SUBMISSION

***From*: Greg Marks (Policy and International Law Analyst)**

To: **Senate Community Affairs Legislation Committee**

Re Inquiry into Social Security Legislation Amendment Bill 2011; Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011; Stronger Futures in the Northern Territory Bill 2011

Introduction

I wish to draw to the attention of the Committee my concerns with one part of the 'Stronger Futures in the Northern Territory Bill 2011'.

The section in question is 'Part 3 – Land Reform'. Within Part 3 I am concerned with the provisions of 'Division 3 – Community living areas', in particular section 35 – 'Modifying NT laws in relation to community living areas'.

This part of the proposed Stronger Futures legislative package appears to have been largely out of the public view to date. The consideration and discussion surrounding the proposed package of legislation has tended to focus on contentious matters of Income Management and of conditionality of social security benefits linked to school attendance (Improving School Enrolment and Attendance through Welfare Reform Measure - SEAM).

However, in my view the 'Land Reform' provisions in respect of Community Living Areas (CLAs) are potentially very important in the longer term. I request that the Committee closely examine these provisions. I will outline my concerns below.

Background - *Community Living Areas*

Community Living Areas are the areas that have, in general, been excised from pastoral leases for the benefit of Aboriginal people. Whilst not granted on a traditional ownership basis, they largely reflect traditional ownership in the pastoral areas of the Northern Territory where there has been little or no other reservation of land for Aboriginal purposes.

Community Living Areas are perceived by Aboriginal people as small pieces of land that have been returned to them out of the totality of their 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 their Aboriginal owners had been largely undisturbed. With pastoralism they lost heavily. The, usually small, Community Living Areas granted since the 1960s have represented at least a modicum of return of ownership and control for the traditional owners of the country concerned.

Community Living Areas are absolutely fundamental to the continued viability, coherence and well-being of Aboriginal people in large areas of the Northern Territory. They are a form of *de facto* land rights.

The proposed legislation

Community Living Areas are the responsibility of the Northern Territory Government and are established under Northern Territory legislation. The Provisions in the Stronger Futures in the Northern Territory Bill 2011 establish a 'contingency' power of the Commonwealth to take over by regulation from the Northern Territory responsibility for the land use and planning of CLAs. It does

not take over that responsibility immediately or directly by the legislation. The Bill simply provides the Commonwealth with the power to do so whenever it so wishes.

The scope of the regulatory and planning powers that can be assumed by the Commonwealth in respect of CLAs is wide. Thus section 35 (1) provides that :

35. (1) The regulations may modify any law of the Northern Territory relating to:
(a) the use of land; or
(b) dealings in land; or
(c) planning; or
(d) infrastructure; or
(e) any matter prescribed by the regulations;

to the extent that the law applies to a community living area.

Before making such regulations, section 35 (4) provides that the Commonwealth Minister must consult with the Government of the Northern Territory.

The Minister must also consult in the case of CLAs with the Land Council for the area. The Minister may also consult with anyone else (the example given in the Explanatory Memorandum is the Northern Territory Cattlemen's Association).

The Minister must consult with the (presumably Aboriginal) owner of the CLA *if the owner requests to be consulted* about the making of the regulations in question (my italics).

This provision, incidentally, contrasts with the same relevant provision in respect of town camps (section 34 (8) (b)) where in that case the (presumably Aboriginal) lessee *must* be consulted and does not need to request consultation for that to be required of the Minister. This appears to be an odd discrepancy as it appears to give a different order of consultation rights between town camps and CLAs. Town camps appear to have a higher degree of consultation rights even though residents of CLAs would usually be traditional owners or associated by tradition with the country in question.

Concerns

My concerns centre around consent and consultation. Overall, the provisions of Division 3 are designed to bring CLAs clearly within the purview of the Commonwealth's policy control as asserted through the Intervention, and to allow it to pursue its 'voluntary' leasing and other economic development objectives. In so doing it can, given the wide range of regulatory powers available, appropriate to itself considerable power over the lives of the residents of the CLAs.

There are two levels of concern regarding consent and consultation.

The first is in respect of the legislation itself. Despite the Government's assertions that it has consulted widely about the "Stronger Futures' package, I do not see, when looking at the FaHCSIA information, any indication whatsoever that these particular provisions, despite their significance, were raised and discussed with Aboriginal people in the Northern Territory in the consultation process.

Important legislation potentially bearing directly and significantly on the lives of Aboriginal people should be explained fully, the views of Aboriginal people sought, and, preferably, their informed consent requested. This does not appear to have happened in this case.

If the relevant consultation has not taken place, one option for this part of the legislation would be for it to be deferred pending such consultation. The question of whether consultation on the these provisions took place is worthy of the Committee's consideration.

The second is the level of consultation and consent envisioned in respect of regulations made under the legislation should the Commonwealth Government decide to make such regulations. The provision for consultation with the Aboriginal owner or owners is weak.

Does the owner *directly* receive notification? – public notification, mentioned in the Explanatory Memorandum (although not included in the Bill) can be ineffective in remote areas, especially given low levels of literacy. Should not the owner be consulted with as a matter of course?

The provisions are potentially disempowering, and it is hard to imagine that mainstream owners or lessees of property would be treated in such a manner (which, incidentally, is why I feel confident that these provisions do not meet the requirements of 'special measures'). The provision for consultation with the Land Council may provide some safeguard, but the Land Council is not the owner. These owners are capable of speaking for themselves, albeit with assistance from the Land Council if they wish, and the legislation should provide that they will be consulted without them having to make a special request.

In all, the potential for the land owner, that is the Aboriginal people involved, to be marginalised from control of their own land appears, on my reading, to pose a threat to the integrity of the range of measures that have, cumulatively over the years, provided for 'land rights' for the Aboriginal people of the Northern Territory. CLAs are an important part of the land base for Northern Territory Aboriginal people.

Conclusion

I have outlined concerns that I have, on my reading of the provisions, with the Community Living Areas section of Part 3 of the Bill. I would greatly appreciate the Committee examining these concerns. If the Committee does feel there is substance to these concerns, the question would arise on ways in which the legislation might be postponed or improved to alleviate these concerns and provide for meaningful consultation and participation. The current provisions are, in my view, in danger of being discriminatory both in terms of the apparent lack of consultation in developing the legislation itself and in respect of the consultation mechanisms contained in the legislation when implemented.

Greg Marks