SUBMISSION TO THE AUSTRALIAN SENATE, COMMUNITY AFFAIRS,

LEGISLATION COMMITTEE

On

THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY)

AMENDMENT BILL 2006 (CTH)

FROM THE

ABORIGINAL AND TORRES STRAIT ISLANDER

SOCIAL JUSTICE COMMISSIONER AND
ACTING RACE DISCRIMINATION COMMISSIONER, TOM CALMA

13 July 2006

INTRODUCTION

I welcome the opportunity to comment on the proposed amendments to The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth).

In my role Aboriginal and Torres Strait Islander Social Justice Commissioner, I hold statutory functions under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (HREOCA) and the *Native Title Act 1993* (the Act or NTA) which include:

> (1) To report on the operation of the NTA and its effect on the exercise and enjoyment of rights by Aboriginal peoples and Torres Strait Islanders;[1]
>
> (2) To report on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed;[2]
>
> (3) To examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders.[3]

I also make this submission as an elder and a traditional owner of the Kungarakan tribal group and the Iwaidja tribal group in the Northern Territory, with responsibilities to country and clan. I am responsible for a number of sacred sites, a custodian of stories and information and I have a responsibility to pass these on and take a leadership role for other Kungarakan and related tribes. This capacity informs my comments on the potential impact of the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (Cth) (Herein ALRA Amendments Bill).

I provide this submission with specific reference to the Committee's terms of reference:

- to seek community and expert opinion on provisions that will significantly impact on the rights of traditional owners and the functions of Land Councils;
- to examine the operation of the provisions of the Bill and their potential consequences.

I have serious concerns about the ALRA Amendments Bill currently before the Australian Parliament. The amendments make significant changes to the existing land rights legislation which has the potential to compromise the rights and interests of Indigenous people living in the Northern Territory.

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[1] *Native Title Act 1993* (Cth) s 209
[2] *Human Rights and Equal Opportunity Act 1986* (Cth) s 46C (1)(a)
[3] *Human Rights and Equal Opportunity Act 1986* (Cth) s 46C (1)(d)

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.
- 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.

My *Native Title Report (2005)* recommends that the *Aboriginal Land Rights (Northern Territory) Act 1976* (Herein the ALRA) not be amended without traditional owners first understanding the nature and purpose of any amendments, and as a group giving their consent.[4] While I am aware that there have been consultations with Northern Territory land councils, there has been no information campaign to inform Indigenous peoples and traditional owners on communal lands.

According to information available to the Commission, the consultations with land councils regarding the ALRA amendments did not cover the full provisions of the proposed changes to the legislation. It is my understanding that land councils were consulted with regard to mining (Part IV) and delegation issues, though not about the head leasing scheme. It appears that the head leasing scheme was not included in the package of reforms agreed to by land councils and Northern Territory government.

I am seriously concerned about the workability of these amendments. Last year I undertook some detailed research into individual titling, and the findings indicate a range of negative impacts. I would like to draw the Committee's attention to international experiences that tell us that converting Indigenous customary lands into smaller land lots leads to increased administrative costs, confusion and fragmentation of ownership over successive generations, and few, if any benefits.

My *Native Title Report (2005)* outlines the experiences of the United States and New Zealand where the trend to individualising title is being reversed. During the 1970, the World Bank also engaged in projects involving individualising title, and found that the strategy was not effective.[5] In fact international experience has shown that individualising title leads to:

- significant loss of land by indigenous peoples;

[4] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2004-2005 (2005)* p171

[5]World Bank Research Report , 'World Band Land Councils For Growth and Poverty Reduction', Oxford University Press, 2003, at xxvii

- complex succession problems – that is, who inherits these land titles upon the death of the owner – in relation to both freehold and leasehold interests;
- creation of smaller and smaller blocks (partitioning) as the land is divided amongst each successive generation; and
- the constant tension between communal cultural values with the rights granted under individual titles.[6]

This submission contains eight recommendations for the Committee. They are as follows:

1. **That consultations and negotiation be undertaken with traditional owners and Indigenous Northern Territorians prior to consideration of the amendments by the Senate.**

2. **That proposed section 19A (3) of the ALRA Amendment Bill be deleted. Further, that the process for certification of Indigenous Land Use Agreements (ILUA) in the *Native Title Act 1993* (Cth) be used as a model for developing replacement provisions to ensure the informed consent of traditional owners.**

3. **That government service provision not be made contingent upon communities agreeing to enter into head-lease agreements;**

4. **That the government ensure that traditional owners have access to independent legal advice and assistance in relation to the decision to enter into a head lease agreement, and in negotiating the terms of these head leases (including restrictive covenants and other caveats to protect the interests of traditional owners and their say in any future development in acquired townships); and**

5. **That the government establish a framework to monitor and evaluate the impact of the amendments against their intended outcomes, including the establishment of baseline information and benchmarks against which to assess economic development in the interests of traditional owners and Indigenous Northern Territorians over time.**

6. **That the ALRA Amendment Bill specify that lease payments to traditional owners under proposed section 19A may not be taken from the Aboriginal Benefits Account or be used to subsidise the payment of rent by governments for individual leases on Aboriginal communal land.**

7. **That Northern Territory Land Councils continue to be funded from the ABA (and not by government) and that ALRA contain a provision ensuring land councils have funds for program-based**

[6] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2004-2005 (2005)* p103-104

initiatives and advocacy functions. The NSW Statutory Investment Fund may provide a relevant model.

8. **That the requirement for establishing a new land council be based on a 70 percent majority agreement by traditional owners from the region. Further, that the process be based on a similar verification and participation threshold as is specified in the Native Title Act 1993 (Cth) for the authorisation of an Indigenous Land Use Agreement.**

INTERNATIONAL HUMAN RIGHTS STANDARDS AND RECENT INTERNATIONAL DEVELOPMENTS

Any changes to existing Indigenous land rights legislation or policy should only be undertaken in compliance with international human rights standards. I outline here those standards that apply.

As a cornerstone right, Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide that:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

There can be no doubt that self-determination applies to indigenous peoples. The Human Rights Committee, which operates under the ICCPR, has confirmed its application to indigenous peoples in several dialogues with governments and Concluding Observations on country reports.[7]

This is also confirmed in the United Nations Draft Declaration on the Rights of Indigenous Peoples with Article 3 containing identical language to that reproduced from Article 1(1) of the ICCPR and ICESCR reproduced above.

The Draft Declaration was recently adopted by the United Nations Human Rights Council and will be considered for final adoption by the United Nations General Assembly in November this year. A small minority of States, including Australia, challenge the application of this right to Indigenous peoples – although it is important to note that the Australian opposition relates to

[7] For details see further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Chapter 2. Available online at: www.humanrights.gov.au/social_justice/sjreport_02/chapter2.html.

concerns that this may have implications for territorial integrity rather than the applicability of this standard to Indigenous peoples.[8]

It is also notable that the United Nations General Assembly adopted the Program of Action for the 2nd International Decade of the World's Indigenous People in 2005. The Program of Action consistently refers to indigenous 'peoples'. The debates at the General Assembly acknowledge that the use of this term is in recognition of the collective status of indigenous peoples and denotes the applicability of the principle of self-determination. The Program of Action was adopted by Consensus, thus providing high level confirmation from governments of the application of this principle.

There are many aspects to this recognition that are vital for indigenous peoples. The first is that it places a high onus on governments to negotiate with indigenous peoples and ensure their effective participation in decision making that affects them.

The second is that a particular aspect of the economic content of the right of self-determination is that all peoples have the right, for their own ends, to freely "dispose of their natural wealth and resources". At the same time, the right also seeks to ensure that "In no case may a people be deprived of its own means of subsistence". This has implications for the debate on individual titling over communal Indigenous lands and the proposed amendments on this issue in the Bill. It sets a high threshold for consent for decisions to enable leasing over communal land. This is discussed further at the relevant section of the submission.

The capacity for Indigenous people to effectively participate in decision-making that affects our rights and interests to land and resources has also been identified as an integral component of the right to non-discrimination on the basis of race (under Articles 2 and 5 of the United Nations Convention on the Elimination of All Forms Racial Discrimination and Articles 2 and 26 of the ICCPR). For example, the Committee on the Elimination of Racial Discrimination in General Recommendation XXIII called upon State parties to:

> Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[9]

And further, calls upon State parties to:

> recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual

[8] Indigenous peoples and most States have opposed this understanding in the United Nations Working Group on the Draft Declaration on the Rights of Indigenous Peoples.

[9] United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, 18 August 1997, para 4 (d). Available online at: www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument.

> reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[10]

The Committee has specifically acknowledged the importance of land rights in Australia in redressing past discrimination against indigenous peoples[11] and has found that the lack of effective participation of indigenous peoples in the formulation of the native title amendments of 1998 was a matter that 'raises concerns with the State party's compliance with its obligations under Article 5(c) of the [ICERD]'.[12]

In its most recent consideration of Australia's compliance with ICERD, the Committee on the Elimination of Racial Discrimination also recommended:

> that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land.[13]

Most recently, these existing obligations relating to the effective participation of indigenous peoples have been synthesized into the principle of free, prior and informed consent.

A working paper was prepared for the UN Working Group on Indigenous Populations which expands on each element of free, prior and informed consent and provides a working definition of the principle. These definitions are summarised below:

- No coercion or manipulation is used to gain consent.
- Consent must be sought well in advance of authorization by the State or third parties for activities to commence or legislation to be implemented that affects the rights of indigenous peoples.
- Full and legally accurate disclosure of information relating to the proposal is provided in a form that is understandable and accessible for communities and affected peoples.
- Communities and affected peoples have meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project.
- Communities and affected peoples are able to secure the services of advisers, including legal counsel of their choice and have adequate time to make decisions.
- Consent applies to a specific set of circumstances or proposal, if there are any changes to this proposal or to the circumstances this will renew the

[10] *Ibid*, para 5.
[11] Committee on the Elimination of Racial Discrimination, *Decision in Respect of Australia of March 1999,* CERD/C/54?MISC.40/Rev.2., paras 3 and 4.
[12] Committee on the Elimination of Racial Discrimination, *Decision in Respect of Australia of March 1999,* CERD/C/54?MISC.40/Rev.2.
[13] Committee on the Elimination of Racial Discrimination, Concluding observations on Australia, UN Doc: CERD/C/AUS/CO/14, 14 April 2005, para 16.

requirement for free, prior and informed consent in relation to the new proposal or circumstances.

- Consent includes the right to withhold consent and say no to a proposal.[14]

The principle of free, prior and informed consent is also recognised in the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples 1989 (Herein ILO 169).

Article 7 of ILO 169 recognises indigenous peoples' "right to decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development." Articles 2, 6 and 15, of ILO 169 require that States fully consult with indigenous peoples and ensure their informed participation in the context of development, national institutions and programmes, and lands and resources. Article 6 requires that consultation must be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent.

As adopted by the Human Rights Council, the United Nations Draft Declaration on the Rights of Indigenous Peoples also explicitly recognises the principle of free, prior and informed consent in Articles 10, 12, 20, 27 and 30.

Article 30, for example, states that:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

As previously noted, we are also currently in the 2nd International Decade for the World's Indigenous People. The Second Decade has five objectives which aim to promote non-discrimination and inclusion of Indigenous peoples in national processes regarding laws and policies that affect them. Importantly, these objectives promote the full and effective participation of Indigenous peoples in decision making.

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[14] See also *UN Permanent Forum on Indigenous Issues Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York, January 2005, para 23-26 incl. and Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues , *Engaging the marginalised: Report of the workshop on engaging with indigenous communities,* HREOC, Sydney, and United Nations, New York, 2005. Available online at: www.humanrights.gov.au/social_justice/.

The five objectives have been approved by the General Assembly and so provide a framework for cooperation and partnership at the international, regional and national levels:

1. Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;
2. Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent;
3. Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples;
4. Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth;
5. Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.[15]

The Program of Action was adopted by consensus at the UN General Assembly. While not constituting a binding legal obligation, **Australia has agreed to act in accordance with and promote these objectives**. They set appropriate parameters for policy making relating to decisions affecting indigenous peoples, either directly or indirectly.

The second objective set out above is of particular importance. Repeated it is:

> Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent.

At the domestic level, the principle of free, prior and informed consent is built into the existing ALRA through the requirement that in carrying out any action regarding Aboriginal land, land councils must be satisfied that the traditional owners understand the nature and purpose of the proposed action, and, as a group, consent to it.[16]

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[15]Second International Decade of the World's Indigenous People Resolution, *Resolution adopted by the General Assembly of the UN*, GA Res Document No. A/Res/59/174. Available online at: www.un.org/esa/socdev/unpfii/en/second.html. Accessed 26 June 2006

[16] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (s.23 (3)(a)).

These rights were supported in the 1999 Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) into proposals to amend the ALRA.[17]

HORSCATSIA emphasised the importance of informed consent in relation to land use decisions made under the ALRA, and in particular in respect of any decisions to amend the ALRA. To this end it recommended:

> Recommendation 1:
>
> The Aboriginal Land Rights (Northern Territory) Act 1976 **not be amended without**:
>
> - traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
> - any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.18

It is clear both internationally and domestically that there is a well established requirement for consultation and consent in respect of major changes to land rights legislation. The failure to provide for such a process may be in breach the principles of self-determination, non-discrimination, equality before the law and the protection of minority group cultures.

There is an onus on governments to establish trusting working relationships with Indigenous people, and to act in good faith to achieve the best possible outcomes for Indigenous Australians.

RECOMMENDATION 1:

That consultations and negotiation be undertaken with traditional owners and Indigenous Northern Territorians prior to consideration of the amendments by the Senate.

99 YEAR LEASES AND ALIENATION OF COMMUNAL LANDS: SECTION 19A (4) (5)

> **Section 19A: Land Trust may grant head lease over township.**
>
> **(4) Subject to subsection (5), the term of a lease granted under this section is 99 years.**
>
> **(5) If, before the end of the 79th year of the term of a lease (the original lease) granted under this section, a Land Trust grants another lease under this section covering the area of land concerned (whether or not**

[17] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future – The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976,* August 1999, Canberra.
[18] *ibid*, xvii.

the other lease also covers other land), the original lease ends at the time the other lease takes effect.

The proposed 99 year leasing provision of s 19A will have the practical effect of alienating Indigenous communal land. If implemented, head leases will mean that traditional owners relinquish control over decision-making processes relating to their ancestral lands for up to four generations. While a lease is not alienation in fact, there is no doubt that it will have the effect of alienation in practice.

The ALRA amendments shift land administration control from traditional owners, land trusts and land councils to the Australian and Northern Territory governments. In terms of the impact on traditional owners, the effect is inestimable and I fear that the impacts will be realised incrementally over time.

Traditional owners will lose the ability to speak for country, and leases will legitimate non-traditional people in townships in a way that may cause or entrench conflict. It is for this reason that I emphasise the need for extensive negotiation with traditional owners and Indigenous people living on communal lands so that they have a thorough understanding of the proposed amendments and the impacts they will have on the future generations of traditional owners.

Any information and consultation process with traditional owner groups should be conducted with an independent scrutineer or third party entity to ensure that the frame of reference of traditional owners is not exploited.

Government parties may argue that the consent issues outlined above are overcome by the fact that communities are free to agree or not to head lease agreement. As I will point out further on in this submission, there are some serious flaws in the legislation in terms of establishing consent of traditional owners. In addition, the proposed ALRA amendments allow for the establishment of new land councils on a slim 55 percent majority community vote. There may be some real issues here where traditional owners comprise a minority of the community, and where non-traditional (historical) people make decisions to establish a land council and to change the land tenure arrangements over the community.

In the light of these legislative changes, and a shifting policy and resource context, it is essential that traditional owners are intimately involved in decision making about proposed leasing schemes on land. The highest level of consultation and information is required, prior to the passage of this legislation, in order for traditional owners to make informed decisions about legislation that will impact on generations to come.

THE 'OPT OUT' CLAUSE - NO SAFEGUARD TO ENSURE TRADITIONAL OWNERS GIVE PERMISSION TO HEAD LEASE AGREEMENTS: PROPOSED SECTION 19A (2) (3):

> **(2) A Land Council must not give a direction under subsection (1) for the grant of a lease unless it is satisfied that:**
>
> > **(a) the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and**
> > **(b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and**
> > **(c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.**
>
> **(3) If a Land Council, in giving a direction for a grant of a lease, fails to comply with subsection (2), that failure does not invalidate that grant unless the person to whom the grant was made procured the direction of the Land Council by fraud.**

One of the fundamental features of the current ALRA is that it ensures that the free, prior and informed consent of traditional owners is obtained before any action is taken by land councils[19].

Under the new s 19A, there is no longer a safeguard to ensure that traditional owners are informed to this standard. While s 19A (2) provides that a land council must not give a direction to grant a head lease unless it has consulted with the Aboriginal community,[20] s 19A (3) immediately negates any requirement of free, prior and informed consent. Section 19A (3) provides the qualification that failure to comply with the requirements of s 19A (2) does not invalidate the grant unless the direction of the land council was procured by fraud on behalf of the grantee[21].

In light of the likely significant impact that the grant of a 99 year head lease could have on traditional owners' capacity to control their land, s 19A (3) does not provide a sufficient threshold of protection. The Commission does not consider that this provision is adequate.

There is 'double jeopardy' in the 19A (3) 'opt out' provision. Given that under the proposed amendments land councils can be established with a 55 percent majority vote, it is possible that new councils could be established against the wishes of traditional owners in communities where traditional owners constitute a minority. This means that non-traditional community members may decide the establishment of a land council, and further, that under 19A (3) that newly established land council is not obliged to appropriately negotiate head lease agreements.

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[19] *Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)* s 23(3)(a)(b)
[20] Aboriginal Land Rights Act (Northern Territory) Amendment Bill 2006 s 19A (2)
[21] Aboriginal Land Rights Act (Northern Territory) Amendment Bill 2006 s 19A (3)

RECOMMENDATION 2:

That proposed section 19A (3) of the ALRA Amendment Bill be deleted.

Further, that the process for certification of Indigenous Land Use Agreements in the *Native Title Act 1993* (Cth) be used as a model for developing replacement provisions to ensure the informed consent of traditional owners.

The *Native Title Act 1993* (Cth) recognises the necessity for free prior and informed consent where there is an application to register an Indigenous Land Use Agreement (Herein ILUA). To ascertain authorisation by a claim group before such an application can be accepted, the Registrar of the Native Title Tribunal must be satisfied that all reasonable efforts have been made to ensure that all persons who hold, or may hold, native title in relation to land or waters in the area have been identified, and that all persons so identified have authorised the making of the agreement. [22]

Authorisation can occur through a traditional decision making process, or through an agreed process by all persons who hold common or group native title rights.[23] An ILUA is essentially a contract that will bind the group, in some cases, for succeeding generations.

In order to ensure inter-generational equity, the process for community consent under the NTA is exacting and stringent. This should be the measure for any agreements under the ALRA.

There are already emerging a number of developments which suggest that concern about consent is a real issue. Recently, a draft Heads of Agreement for a 99 year lease was established with the traditional owners of Bathurst Island Northern Territory. While this was part of a Shared Responsibility Agreement (SRA) and not effected under ALRA, the method of negotiating this agreement is at odds with the Australian Government's own policy for these agreements which specifies that SRAs must not negotiated for essential services.

The Bathurst Island agreement sets a concerning precedent for Australian Government involvement in lease agreements. In May 2006, the Senate Estimates Committee (Employment, Workplace Relations and Education Legislation Committee) revealed that the funding for the school was contingent upon the signing of a Heads of Agreement for a 99 year lease over Nguiu (Bathurst Island). I include the relevant exchange from Hansard here:

> **Senator CROSSIN**—Why does it have to be linked with this government's new agenda of changing the land rights act and allowing for 99-year leases?... No-one else in this country has to give up their land in order to get a local school…

[22] *Native Title Act 1993* (Cth) s203BE (5)
[23] *Native Title Act 1993* (Cth) s 251A

> **Mr Greer**—This was an agreement that the community welcomed. I understand they have embraced the opportunity to enter the heads of agreement…
>
> **Senator CROSSIN**—Are you convinced the community leaders knew what they were signing when they signed this SRA? My last discussion with them showed they were not aware that the school was specifically linked to the 99-year lease. They knew that both items were on the table for discussion, but they did not realise that they were specifically linked: they must give up their land for 99 years before they get the $10 million...
>
> **Mr Greer**—That SRA is yet to be finalised. What has been signed, I understand, is a heads of agreement between the government and the community. That will flow into a comprehensive agreement.
>
> **Senator CROSSIN**—Does the SRA need to be signed before the $10 million is released?
>
> **Mr Greer**—It is my assessment that, before funding is released to the community, an SRA would need to be in place but not before funding is released from the Commonwealth to the BGA.[24]

In light of this lease agreement precedent, I have grave concerns that traditional owners may be coerced into consenting to a 99 year lease agreements under an amended ALRA by the promise of provision of essential government services.

RECOMMENDATION 3:

That government service provision not be made contingent upon communities agreeing to enter into head-lease agreements.

If the provision of essential services is withheld pending agreement to head lease agreements, this may constitute racial discrimination under s 9 of the *Racial Discrimination Act (1975)* (Herein RDA).

Section 9 (1) of the RDA prohibits 'direct' discrimination on the basis of race. It provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or

[24] Employment, Workplace Relations and Education Legislation Committee, Senate, 'Estimates (Budget Estimates)' 31 May 2006, EWRE 109. Available at www.aph.gov.au/hansard/senate/commttee/S9358.pdf, accessed 26 June 2006.

> fundamental freedom in the political, economic, social, cultural or any other field of public life[25]

Each of the following elements must be established for 'direct' discrimination to be found.

- An act involving a distinction based on race
- The act impairs the enjoyment of a right 'on equal footing'
- A human right or fundamental freedom is impaired

In determining whether the distinction was based on race, a Court would consider whether race was a 'real reason' or 'true basis' for that distinction. In circumstances where non-Indigenous communities in the same or similar localities are provided with the same or similar essential services in the absence of having to enter into lease agreements, there may be a case to make that a distinction has been made in the provision of a service based on race.

SUBLEASING: SECTION 19A (13) (14) (15)

> **(13) This section does not prevent a sublease of a lease granted under this section.**
>
> **(14) A lease granted under this section must not contain any provision requiring the consent of any person to the grant of a sublease of the lease.**
>
> **(15) A lease granted under this section must not contain any provision relating to the payment of rent, or the non-payment of rent, in relation to a sublease of the lease.**

One of the most concerning aspects of the subleasing provision is that no consent is required under s 19A (14) in the granting of a sublease.

The effect of this provision is to take away traditional owners rights to carefully consider and consent to any economic development that occurs on their land. This provision effectively allows any type of unwanted or inappropriate commercial development.

Hansard gives us some indication of the future that this government envisages for remote communities.

> …when you travel around community after community on Aboriginal land in the Northern Territory nowhere do you see a market garden that grows fresh vegetables; nowhere do you see a butcher shop or a small abattoir; nowhere do you see bakeries. You do not see hairdressers; you do not see clothing stores—let alone a McDonald's or an Irish theme pub. The reason none of that exists is that it is impossible to get those businesses up and running

[25] Commonwealth Racial Discrimination Act 1975 s 9 (1) at http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/notes.html, accessed 11 July 2006

unless there is the incentive for people to make that investment in those communities. [26]

It is vital that traditional owners continue to have a say over the type of development that occurs on their communal land. One way of achieving this is for traditional owners to not enter into head-lease agreements. Where the traditional owners do seek such an agreement, however, protections should also be built into the head-lease, including requiring consultations with traditional owners over particular types of development prior to the granting of individual leases. Traditional owners need to be armed with sufficient information to be able to make informed decisions about whether to enter into a head-lease arrangement as well as advice on terms in such agreements which would ensure protection of their interests into the future.

RECOMMENDATION 4:

That the government ensure that traditional owners have access to independent legal advice and assistance in relation to the decision to enter into a head lease agreement, and in negotiating the terms of these head leases (including restrictive covenants and other caveats to protect the interests of traditional owners and their say in any future development in acquired townships).

ALTERNATIVE MEASURES

Minor amendments to ALRA are all that are required to give effect to the Australian Government's stated objectives of encouraging leasing and economic development in Indigenous communities. In the ALRA second reading speech Minister Brough indicates that the amendments are intended to do three things:

1. Provide for individual property rights in Aboriginal townships
2. Streamline processes for economic development on Aboriginal land and
3. Improve the efficiency and enhance accountability of organisations under the Act [27]

With regard to the first aim, leasing provisions already exist under ALRA and if changes need to be made to reduce the burden of Ministerial consent, then minor amendments are all that is required. The third aim requires measures for securing accountability of organisations under the Act. Specific changes in terms of monitoring, auditing and evaluation are required for this purpose. Interestingly, there is no provision in the second economic development aim in the amended ALRA before us, except perhaps the leasing provision. Minister Vanstone noted that:

[26] The Hon. D. Tollner MP, Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Commonwealth House, 19 June 2006, Hansard, p61

[27] Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs the Hon. M. Brough, Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Commonwealth House, 31 May 2006, Hansard

> the Government recognises that individual property rights are not a panacea to economic development but it is an important step – we are opening the door for economic development[28]

Accompanying Minister Vanstone's comment was a second announcement of initiatives to promote individual home ownership on Indigenous land. The initiatives include:

- Funding for Indigenous Business Australia (IBA) for a new programme targeted to Indigenous Australians living in Aboriginal communities.
- An initial allocation from the Community Housing and Infrastructure Programme to reward good renters with the opportunity to buy the community house they have been living in at a reduced price.
- Use of the Community Development Employment Projects (CDEP) programme to start building houses, support home maintenance, and to maximise employment and training opportunities[29]

The initiatives are described as 'Australia-wide measures'. To quote the Minister:

> These programmes will be available to all States that follow the Australian and Northern Territory government's lead to enable long term individual leases on Aboriginal land... The Australian Government will consult with the States to promote any necessary amendment of State Indigenous land rights regimes to ensure access to the new programmes.[30]

Economic development opportunities for Indigenous people are contingent on state and territory governments implementing legislative changes that will enable long term individual leases on Aboriginal land. This begs the question: for whom are economic development opportunities designed? If economic development is aimed at Indigenous community members, then programs such as the IBA, CDEP and good renters programs apply. Why then the need to make such sweeping and long term amendments to ALRA? It would appear that the ALRA amendments have a specific design to open up economic opportunities **for non-Indigenous interests** on Indigenous land and in Indigenous communities**.**

THE LACK OF A COST / BENEFIT ANALYSIS OF THE AMENDMENTS

Any significant change to policy or legislation should be accompanied by a thorough analysis of the baseline situation, the issues that the policy / legislation seeks to address, and the intended outcomes of any new initiatives. The ALRA amendments in the Northern Territory will make significant changes to land rights, yet there is little in the way of explanation as to how and why these particular amendments will achieve the intended outcomes.

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[28] Senator Amanda Vanstone (Former Minister for Indigenous Affairs) 'Long term leases the way forward for NT Aboriginal townships' (Media Release ID: vIPS 35/05, 5 October 2005)
[29] Senator Amanda Vanstone (Former Minister for Indigenous Affairs) 'Long term leases the way forward for NT Aboriginal townships' (Media Release ID: vIPS 35/05, 5 October 2005)
[30] Ibid

The ALRA Explanatory Memorandum provides no analysis of the cost /benefit of the amendments. We are told only that the objectives of the amendments are to "improve the socio-economic conditions of the Northern Territory Aboriginal people" and "to ensure that the mining royalty equivalent payments are used optimally to increase Aboriginal participation in the economy through business activities and to expand industry development in the Northern Territory." [31]

In his second reading speech, the Minister for Families, Community Services and Indigenous Affairs the Hon. Mal Brough stated: "it is individual property rights that drive economic development"[32]. Further, the Office of Indigenous Policy Coordination stated that head leasing scheme will give 'communities who wish to have the opportunity to promote economic development on their land and to help the wealth creation of their community members'.[33]

I am interested in any research that the Australian Government may be able to provide that links its individual titling scheme with economic development and wealth creation. My research demonstrates the opposite. In the light of the well documented problems encountered by countries such as New Zealand and the United States, the Australian Government owes it to Indigenous Australians to outline the cause and effect links of such significant changes to communal land rights. Further, wealth creation and economic development will not be realised without targeted and pro-active support by governments, and it is imperative that such support and safeguards are known and promoted at the outset.

RECOMMENDATION 5:

That governments establish a framework to monitor and evaluate the impact of the amendments against their intended outcomes, including the establishment of baseline information and benchmarks against which to assess economic development in the interests of traditional owners and Indigenous Northern Territorians over time.

[31] Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, p3 & p5

[32] Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs the Hon. Mr Brough, Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Commonwealth House, 31 May 2006, Hansard, p.5

[33] Office of Indigenous Policy Coordination *Questions and Answers on land tenure reforms to the Northern Territory Aboriginal Land Rights Act*, "4. Is the Government winding back land rights?" Available online at www.oipc.gov.au/ALRA_Reforms/QA_LandTenureReforms.asp, accessed 29 March 2006.

USE OF THE ABORIGINAL'S BENEFIT ACCOUNT (ABA)

While never having a clear stated (financial) policy, the ABA, is understood to be for the benefit of Aboriginal people in the Northern Territory.[34] Under the ALRA amendments, the ABA's financial framework will be fundamentally altered from the existing 40/30/30 formula administered by land councils, to a 70/30 formula predominantly managed by government. The government will have 70 per cent control of ABA funds and the remaining 30 per cent will be allocated to areas affected by mining. The following will be deducted from the ABA out of the 70 per cent pool:

- Administrative costs of land councils (based on performance indicators)
- Capital costs of land councils
- Grants to Aboriginal communities (Northern Territory-wide)
- Administration of the new leasing scheme
- Rent payments on head leases

In essence, the control and administration of the ABA funds has been taken from land councils and redirected to a government entity. Not only is this a derogation of a self determining function of an Indigenous entity, it also contradicts the government's intention to promote a culture of enterprise and economic development amongst Indigenous peoples. On the one hand, the government seeks to promote a culture of Indigenous enterprise, and on the other it takes away the discretionary funds that provide the capacity for Indigenous controlled entities to do this.

I have concerns that there will be a reduction in funds for the range of land management and other programs that the land councils fund for the benefit of traditional owners and Indigenous Northern Territorians. Minister Brough's Second Reading Speech for the ARLA Amendments Bill notes that 'In future, Land Councils will be funded on workloads and results'. [35]

In the absence of clearly articulated "performance indicators" for lands councils I would like to be convinced that the overall funding to land councils will not be arbitrarily reduced as a result of these amendments, and I will monitor this situation, should the amendments be implemented.

The original ABA financial formula, devised by Woodward in 1974, was arrived at arbitrarily. However it was always his intention that the formula be reviewed according to the changing needs of land councils and local communities.

Neither the Reeves Review of the ALRA, or the HORSCATSIA report recommended changes to the ABA formula as they exist in the ALRA amendments.

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[34] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 64 (4)

[35] Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs the Hon. M. Brough, Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Commonwealth House, 31 May 2006, Hansard, p5

In fact, the HORSCATSIA Report recommends:

> As a reflection of its core principles, the Committee agrees that Aboriginal people should take as much responsibility as possible for controlling their own affairs. This applies too, for the administration of the ABR (ABA)[36]

A further concern about the use of the ABA money for head leases is that it is effectively a targeted distribution of funds to some communities, while others will not benefit at all. Will communities feel compelled to participate in the scheme as the only option to receive some benefit from mining royalty monies? We know that the ABA is not an unlimited source of funds, providing approximately $30 million in royalties per year, so what is the government's plan in the event that all or many communities opt for the head leases?

Where will future funding for head leases come from and for the significant portion of the term of the 99 year lease? Such arrangements must be clearly articulated to the community and there must be safeguards in legislation to ensure that the arrangements go beyond the life of a Parliamentary term.

How is it that we have arrived at a situation where a government can appropriate Indigenous funds to pay for the government's own initiative? Under s 64 (4) of the amended ALRA, a Northern Territory entity can use ABA funds for the acquisition and administration of leases that are granted under the new s 19A (until the head leases are self funding). To quote Minister Vanstone:

> The scheme is designed to be self financing in the longer term with sub-lease rental payments covering the costs. Until then all reasonable costs will be met from the NT Aboriginals Benefit Account (ABA), subject to consultation with the ABA Advisory Committee.[37]

Under proposed s 19A, the amendments propose an annual head lease rent payment capped at 5 percent of the improved capital value of the land to be paid to the land trust. The legislation provides no safeguards to ensure that the 5 percent will be offered in all instances, and that in future rental disparities could arise in different communities. The amendments are also silent on the amount that Indigenous people and others will be required to pay as rental for the sublease. Will governments pay full commercial rental and /or market rates on Indigenous lands?

Spending ABA money to pay for head lease rental will significantly reduce the overall amount available from the ABA. Further, I am of the view that the use of ABA to fund the 99 year leasing scheme is a misuse of funds. Land council estimates expect head leasing costs of up to $15 million over 5 years. Other

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[36] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future – The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976,* August 1999, Canberra.

[37] Senator the Hon A Vanstone: Former Minister for Indigenous Affairs, Press Release, Long term leases the way forward for NT Aboriginal townships, 5 October 2005

commentators suggest that this is a conservative estimate.[38] This is a significant portion of the Account. I am also concerned that the ABA will be used indefinitely to pay for head leases, and that the subleasing scheme will not fund the head lease over time as intended.

The Australian Government has stated that it intends the head leasing scheme to be self-financing. Such a scheme requires profits to pay the head leases over time and to fund the recurrent operational costs of the head leasing agency. Presumably this money will come from sublease rental, though I am yet to see any projected figures on the potential for self financing to occur. As the sublease arrangements are not specified in the amendments it is difficult to assess their capacity to be self financing.

As the intention of the head leasing strategy is part of a 'normalisation' process, the Australian government should implement the same leasing arrangements as exist in other non-Indigenous townships. In the interests of equity and non-discrimination, government service providers (at the federal and territory level) and utilities should pay market rental for the use of the land. While not specified in the ALRA amendments, I would expect this to be the standard in communities under a head lease. This is necessary for the leasing scheme to become self funding and for Indigenous people to become economically self sufficient.

The ALRA Explanatory Memorandum explicitly recognises that the ABA funds are to be used for the benefit of Indigenous people and confirms the compensatory nature of this account.[39] The original Woodward Report and the second reading speech of the ALRA also confirm that ABA funds were not intended to fund government initiatives, especially where there is no clear indication that the leasing initiative will lead to benefits for traditional owners and Indigenous Northern Territorians.

Ultimately, the use of the ABA funds as payment for a government initiative may constitute racial discrimination under s 9 of the *Racial Discrimination Act (1975)*. The government's act to appropriate funds from Indigenous land councils in order to fund its own initiative may be found to be an act of relevant racial distinction where it can be shown that other communities in the same or similar situations do not have their profits or shares from royalty monies appropriated for government initiatives.

RECOMMENDATION 6:

That the ALRA Amendment Bill specify that lease payments to traditional owners under proposed section 19A may not be taken from the Aboriginal Benefits Account or be used to subsidise the payment of rent by governments for individual leases on Aboriginal communal land.

[38] Hon. W. Snowdon MP, Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Commonwealth House, 19 June 2006, Hansard, p56

[39] Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, p14

AUTONOMY OF LAND COUNCILS

The change of land council function and funding autonomy will significantly impact on the ability of land councils to operate on 'arms length' terms with government. While land councils are free to determine their priorities under s 23AA, the independence of land councils will be compromised. Under the amended ALRA, land councils' functions will include: administering funds to new bodies corporate; negotiating head lease agreements with traditional owners and others; collecting and administering rental payments for subleases; and providing these funds back to the ABA on a 6 monthly basis. An expansion of administrative functions will either require an overall increase funding to councils, or some functions will be compromised or lost.

My concern with the new provisions under the amended ALRA is that they may restrict the free functioning of land councils to set priorities for projects of benefit to traditional owners and Indigenous Northern Territorians. Land councils currently participate in a wide range of advocacy and policy activities that are essential to the adequate representation of Indigenous interests in the Northern Territory. As an example, the Northern Land Council has provided policy advice on a range of important issues such as the House of Representatives Inquiry into Capacity Building for Indigenous Communities and Development of Northern Territory Social Policy[40]. If land councils operate with less capacity, it will be the voice of advocacy and the policy analysis functions that are likely to be the first to go. This is especially the case if government funding is tightly linked to performance outcomes based on prescribed activity.

In the absence of a national body representing Indigenous interests, the Northern Territory land councils have become an important voice for Indigenous peoples at both regional and Territory-wide levels. Removing the guaranteed 40 percent ABA funding may make it extremely difficult for land councils to participate in vital advocacy and policy functions as they devote resources to functions which will source their funding for the following year.

In the same way that the ABA is to be used in a compensatory manner for Indigenous people, so too the New South Wales Aboriginal Land Rights Act 1983 (NSW) (Herein NSW ALRA) made provision for a Statutory Investment Fund (SIF) intended to provide compensation for loss of land through dispossession and the subsequent revocation of reserves.

Funds from this source are used for land claims, for purchases by Local Aboriginal Land Councils, and for the establishment of commercial enterprises which create an economic base for Aboriginal communities. [41] The SIF funding formula may provide a potential model for the ABA should any changes to the formula be required. Importantly, the SIF reflects the intention

[40] Northern Land Council, 'Aboriginals Benefit Account Report', Northern Land Council Annual Report 2002/2003 at 37

[41] NSW Aboriginal Land Council, 'NSWALC Funding'. Available online at: www.alc.org.au/about/Funding/funding.htm. Accessed 29 June 2006

of funds, and does not compromise the integrity of monies which have been established for the benefit of Indigenous people.

I support the views put forward by the Northern Land Council and Central Land Council that the changes to their funding arrangements will seriously undermine their independence and will essentially place land councils at the whim of government interests - not necessarily in accordance with the interests of the Indigenous communities that they were established to represent. The establishment of new smaller land councils, each with smaller capital base, compounds the potential that the Indigenous voice will be diminished. This diminution of capacity to advocate Indigenous rights and interests will become more pronounced over time if new councils are established and the overall funds do not increase.

RECOMMENDATION 7:

That Northern Territory Land Councils continue to be funded from the ABA (and not by government) and that ALRA contain a provision ensuring land councils have funds for program-based initiatives and advocacy functions. The NSW Statutory Investment Fund may provide a relevant model.

NEW LAND COUNCILS AND DELEGATION (55% MAJORITY)

I acknowledge that under s 28 (1) (2) and (3), the creation of smaller bodies corporate may enable more direct representation of community interests. However smaller entities may be at a disadvantage in performing the complex functions of existing land councils unless they are guaranteed to receive sufficient funding to enable them to provide a comprehensive service to relevant traditional owner groups. Inadequately funded smaller bodies will not be able to effectively participate in complex negotiations with commercial bodies. Creating more representative bodies without sufficient funding will have the effect of stretching already limited resources, and will dilute the power of existing land councils to engage in advocacy, policy and long term development initiatives on behalf of Indigenous traditional owners. I am well aware that there are large infrastructure projects in progress in the Northern Territory. It will be necessary to ensure that small bodies corporate have resources to employ quality legal, engineering and negotiation personnel in order to adequately represent the best interests of traditional owners.

The 55 percent required to establish a new land council under s 21 (C) does not constitute a representative majority. Under this provision, traditional owners may be excluded from deciding the establishment of a new land council if they are a minority in the community. Non-traditional or historical people could vote in a block to establish a local land council, and thereby take control of decisions for matters such as head leases. If this were to occur without safeguards to ensure the consent of traditional owners to these new bodies, it would clearly contradict the very principles under which land rights

were originally established and may inadvertently disenfranchise traditional owners.

RECOMMENDATION 8:

That the requirement for establishing a new land council be based on a 70 percent majority agreement by traditional owners from the region. Further, that the process be based on a similar verification and participation threshold as is specified in the *Native Title Act 1993* (Cth) for the authorisation of an Indigenous Land Use Agreement

CONCLUSION

In concluding this submission I would like to draw the Committee's attention to the following questions which still remain unanswered:

- What problems are the government trying to solve in amending the ALRA?
- What are the expected results of the amendments?
- What processes or campaigns have been deployed to inform the local community of the proposed changes to the ALRA?
- What mechanisms, if any, have been employed to monitor and evaluate these amendments?
- Where is the research that the leasing scheme is an appropriate mechanism for addressing socio-economic disadvantage?

General Recommendation 23 (5) of the UN CERD describes a standard for state parties in the protection of the rights of indigenous peoples. The CERD states:

> 5. The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories. [42]

This is the standard that should apply in relation to any proposed changes to land rights legislation in Australia.

Given current international law developments advocating the involvement of Indigenous peoples in decision making about issues that determine rights and interests, it extremely disturbing that the government has failed to consult with

[42] Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples 18/08/97

traditional owners and to adequately consult with Indigenous representative bodies about the proposed amendments to ALRA.

To this end I would like to reiterate my first recommendation: that thorough consultations and negotiations be carried out with traditional owners and all Indigenous Northern Territorians and representative entitles before the ALRA Amendment Bill progresses through the Parliament. It is important that the views of Indigenous people be incorporated into any future amendments to the ALRA. This should be carried out with regard to international human rights standards and developments to ensure Australia's compliance with these provisions to a high standard.

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