



12 April 2013

The Hon Jenny Macklin MP  
Minister for Families, Community Services  
and Indigenous Affairs  
Parliament House  
Canberra ACT 2600

Dear Minister Macklin

**Re: Community Living Area Land Reform in the Northern Territory Discussion Paper**

I welcome the Government's intention to commit to reforming land tenure arrangements on Community Living Area (CLA) lands in order to provide land owners with the opportunity for economic development and home ownership.

This approach is consistent with the view of the Special Rapporteur on the rights of indigenous peoples, who has stated that 'increasing indigenous peoples' control over their lands and resources, self-determination and self-government is an essential component of advancing economic development'.<sup>1</sup> It is also consistent with Article 32(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*, which states that Aboriginal and Torres Strait Islander peoples 'have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.

I make the following comments in relation to the four proposals outlined in the Government's discussion paper, *Community Living Area Land Reform in the Northern Territory*.

*Allowing for voluntary lease negotiations*

In its submission to the Senate Community Affairs Legislation Committee in the Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills (Stronger Futures Inquiry), the Commission stated:

While the Commission is supportive of the Australian Government's commitment to transition to voluntary leases, we have broader concerns about the Government's prioritisation of obtaining 'secure tenure'.<sup>2</sup>

In particular, I urge the 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. To do this, the

measures must be developed and implemented in partnership with affected Aboriginal people.

I also note that 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.’<sup>3</sup>

However, land tenure reform will not – on its own – create economic development opportunities and guarantee home ownership. For example, the submission from the Aboriginal Peak Organisations Northern Territory (APO NT) to the Stronger Futures Inquiry noted:

Problems arise, however, from seeking to address entrenched economic and social disadvantage experienced in remote communities simply as a matter of securing leases. 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.<sup>4</sup>

The Commission also considers issues such as remoteness, education, health, job readiness and poor infrastructure (in particular, power, water and sewerage) are substantially more important and have a greater impact on the economic development of communities than lack of secure tenure.<sup>5</sup> The Government should ensure prioritisation of funding to address these factors in addition to formalising tenure arrangements.

#### *Giving more support to CLA land owning associations and corporations*

The discussion paper proposes to provide more support to CLA land owning associations and corporations. While I welcome the proposal for the Government and/or land councils to provide assistance to associations and corporations, this should be consistent with arrangements that facilitate effective, legitimate and culturally relevant Indigenous governance set out in chapters 2 and 3 of the *Native Title Report 2012*.<sup>6</sup>

#### *Ensuring the right processes are in place for land dealings*

I note that the discussion paper states that the ‘Australian Government recognises the key role of the NT Government in CLA reform. The Stronger Futures legislation does not prevent NT legislative amendments, and can complement any NT improvements to CLA title.’<sup>7</sup> However, it is not clear how the proposed reform of CLA land will operate in the context of other land tenure and land reform proposals; for example, changes to the Homelands policy currently being proposed by the Northern Territory Government. Again, I reiterate that any processes about land reform need to ensure that traditional owners are enabled to make decisions about their country and are consistent with the arrangements that facilitate effective, legitimate and culturally relevant Indigenous governance set out in the *Native Title Report 2012*.<sup>8</sup>

*Allowing for sustainable models for CLA land*

I support the intention of this proposal to 'be informed by the views of CLA land owners and community members in the first instance'.<sup>9</sup>

*Consultation process*

I note that the discussion paper states that the Government is seeking the views of CLA land owners, community members, the Northern Territory Government, relevant land councils and the NT Cattlemen's Association.<sup>10</sup>

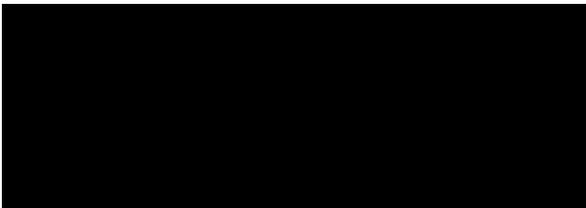
I also urge the Government to adhere to the features of a meaningful and effective consultation process when working with the Aboriginal communities in the Northern Territory: a copy of this is set out at Appendix A.

Please contact either myself or Jenny Bedford (Principal Adviser, Social Justice Team) on telephone: 02 9284 9785 or email: [Jenny.Bedford@humanrights.gov.au](mailto:Jenny.Bedford@humanrights.gov.au) if you would like to further discuss the comments in this letter.

Yours sincerely



Mick Gooda  
**Aboriginal and Torres Strait Islander  
Social Justice Commissioner**



## **Appendix A: Features of a meaningful and effective consultation process<sup>11</sup>**

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### **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'.<sup>12</sup> Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.<sup>13</sup>

### **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.

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<sup>1</sup> J Anaya, *Report on the Situation of indigenous peoples in Australia*, note 4, para 74. Also see T Calma, *Native Title Report 2009*, p 73.

<sup>2</sup> Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee in the Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (2012). At [http://www.humanrights.gov.au/legal/submissions/2012/20120206\\_stronger.html](http://www.humanrights.gov.au/legal/submissions/2012/20120206_stronger.html) (viewed 4 April 2013).

<sup>3</sup> Australian Government, *Community Living Area Land Reform in the Northern Territory Discussion Paper* (2013), p 2. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/community-living-area-land-reform-in-the-northern-territory-discussion-paper> (viewed 4 April 2013).

<sup>4</sup> Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (2011), pp 33–34. At <http://www.clc.org.au/publications/content/apo-nt-submission-to-the-senate-community-affairs-committee-inquiry-into-th/> (viewed 4 April 2013).

<sup>5</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 125. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport06/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html) (viewed 4 April 2013).

<sup>6</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012*, (2012), pp 77–91 and 101–126. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport12/](http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/) (viewed 5 April 2013).

<sup>7</sup> Australian Government, *Community Living Area Land Reform in the Northern Territory Discussion Paper* (2013), p 2. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/community-living-area-land-reform-in-the-northern-territory-discussion-paper> (viewed 4 April 2013).

<sup>8</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012*, (2012), pp 77–91 and 101–126. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport12/](http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/) (viewed 5 April 2013).

<sup>9</sup> Australian Government, *Community Living Area Land Reform in the Northern Territory Discussion Paper* (2013), p 5. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/community-living-area-land-reform-in-the-northern-territory-discussion-paper> (viewed 4 April 2013).

<sup>10</sup> Australian Government, *Community Living Area Land Reform in the Northern Territory Discussion Paper* (2013), p 3. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/community-living-area-land-reform-in-the-northern-territory-discussion-paper> (viewed 4 April 2013).

<sup>11</sup> This Appendix summarises the ‘Features of a meaningful and effective consultation process’ set out in Chapter 3 of the *Native Title Report 2010*. It builds on international standards and draws on feedback from Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Prescribed Bodies Corporate (PBCs) regarding meaningful and effective consultation processes in the native title system, as well as comments by Aboriginal and Torres Strait Islander peoples’ organisations as expressed in their submissions to recent public inquiries and international processes.

<sup>12</sup> J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 50. At <http://unsr.jamesanaya.org/PDFs/Annual2009.pdf> (viewed 5 April 2013).

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<sup>13</sup> Anaya, above, para 48.