



THE UNIVERSITY  
OF  
NEW SOUTH WALES



FACULTY OF LAW

Ms Jackie Morris  
Committee Secretary  
Senate Legal and Constitutional Committee  
Parliament House  
Canberra ACT 2600

9 August 2007

Dear Ms Morris

### **Inquiry into NT National Emergency Response Package 2007**

There is a debate about the extent to which it is necessary to over-ride existing property rights in order to deal with very serious issue of child sexual abuse in Northern Territory Aboriginal communities. The Committee is hearing from a range of organisations that are familiar with these issues on the ground and we do not propose in this submission to enter that debate in any detail.

We merely note two preliminary points. First, Aboriginal organisations and individuals have sought decisive government action on these and related issues for many years. A concerted commitment to make long term improvements, backed by the necessary resources, in itself is a welcome thing. Secondly, *how* governments go about the task is vital. That is so for reasons of principle, because human beings and their fundamental rights are at stake. And it is so for pragmatic reasons as well. Hard-headed analysts such as the Secretary of the Treasury, Dr Ken Henry, the Chairman of the Productivity Commission, Mr Gary Banks, and the Commonwealth Grants Commission have all emphasised that top-down approaches in Indigenous affairs that lack a long-term partnership approach are extremely unlikely to achieve their stated objectives.

This submission, however, focuses on a single legal and constitutional aspect of this very large legislative package. That is the impact of Part 4 of the Northern Territory National Emergency Response Bill 2007 (Emergency Response Bill). In particular we focus on property rights and compensation consequences, taking account of the just terms guarantee in the Australian Constitution.

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We have isolated two distinct issues:

1. To what extent are Aboriginal property rights diminished under Part 4?
2. How does the Emergency Response Bill address the compensation consequences?

We do so for two reasons. Whatever one thinks of the merits of diminishing property rights as part of an emergency response to child sexual abuse, it is necessary and appropriate to crystallise an understanding of how far that incursion on property rights goes. And debate over the merits of infringing on property rights needs to be separated out from the Commonwealth's legal and constitutional obligations to property holders who suffer adverse consequences from the pursuit by the Commonwealth of its public policy objectives.

In relation to the issues enumerated above, the two basic points of this submission are:

1. The incursions on Aboriginal property rights are significant and occur on a number of fronts, including a wholesale exemption from the future act regime of the *Native Title Act 1993* (Cth). It is very difficult to imagine non-Aboriginal people's property rights being diminished in a similar, blanket way by the Commonwealth in pursuit of a child welfare policy objective.
2. The compensation procedures under the Emergency Response Bill compare unfavourably with what non-Aboriginal people can expect to enjoy if they find their property rights diminished in a similarly significant way.

***A non-Aboriginal property holder in the Northern Territory whose property rights are taken away by government has access to a statutory compensation regime. Why not accord the same respect to Aboriginal property rights in this instance? Why should traditional owners have to climb over numerous additional legal obstacles to obtain compensation, by proving that a constitutional 'acquisition of property' has occurred? This relegates Aboriginal property rights to a lower level of legal protection. Whether intentional or not, it has the effect of capitalising upon numerous complexities and doubts surrounding the meaning of section 51(xxix), to the advantage of the Commonwealth and to the disadvantage of Aboriginal people whose sole valuable asset is frequently their property rights.***

In ordinary circumstances, we would provide the Committee with a detailed written submission, substantiating these points and dealing with other aspects of this very large legislative package. That, of course, is impossible in the absurdly compressed timeframe in which Parliament and the community must scrutinise the detailed legislation.

For that reason we simply add a series of questions which we believe are appropriate to be put to the Commonwealth at the one-day hearing to be held tomorrow, 10 August 2007.

## **Questions for the Commonwealth**

### ***Issues relating to the Emergency Response Bill itself***

1. As a matter of policy, why should traditional owners have to climb over numerous additional legal obstacles to obtain compensation, by proving that a *constitutional*

‘acquisition of property’ has occurred, when other property holders in Australia enjoy an upfront *statutory* right to compensation when their property rights are taken away?

2. Why is the payment of rent for a section 31 lease left to the Minister’s discretion, as to whether he/she requests a valuation from the Valuer-General (see s 62)?

3. Are these two obstructionist aspects of the compensation regime consistent with the Government’s stated objective that Aboriginal people should derive greater economic benefit from their land rights than has been the case to date?

4. Are improvements on Land Rights Act (ALRA) land that are funded by the Commonwealth, such as buildings or infrastructure, assets owned by the traditional landowners? If not, what is the rationale for s 61(c) of the Bill?

5. Should s 57 of the Bill be read as an indication that there is a close relationship between the forced 5 year lease provision (s 31) and the creation of a headlease-sublease arrangement in townships?

6. Why should the Commonwealth be able to sublease ALRA land to someone else without the consent of traditional owners (s 52(7)) when the Land Rights Act has always insisted that such consent is necessary and appropriate (ALRA s 19A(8))?

7. Why does the Bill prohibit Parliament from examining Commonwealth public works on affected Aboriginal land through the Parliamentary Standing Committee on Public Works, during the 5 year window?

### ***Constitutional issues***

8. What is the Commonwealth’s view on whether the just terms guarantee in the Constitution applies in the Northern Territory, since the High Court’s decision in *Newcrest v Commonwealth*?

9. In the Commonwealth’s view, is the fairness of the *process* for recovering compensation from the Commonwealth for a constitutional ‘acquisition of property’ relevant to whether ‘just terms’ are provided?

If it proves possible overnight, we will send the Committee a brief supplementary written submission prior to the commencement of hearings providing more detail in relation to the two key points made in this submission.

Yours sincerely

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