for human rights established through the *Human Rights (Parliamentary Scrutiny) Act* are to have a purpose and legitimacy, it is imperative that the Bills procedurally be seen to comply with parliamentary procedures for good democratic practice. In this instance it is important that the Bills undergo a proper and independent assessment by the Joint Committee of their human rights impact.

Congress requests the Committee conduct a full and independent examination of the Stronger Futures Bills for compliance with human rights obligations under Section 7 of the Act, addressing each of the concerns raised in this statement, and utilising the *United Nations Declaration on the Rights of Indigenous Peoples* as the relevant interpretative instrument through which human rights compliance is assessed.

A commitment by the Committee to examine the Bills for human rights compliance will demonstrate good faith by the parliament and be a basis upon which all levels of Government can generate productive partnership with Aboriginal and Torres Strait Islander peoples.

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