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

11 August 2007

Dear Ms Morris

Inquiry into NT National Emergency Response Package 2007 – Supplementary Submission

In this supplementary submission we provide some detail to support the two main points made in our original submission, sent to the Committee yesterday. The two points we made in that earlier submission about the operation of Part IV of the Northern Territory National Emergency Response Bill (Emergency Response Bill) were:

1. The incursions on Aboriginal property rights are significant and occur on a number of fronts.
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.

We also refer to the presence of a Henry VIII clause in Part IV and recommend the insertion of a sunset clause to control its effect.

1. Incursions on Aboriginal Property Rights in Part IV

The following incursions are made on the property rights of Aboriginal people, through the operation of Part IV of the Emergency Response Bill.

Section 31 leases on ALRA land, Community Living Areas and other areas

1. **Involuntary leases** over Aboriginal township land are handed to the Commonwealth, by force of statute, for five years (s31).

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2. Such leases grant the Commonwealth **exclusive possession and quiet enjoyment**, subject to preserved interests, future township leases and future section 19 leases granted by an ALRA Land Trust (s35).
3. It appears the Commonwealth is under **no legal obligation to pay rent** for a five year lease. The combined effect of ss 35 and 62 appears to make the payment of rent turn on the *discretionary* decision of the Commonwealth Minister to seek a Valuer-General's assessment.
4. While the traditional owners cannot terminate or vary a five year lease, the Commonwealth lessee may **remove land** from the lease area and, in defined circumstances, **add land** to it.
5. The Commonwealth may **terminate** the lease and it may also **sublease, license, part with possession of or otherwise deal** with its interest (short of a transfer of the lease) (s35).
6. A **sublease or other dealing** by the Commonwealth in these circumstances dispenses with the normal requirement for **traditional owner consent** under s 19(8) of the Land Rights Act (s 52(7)).
7. The **terms and conditions of a lease** are within the discretion of the Minister and can be **unilaterally varied** by the Minister (s36).
8. Ostensibly section 34 preserves any non-native title right or interest in the affected land (including a licence) – with any non-owner's rights being deemed to be held from the Commonwealth on identical terms. Importantly however this is subject to termination of such interests by the Commonwealth under section 37 (see point 9 below). [The Commonwealth Minister may determine that s 34(4) does not apply. It is unclear if this intends a power for the Commonwealth Minister to unilaterally vary the terms on which such interests are held. It seems the intention might be to leave open the option of maintaining the Land Trust or other owner as the grantor.]
9. The Commonwealth can **terminate preserved rights or interests**, or an earlier lease – except certain Commonwealth interests held over ALRA land, missions, certain mining areas around Kakadu and other defined interests (s37).
10. On ALRA land, a Land Trust can:
    - grant or vary a section 19 lease subject to Ministerial consent, with such a lease displacing the effect of a five year lease (s52) and
    - grant a township lease under s19A, upon which the 5 yr lease is terminated when the areas are exactly the same, or reduced in size accordingly when there is a partial overlap. (s37(6))

    But it **cannot otherwise deal** with land subject to a 5 year lease. (s52(5))

Town Camp Special Purpose and Crown Leases

1. During the five year window, the Commonwealth Minister can **resume** the Special Purpose or Crown leases over town camps in Alice Springs, Darwin, Katherine and Tennant Creek on **60 days' notice** (ss44, 46). Non-Aboriginal leaseholders will continue to be entitled to **six months' notice** from the Northern Territory Minister.
2. The Commonwealth Minister may also **forfeit** the lease upon conditions which currently regulate the exercise of that power by the Northern Territory Minister (ss44, 46).
3. The Northern Territory **land laws** governing town camp leases - the *Special Purposes Leases Act* and *Crown Lands Act* – are **liable to further change simply by Commonwealth regulation** whereas the normal law remains on foot for all other leaseholders under that legislation (ss44, 46).

4. In assessing **compensation**, the references in the lease itself to the manner in which and the matters in respect of which compensation shall be assessed will be **disregarded** (s46).
5. Separately, the Commonwealth Minister may, at any time in the next five years, unilaterally **vest** (non-mining) rights, titles and interests in the land in the Commonwealth freed of all other rights and interests. This confiscation is effective from the time specified in the vesting notice given to the Northern Territory. No notice to the lessees is required if their interest is not to be preserved (s47). This appears to be a **new power of compulsory acquisition which does not require notice** to the holders of long term leases for residential purposes.
6. This is subject to the possible express preservation of interests in the notice of vesting. The Minister may deem such interests to be held from the Commonwealth on identical terms, in which case notice will be given to the interest holder of that change. (s48) Preserved interests can, however, subsequently be **terminated unilaterally** by the Commonwealth under s49.

Other Provisions

1. The normal provisions of the Commonwealth's **law for compulsory acquisition** of property rights ceases to apply to Aboriginal freehold and leasehold land covered by the Bill in terms of the above matters (s50).
2. Any **other Commonwealth or Northern Territory law** that might apply to the affected land in terms of the above matters also ceases to apply (s50).
3. The operation of the **Land Rights Act** to ALRA land is circumscribed (s52).
4. The operation of the future act regime in the **Native Title Act** is ousted where a section 31 lease is granted

2. Compensation for the Compulsory Acquisition of Property Rights

To assess the compensation provisions for ALRA land and community living areas under Part IV of the Bill, a comparison with existing law is helpful. For that purpose we will refer to a fictional non-Aboriginal freehold owner of property in the Northern Territory as X. What would the law say if the Commonwealth reduced X's freehold property rights by taking an involuntary lease granting 'exclusive possession and quiet enjoyment' for a term of five years, in order to achieve an urgent child welfare objective?

The short answer is that X would have an unambiguous, upfront statutory entitlement to compensation.[1] Importantly, that entitlement does not depend on establishing that X has suffered what the Commonwealth Constitution regards as an 'acquisition of property'. The Constitution stands in the background as an irreducible minimum, acting as both a safety net and potential source of top-up compensation. But like other jurisdictions around Australia, the Commonwealth treats government incursions on private property rights seriously and creates a much more straightforward statutory entitlement under the *Lands Acquisition Act 1989* (Cth) (LAA).

[1] 'A person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Commonwealth in accordance with this Part in respect of the acquisition.' (Section 52, *Lands Acquisition Act 1989* (Cth)) (LAA).

The LAA would apply to the confiscation of less than a full freehold interest – such as an exclusive possession lease for a fixed term of five years.[2] It would, however, adopt a process quite different to the Emergency Response Bill, one that is more favourable to the owner and more respectful of their property rights.

Ordinarily the government makes a preliminary show of interest in the property (a pre-acquisition declaration). A detailed statement of purpose is given to the owner together with a statement of their principal rights (which include a right to have the declaration reconsidered and/or reviewed).[3] In urgent situations the Minister can dispense with a pre-acquisition declaration and lodge a certificate to that effect in Parliament and with the owners.[4]

If the Minister decides to proceed, then the Act provides for negotiations to achieve an acquisition by agreement.[5] Alternatively the Minister can declare in writing that the interest is compulsorily acquired. On publication in the Government Gazette, that declaration vests the property in the Commonwealth by force of law. Within 14 days the Minister must inform the owner about compensation entitlements and provide them with a compensation claim form.

The Act contains detailed provisions for determining what will 'justly compensate the person for the acquisition'.[6] Compensation can be handled at an administrative level because claims first go to the Minister who can accept the claim or make a counter-offer. The only ground for rejection specified in the Act is that the interest in land was not 'acquired by compulsory process from the claimant'.[7] The next step is an application to the Administrative Appeals Tribunal (AAT) or the Federal Court, asking the Tribunal or Court to declare that a compulsory acquisition has occurred and that the Minister must accept the claim or make a counter-offer. The amount of compensation payable can be referred by consent to an arbitrator. In the final event, compensation will be determined by the AAT or Federal Court.[8]

Advance payments of compensation, pending finalisation of the issue can be made to the owner.[9] Interest is payable for the period between acquisition and payment.[10]

It is only at this point that the Act makes reference to the constitutional safety net of just terms, as contained in section 51(xxxi) of the Constitution. Basically if the statutory compensation amount falls short of just terms then a court can order a top-up amount.[11]

These provisions available to X under the LAA stand in stark contrast to the provisions of the Emergency Response Bill. Take the position of traditional owners of ALRA land forcibly subjected to a five year lease in favour of the Commonwealth. First, the Act

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[2] Section 17 of the LAA makes clear that the Act applies to the acquisition of 'a legal or equitable estate or interest in land and any other right [etc]…in connection with land'.
[3] Section 22, LAA.
[4] Section 24, LAA.
[5] Section 40 and Part VII Division 5, LAA.
[6] Section 55, LAA and see generally Part VII.
[7] Section 70, LAA.
[8] Sections 81 and 82, LAA.
[9] Section 85, LAA.
[10] Section 91, LAA.
[11] Section 93, LAA.

leaves it to the Minister's discretion as to whether rent is paid.[12] Secondly the entitlement to compensation does not depend, as it would under the LAA, on demonstrating that the property of traditional owners has been acquired by compulsory process (which would require no more than a reference to section 31 of the Bill). It requires the traditional owners to show that they have suffered 'an acquisition of property to which paragraph 51(xxxi) applies' on other than just terms.

Instead of a top-up provision, the just terms guarantee in the Constitution becomes the traditional owners' only hope. As demonstrated immediately below, the Bill's reliance on section 51(xxxi) as the grounds for eligibility puts formidable legal hurdles in the path of the traditional owners.

In addition, the compensation regime for traditional owners under the Bill lacks many of the features available under the LAA. This includes not only the process aspects, but also the grounds and criteria for determining loss and compensation. Instead the Bill goes in the opposite direction, seeking to off-set any compensation entitlements by directing the Court's attention to any construction activity unilaterally engaged in by the Commonwealth on the land during the period of the involuntary lease.[13]

When one appreciates the stark difference in treatment between ordinary property holders and Aboriginal property holders in this respect, it is no surprise to find that the Bill expressly excludes the operation of the LAA.[14]

Making a constitutional rather than statutory case for compensation

There are many reasons why the Bill's use of an constitutional 'acquisition of property' basis for compensation is unfair and unsatisfactory.

The first is the point already made. Ordinary property holders do not have the same legal hurdles put in their way. The statutory regime is tilted significantly in favour of a compensation outcome.

Secondly, there is constitutional doubt about whether the just terms guarantee applies in the Northern Territory at all. The Commonwealth has argued the contrary position in the High Court. It was successful to the tune of seven judges to nil in the case of *Teori Tau* in 1969. More recently in 1997 in the *Newcrest* decision, the High Court split 3:3:1 over whether the just terms guarantee applies. Based on the 3+1 majority stitched together to achieve a result in that case, the law probably leans in favour of the just terms guarantee applying in the Territory. But the composition of the court is significantly different ten years on and the artificial majority is a slender and inappropriate basis upon which to pin the compensation entitlements of property owners under the Bill.

Indeed there is an obvious conflict of interest here. The Commonwealth has drafted a Bill that displaces a straightforward statutory compensation obligation upon itself and replaces it with a constitutional criterion that is surrounded by legal uncertainty. It has a track record of arguing in the High Court that indeed just terms is not applicable in the Northern Territory.

[12] Section 62.
[13] Section 61.
[14] Section 50(2).

Thirdly the law on section 51(xxxi) is particularly vague and unpredictable. If more time was available we would cite a number of academic articles and some judicial statements about the unsatisfactory and/or unpredictable nature of the case law in this area.

There are at least five legal objections the Commonwealth could seek to raise in court, to oppose a just terms claim. They are:

- the interest is not 'property' – this is usually the least likely to succeed
- the loss of property does not amount to an 'acquisition' – this requires a demonstration of what has been termed a 'benefit' in the constitutional sense
- the law is appropriately characterised as one with respect to a subject matter other than the acquisition of property – this is the most unpredictable and unsatisfactory area of the law
- the interest at stake is 'inherently defeasible' and therefore does not attract the just terms guarantee – the case law in this area is embryonic and lacks a strong guiding set of principles
- the acquisition is 'other than on just terms' – in the past half century, there has been little substantial development of the law in this area that has formed the basis for a High Court decision (the *ratio* of a case), as opposed to various observations in passing over the years by individual judges (*obiter dicta* which is of far less precedential value).

An additional point: in the drafting of the Bill the Commonwealth has signalled that 'just terms' would be a live issue in any litigation. The High Court has, as just stated, offered very little guidance on what that means. The reason is that most High Court cases are not typically about establishing what is the correct *compensation amount* payable. They are challenges to the *validity* of an Act. In other words the Bill points those who lose property rights under Part IV towards a legal standard about which we know very little and therefore itself highly likely to generate further litigation.

In short, the use of the constitutional standard not as a top-up but as the very basis for **compensation entitlement** encourages highly complex, adversarial litigation about mainly collateral issues. The **compensation process** in the Bill lacks the procedural rights accorded under the LAA and relies entirely on litigation rather than administrative processes and negotiation.

3. Henry VIII clause

We draw one additional point about the provisions of Part IV to the Committee's attention. Section 54 appears to contain what is often referred to as a 'Henry VIII clause'.

The Scrutiny of Bills Committee has defined a Henry VIII clause as 'an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation' and states that '[s]uch provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee'.[15] Section 54 allows the Minister to amend the scope of other Commonwealth legislation. If the Minister chooses to specify an existing law or

[15] See, for example, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2007*, 13 June 2007, 165.

provision in a legislative instrument, that law will no longer apply so far as it would 'regulate, hinder or prevent the doing of an act' in relation to the affected land.

Delegating power to the Minister to, in effect, amend Acts of Parliament threatens the role of Parliament as the legislative arm of government. In principle Parliament, and not the Minister or Executive, should decide to vary the application of laws that it has created - so that amendment to the scope of such laws is the subject of conscious parliamentary scrutiny.

In Part IV there are already extensive provisions for the *specific* disapplication or modified operation of existing Commonwealth and State laws, in relation to affected land (that is, where a forced section 31 lease exists; where a town camp lease has been forfeited, or resumed; and where a Commonwealth interest exists). Section 54 gives the Minister an open-ended capacity to expand the legal effect of Part IV in this respect.

The Queensland Scrutiny of Legislation Committee commented in 1997 that Henry VIII clauses 'should not be inserted into hastily drafted legislation to be introduced in a restrictive timetable as a substitute for careful well developed drafting.'[16] That Committee noted that the use of Henry VIII clauses might be accepted 'in circumstances warranting immediate Executive action' but in considering 'whether such an infringement of fundamental legislative principles is justified' one factor it took into account was whether any regulations made pursuant to the Henry VIII clause are subject to a suitable sunset clause.[17]

Section 54 of the Emergency Response Bill has been drafted in a context that the Commonwealth has characterised as a national emergency and where the normal legislative timetable has been much abbreviated. That may justify the provision in the Commonwealth's view. Equally, however, the minimal opportunity for Parliamentary and community scrutiny of the Bill reinforces the need for Parliament to reassert its fundamental legislative role. Effectively the Bill sets up a sunset clause of five years, due to the way the land tenure changes in Part IV operate. This falls far short of striking the appropriate balance – and in the case of land in which a Commonwealth interest exists (s 54(1)(b)), even that limitation does not appear to apply. A sunset clause of a few months will enable Commonwealth drafters, in consultation with the Northern Territory Government and other affected parties, to ascertain specifically what other laws need to be modified or repealed and to put those legislative proposals to Parliament.

Yours sincerely

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[16] Scrutiny of Legislation Committee, Parliament of Queensland, *The use of 'Henry VIII clauses' in Queensland legislation*, January 1997, 50.
[17] Ibid, 42-43.

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