The 'National Emergency' and Land Rights Reform: Separating fact from fiction

An assessment of the proposed amendments to the
Aboriginal Land Rights (Northern Territory) Act 1976

Briefing paper for Oxfam Australia
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EXECUTIVE SUMMARY

This paper provides compelling evidence to show that the proposed changes to the *Aboriginal Land Rights (Northern Territory) Act 1976* (the "ALRA") have no connection with the incidence of child sexual abuse; are likely to jeopardize the effectiveness of the Government's emergency response in the Northern Territory and are detrimental to the development of Aboriginal communities.

The paper argues that the partial abolition of the permit system and the compulsory acquisition of five-year leases over townships should be vigorously opposed for the following reasons:

- There is no evidence that either measure is related in any way to child sex abuse;
- There is some risk that the relaxation of the permit system might exacerbate the problem of child sex abuse;
- The development of the proposal to abolish the permit system predates the release of the Anderson/Wild *Little Children Are Sacred* report and is based on an ideological position rather than any factual basis as there is no evidence that child abuse is any higher where the permit system exists;
- These two land rights reform measures are at direct loggerheads with a number of other measures and are consequently likely to jeopardize the effectiveness of the overarching National Emergency Response;
- Abolition of the permit system will be unnecessary if compulsory leasehold of townships is implemented.

From a broader developmental perspective, the compulsion associated with both measures will be counter-productive. In particular, both measures will lessen the property rights, and associated political and economic power, of an already marginalized Indigenous minority.

From a public policy perspective, it is of grave concern that much of the land reform being proposed may be funded from the Aboriginals Benefit Account (ABA) – a special account that receives the equivalent of mining royalties raised on Aboriginal land. While ABA funds can be distributed to, or for the benefit of, Aboriginal people in the NT, this needs to be based on the advice of the ABA Advisory Committee. Funding any new scheme from the ABA will shift the risk away from the Commonwealth Government to Aboriginal interests using resources earmarked for development according to Aboriginal priorities.

From an Indigenous policy perspective, it is extremely disappointing that there are very clear, inherent inconsistencies in the National Emergency Response.

RECOMMENDATIONS

Given the proposed changes to the ALRA are in no way associated with child sexual abuse in Aboriginal communities and there is therefore no pressing urgency to pass the amendments, Oxfam Australia makes the following recommendations:

1. The legislative amendments be subjected to thorough parliamentary scrutiny – particularly a Senate Inquiry – to ensure that all stakeholders have the opportunity to contribute to the debate concerning the proposed changes and to ensure that Parliamentarians are fully apprised of their potential impact.

2. All political parties engage in a respectful dialogue with Aboriginal communities who will be affected by the proposed changes to ascertain whether there is community support for the changes.

3. The workability of the land rights amendments made in 2006 be rigorously assessed before any further reforms are introduced.

4. In the absence of all of the above, the proposed amendments be vigorously opposed and not passed by the Parliament of Australia.

Note: This briefing was prepared prior to sighting the Aboriginal Land Rights amending legislation to be tabled in Federal Parliament during the sitting week beginning 6 August 2007.

BACKGROUND

On 21 June 2007, the Prime Minister of Australia and the Minister for Indigenous Affairs declared a 'national emergency' with eleven measures aimed at combating child abuse and dysfunction in Indigenous communities in the Northern Territory. A twelfth measure – the abolition of the Community Development Employment Program (CDEP) only in the Northern Territory – was announced on 23 July 2007.

These measures are all listed and numbered (for this paper's purposes) in Appendix A.

This paper responds to two of the measures outlined in the Government's emergency response: the compulsory acquisition of an undefined number of prescribed communities (Measure 5) and the partial abolition of the permit system (Measure 10). The major source of information available at the time of writing this paper was a series of 18 Northern Territory Emergency Response Fact Sheets.[1]

At the time of writing, the prescribed communities have not yet been defined. However, following the national emergency declaration, two maps were produced by the Department of Families, Community Services and Indigenous Affairs (FACSIA). These maps are reproduced at Appendixes B and C. There are 57 major communities on Aboriginal land (inalienable freehold title) and 16 other major communities referred to as non-ALRA communities mainly located on Community Living Areas.[2] In total, there are 73 major communities with a population greater than 100 each that appear to be the initial focus of visitation by communication and survey teams that are informing the Emergency Response Task Force.[3]

It is noteworthy that, according to the ABS *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2006* survey,[4] there are 81 discrete Indigenous communities with populations of over 100 in the Northern Territory, with an estimated usual population of 32,000. There are an additional 560 communities with a population of less than 100 and an estimated usual population of nearly 10,000 that are not mentioned in the Northern Territory Emergency Response.

While this paper focuses on only two of the National Emergency response measures,[5] a major issue that arises is the incompatibility of these two measures with the ten others. An attempt is made to highlight this major problem in an illustrative rather than exhaustive manner.

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[1] These fact sheets were posted at http://www.facsia.gov.au/internet/facsinternet.nsf/via/nt_emergency/$file/factsheet_all.pdf on 23 July 2007 and are referred to hereafter as NTER Fact Sheets 1–18.
[2] NTER – Fact Sheet 5
[3] NTER – Fact Sheet 3
[4] 17 April 2007 (ABS Cat. No. 4710.0)
[5] Covered in NTER – Fact Sheets 14 and 15

LEGISLATIVE CONTEXT

The ALRA was passed in 1976 – two years prior to the Commonwealth's *Northern Territory (Self-Government) Act 1978*. The ALRA has been the subject of a number of major and minor reviews over the past 31 years – the most recent, and arguably most contentious, being The Reeves Review of 1998, *Building on Land Rights for the Next Generation*.

The recommendations in this review were so contentious that they were referred by its commissioning Minister, John Herron, for inquiry to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA). The Committee's report, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, published in August 1999, was highly critical of the Reeves Review and dismissed all of its recommendations.

This episode in recent history is revisited for two reasons. First, one of the Reeves recommendations which was summarily dismissed by the Committee was that the permits system be abolished and replaced by the amended Trespass Act 1987 (NT). Second, John Reeves QC has been appointed as a member of the Emergency Response Taskforce.[6]

In 2004, the Commonwealth Government created a new package of reforms to the ALRA, without revisiting the 1999 HRSCATSIA review or its recommendations. During 2004 and 2005, there was considerable policy debate about appropriate mechanisms to address acute Indigenous housing shortfalls identified throughout Australia. There was much focus, and still is, on the issue of individual titling on inalienable land that is held under group (often termed 'communal') freehold title. There was also much debate about the need to provide public, as distinct from community, housing on Aboriginal land in the Northern Territory. Much of this discussion was instigated in the Northern Territory by the then Department of Community Development, Sport and Cultural Affairs.

In 2005, the National Indigenous Council – the Government's appointed Indigenous advisory body – raised the possibility of compulsory acquisition of townships. The ensuing debates were summarised and analysed in the report *Land Rights and Development Reform in Remote Australia*.[7]

The Commonwealth Government pressed on with its land rights reform agenda and introduced the *ALRA Amendment Bill 2006* into Parliament on 31 May 2006. Subsequently, the Bill was referred to the Senate Community Affairs Legislation Committee for inquiry and report by 1 August 2006. The Committee noted that the time made available for this inquiry was totally inadequate.[8] The Senate report includes dissenting reports from the Australian Labor Party, the Australian Democrats and the Australian Greens – all of which expressed concern about the absence of

[6] NTER – Fact Sheet 4
[7] Jon Altman, Craig Linkhorn and Jennifer Clark, Oxfam Australia, August 2005.
[8] Senate Community Affairs Legislation Committee, report on the *Aboriginal Land Rights (Northern Territory Amendment Bill 2006*, August 2006, p.1

appropriate consultation with Indigenous stakeholders in the Northern Territory – the people most affected by the reforms.

This episode in very recent parliamentary history is retold in an attempt highlight the need for appropriate consultation and due process about changes to the law that impact on Aboriginal Australians as would be afforded to other groups in Australian society. The Senate Inquiry held only one day of hearings and only in Darwin.

The *ALRA* was amended in August 2006. Of key interest, for the purposes of this paper, were changes to arrangements for township or community leasing of land. New sections 19A–19E provided options for 99-year head leases to a Commonwealth or Northern Territory government entity that would take responsibility for the granting of sub-leases within an Aboriginal community. These arrangements are generally referred to as 'section19A head leases'.

There are two important aspects of this arrangement that are relevant to the current debate. First, the head leasing arrangement is voluntary and is subject to the provision of free, prior, informed consent by traditional owners.[9] Second, if a head lease is signed, then the permit system is relaxed within the jurisdiction of the head lease for a sublease holder or anyone with legitimate business in the area covered by the head lease. This does not make the township entirely 'open'. A permit would still be required for any person who does not have legitimate business in relation to a sublease, or for a person who wanted to go places in the town beyond their business related to a sublease.[10]

Immediately after the reform of the *ALRA*, on 12 September 2006, Minister for Indigenous Affairs, Mal Brough, announced a review of the permits system. The Minister expressed the view that the permit system reduced external scrutiny of crime in Indigenous communities and believed that permit liberalisation would have economic benefits.

In October 2006, a permits review process was launched by the Office of Indigenous Policy Coordination (OIPC), with the release of a discussion paper, *Access to Aboriginal Land under the Northern Territory Land Rights System – Time for a Change?,* and an invitation for comment by any interested party. The closing date for comments was 30 November 2006, subsequently extended to 28 February 2007.[11] About 100 submissions were received by OIPC. None have been made public, nor has there been any OIPC or Australian Government response to issues raised in the submissions.

In the almost 12 months since the introduction of the section 19A voluntary head leasing option, there has been limited take up by Aboriginal communities. To date, only one community has seriously proceeded down this path, with an in-principle agreement for a head lease over the Tiwi township, Nguiu, on Bathurst Island having been completed.[12]

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[9] Subsection.19A(2).
[10] http://oipc.gov.au/ALRA_Reforms/QA_Aboriginal_township_leasing.asp
[11] See http://oipc.gov.au/permit_system/docs/Permits_Discussion_Paper.pdf
[12] http://oipc.gov.au/ALRA_Reforms/documents/What's_Deal_Factsheet.pdf

This agreement will see $5 million paid up front from the Aboriginals Benefit Account (ABA) to the Tiwi Land Council. The ABA is a special account that receives the equivalent of mining royalties raised on Aboriginal land. While ABA funds can be distributed to, or for the benefit of, Aboriginal people in the Northern Territory,[13] this needs to be based on the advice of the ABA Advisory Committee.

The finalisation of the agreement is currently stalled in court proceedings initiated by some traditional owners.[14] A decision in the case is due on Tuesday 7 August 2007.

In June 2007, the *ALRA* was further amended by the *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007* in order to establish the new office of the Executive Director of Township Leasing. This will be the Commonwealth entity that will hold the Nguiu head lease. It should be noted that this is a statutory office and not an independent statutory authority as proposed by the Northern Territory Government.

The cost of The Executive Director of Township Leasing will also be sourced from the ABA, with an allocation of up to $15 million committed to 2010–2011. Serious concerns have been raised about the fact that both the head lease payments, and now the cost of administration of the new system, will be met from the ABA.[15]

The stated policy intent of amending the *ALRA* and introducing section19A head leasing arrangements is to fast track the provision of housing and housing-related infrastructure on Aboriginal land. There have been discussions and negotiations with a number of communities - including Galiwinku, Wadeye, Angurugu and Umbakumba – regarding potential leases in the last year, but all have stalled or ended for a variety of reasons. There has also been considerable media coverage of the Commonwealth Government offer to provide $60 million to upgrade Alice Springs town camps. However, that is a somewhat different arrangement, as the funding allocation is contingent on the surrender of Special Purpose Leases and their conversion to 99-year head leases.

The lack of progress in implementing section 19A head leasing arrangements for a mandatory 99 years is not surprising. It was expected that few traditional owners would voluntarily adopt these new arrangements because of insufficient incentives and a reluctance to forego the available exercise of authority over the land they own.[16]

SEARCHING FOR A CONNECTION BETWEEN THE EMERGENCY RESPONSE AND *ALRA* REFORM

The changes to the permit system and the compulsory leasing of townships are separate measures which should be clearly distinguished.

The partial abolition of the permit system was announced on 21 June 2007, appended to the statement by the Prime Minister and Minister for Indigenous Affairs.[17]

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[13] Under subsection .64(4) of the *ALRA*.
[14] http://www.thewest.com.au/aapstory.aspx?StoryName=405589
[15] See http://www.aph.gov.au/library/Pubs/bd/2006-07/07bd165.pdf
[16] See http://www.anu.edu.au/caepr/Publications/topical/Altman_ALRA.pdf
[17] http://oipc.gov.au/permit_system/docs/changes-to-permit-factsheet.pdf

However, it appears the Government had already decided to proceed with this change, which had been set out as option 2 in the OIPC discussion paper of October 2006.

In contrast, the compulsory leasing of prescribed townships represents a new policy position – one which had been previously rejected as recently as August 2006. Clearly, developments between August 2006 and June 2007 were behind the policy back-flip. The reasons for this shift from voluntary leases to compulsory leases are far from clear.

One of the Commonwealth Government's fact sheets[18] indicates two broad reasons for the change in policy. First, a suggestion that public investment in housing and repair had proved to be ineffective because of the underlying tenure and control of houses. This statement, which is not backed up by any credible evidence, suggests that this is not a temporary five-year measure. Second, it is stated that public investment to repair houses, buildings and infrastructure is hampered by a long approval processes. There is no evidence to support this contention – on the contrary, experience dating back to 1976 suggests that proper approval and planning processes have rarely been used by public sector agencies in respect of Aboriginal communities.

There are two very worrying aspects of the Government's Fact Sheet 14. First, there is an apparent attempt to down play the physical extent of this compulsory five year lease acquisition with an estimate that the area covered will only be 0.1 to 0.2 per cent of all Aboriginal land in the Northern Territory. Yet, for traditional owners of affected townships, these areas might be a significant proportion of their land holdings.

Second, while the wording of Measure 5[19] suggests an iron-clad commitment to the payment of just terms compensation, Fact Sheet 14 has somewhat different wording: 'Traditional owners will be paid compensation on 'just terms', *if required*, in accordance with the Australian Constitution'. This suggests some retreat from the original Prime Ministerial commitment: "We're offering a guarantee that we are not taking anything from anybody. We are trying to give things back".[20]

Fact Sheet 15, dealing with the partial repeal of the permit system, reiterates a series of unsubstantiated allegations contained in the OIPC discussion paper *Access to Aboriginal Land under the Northern Territory Land Rights System – Time for a Change?* Some are worth highlighting and will be critiqued below:

1. The permit system has:
    - resulted in closed communities that have hidden dysfunction from public view;
    - allowed some people in communities to create a climate of fear and intimidation; and
    - failed to stop criminal behaviour.

2. The removal of the permit system will:

[18] NTER, Fact Sheet 14.
[19] See Appendix A.
[20] See NTER Fact Sheet 14.

- provide access for people including police, media, doctors and other essential service provider; and
- strengthen economic links with the outside world.

It is worth noting that, just as section 19A head leases would relax the permit system, Measure 5 would preclude the need for permits in common areas of major towns. The major issue with this measure, assuming compulsory acquisition occurs, is that there would no longer be any requirement to obtain a permit for access roads to these townships. Given that some of these access roads are hundreds of kilometers long and traverse considerable tracts of Aboriginal land, this signals a significant change. While it is stated that the permit system would continue to apply to the vast majority of Aboriginal land, including homelands, many of these access roads pass near, or through, homelands.

CONCERNS ARISING FROM THE PROPOSED LAND TENURE REFORM

The Commonwealth is proposing to use constitutional powers to compulsorily acquire five-year leasehold interest in prescribed communities. There is no precedent of Commonwealth compulsory acquisition of land on such a scale in Australia. Moreover, compulsory acquisition is usually made on a permanent, not a limited, basis.

While this is not a 'land grab' beyond the 0.1 to 0.2 per cent of the Aboriginal land base identified, it is significant that some owners of this land have perceived it as such. The distrust that these measures have generated in the absence of comprehensive community consultation does not bode well for promoting cooperation between government and communities to combat child sexual abuse.

The compulsion in the proposal will also effectively override the 'right of consent' provisions which are set out in the *ALRA*, but rarely implemented, within townships. Given that the 2006 *ALRA* reforms were promoted as a means to open up Aboriginal land to mineral exploration and development, the exercise of compulsory acquisition in townships may create a dangerous precedent in relation to other Aboriginal lands. This could have concerning human rights implications, particularly if the purpose of compulsory acquisitions is unclear beyond challengeable assertions.

Historically, it is clear that traditional owners of townships have been disadvantaged by colonial administrations allowing the location of government settlements and missions at these locations without traditional owner consent. This new compulsory acquisition measure also disempowers traditional owners of townships. In so far as land ownership constitutes a form of property right, this measure will also economically disadvantage current and future generations of traditional owners.

The Commonwealth Government has indicated that, during this five-year period, it will continue to negotiate for 99-year township leases with traditional owners, pursuant to section 19A of the *ALRA*.[21] This gives rise to an extraordinary proposition: having stripped traditional owners of the use of, rights to, and responsibility for their land, the Commonwealth is proposing ongoing negotiation of

[21] See NTER Fact Sheet 14.

99-year leasing arrangement under extremely asymmetric power relations. This has the potential to leave traditional owners extremely vulnerable to 'sweeteners' from the Commonwealth (although it is notable that such strategies, involving millions of dollars, have previously not been effective at Galiwinku and Alice Springs town camps). The ethics of such an approach to dealing with poor Aboriginal people who are facing extreme overcrowding is questionable.

A stated reason for the compulsion is to deliver better living environments for residents of prescribed townships. It is unclear how this will occur in the context of five year leases. This measure directly contradicts the rationale for the section 19A requirement that public housing investment in townships requires the certainty of a long-term lease. Indeed, in some communities, such as Wadeye, negotiations over head leasing have stalled over the very issue of the length of the lease, with the community seeking a term considerably shorter than 99 years. It is extremely unlikely that any commercial finance would be attracted to underwrite provision of housing either to individuals or corporations or government on such short-term lease arrangements.

The Government has indicated that funding for more and better housing will be increased substantially from 1 July 2008.[22] However, this funding under the new Australian Remote Indigenous Accommodation (ARIA) program – which was announced in the 2007–08 Budget, six weeks before the national emergency declaration – is for housing in remote regions throughout Australia, not just the Northern Territory. Given the emergency context, with analogies being drawn to Hurricane Katrina, it is surprising that new funding will not be available till 1 July 2008. Moreover, given the extent of the backlog – estimated at between $1.4 billion and $2.3 billion worth of housing and infrastructure in the Northern Territory alone [23] – the extra resources to be provided under the ARIA program are grossly inadequate.

The need to provide 'just terms' compensation for the compulsory acquisition of townships raises some critical questions for the Commonwealth. First, any compensation paid to traditional owners of townships would represent dollars that are not spent on housing and infrastructure. This is not an argument for minimising payments to traditional owners. Rather, it is to point out that negotiated payments – such as the $5 million at Nguiu – are likely to be lower than legally contested payments for the compulsory acquisition of land, since agreement-making is generally cheaper than litigation.

Second, as noted above, one of the Commonwealth's key objectives is to speed up long approval processes. However, given that 'just terms' compensation is likely to be contested in many situations – if only because compulsory acquisition in such cross-cultural contexts is so rare – it is likely that approval processes will be lengthened rather than shortened. The transaction costs of this reform, especially if there are legal challenges, are likely to be extremely high.

Third, any adversarial proceedings arising from compulsory leases and just terms compensation are likely to strain Commonwealth/community relations. It is also

[22] See NTER Fact Sheet 16.
[23] See http://www.anu.edu.au/caepr/Publications/topical/Altman_Costing.pdf

likely that Commonwealth/Territory relations, which are critical to the delivery of housing and infrastructure to Aboriginal townships, will be strained. Indeed, it appears that since the passage of the *ALRA* amendments in 2006, the Northern Territory and Commonwealth have adopted quite different approaches: the Northern Territory Government is revisiting the option of using section 19 of the *ALRA* to lease subdivisions for public housing in Aboriginal communities, while the Commonwealth is focusing solely on 99-year leasing arrangements, pursuant to section 19A. This divergence is unfortunate given the high level of cooperation achieved in recent years under the broad umbrella of the Indigenous Housing Authority of the Northern Territory.

There is no evidence that the amendments made to the *ALRA* in 2006 have been beneficial. Arguably, this is a consequence of the lack of adequate consultation with stakeholders and the oppositional approach adopted by the Commonwealth in forcing reforms through the Parliament without adequate public debate. Yet, the Government is once again adopting this approach to achieve the hasty enactment of the latest proposed amendments. Unfortunately, these amendments are likely to be even less workable and may well attract widespread condemnation.

CONCERNS ARISING FROM THE PROPOSED PERMIT REFORM

As noted above, if the Government perseveres with its plan to compulsorily lease prescribed townships there would be no need for permits during the five year leases. Townships would then revert to traditional ownership and the permit system would be automatically revived. However, any proposal to partially abolish the permit system though amendment to the *ALRA* suggests an intention to change the law beyond the five-year compulsory leasing period.

To reiterate, what is being proposed is a version of option 2 set out in the OIPC discussion paper of October 2006. This option noted that, even in townships, the current permit system would be maintained in non-public spaces – suggesting that towns would be divided into zones where a permit is required and zones where it is not. The discussion paper recognised that defining public and private space might prove challenging. This is particularly so in a cross-cultural context where differing concepts of private space can apply. For example, some Aboriginal groups may conceive private space as including homes, hunting and fishing grounds, ceremony places, cemeteries and sacred sites. Other Aboriginal groups may regard entire clan estates as private spaces. The arbitrary discretion to delineate between the public and private, and question of who will exercise that discretion, is likely to make the division of townships in this manner unworkable and highly contested.[24]

The Government's latest proposals continue to focus on the removal of permits in common areas of 'major' townships. However, there is no commitment to retain the permit system in non-public places, which raises the question of how entry to non-public places will be regulated.

Proposals to change the permit system that has been in place on Aboriginal reserves in the Northern Territory since 1918 and Aboriginal land since 1976 are highly

[24] See http://www.anu.edu.au/caepr/Publications/topical/Altman_Permits.pdf

contentious and hotly debated. Good public policy making would require an evidence-based case to be made for changing the law. The two reasons provided by the Government for its proposed changes are, firstly, that increased public scrutiny of communities would reduce dysfunction and child abuse and, secondly, that removing the permit system would strengthen economic links with the outside world.

Given there are 16 Aboriginal communities in the Northern Territory which have a population of more than 100 and do not require a permit, it should be a straight forward exercise for policy makers to undertake a comparative analysis of the two types of communities – permit and non-permit – to ascertain if there are any significant differences between them in relation to dysfunction and economic well-being.

What is missing from the debate so far is a recognition that the permit system constitutes both a form of property and a means to regulate visitation. This can be demonstrated with reference to Gunbalanya in western Arnhem Land, adjacent to Kakadu National Park. Traditional owners of the township issue a visitor permit that returns them $13.20 per visitor. During the dry season about 100 visitors a day come to Gunbalanya returning land owners over $1000 a day for land use. Visitors generate economic returns through purchases at Injalak Arts and through local businesses, but are regulated at a rate that local businesses can manage. On the one hand, the abolition of the permit system might see traditional owners seeking compensation for loss of livelihood. Equally concerning on the other hand, is the prospect that an unregulated influx of 200,000 visitors to Kakadu National Park may choose to visit Gunbalanya, with potentially disastrous social impacts for the community.

A Senate Committee report, *Indigenous Art – Securing the Future: Australia's Indigenous visual arts and crafts sector*[25] was released on 20 June 2007, a day before the announcement of the national emergency. Chapter 13 of that report is devoted to 'The permit system and Indigenous art' and it should be noted that a number of submissions to the inquiry made reference to the positive impact of the permit system and its positive impact on Indigenous art and artists.[26] The Committee noted support for the retention of the permit system, although there was some division along party lines about this issue. Government senators appeared somewhat ambivalent about whether the permit system effectively protects artists, while non-government senators were overwhelmingly supportive of the existing permit system.[27]

What is undeniable is that there is a strong Indigenous community voice that is in favour of retaining the permit system, consistent with recommendations made as long ago as 1974 by Justice Woodward in the Aboriginal Land Rights Commission's Second Report. The significance of this issue for the local community has been evident in the only negotiations for a section 19A head lease. Despite the fact that the *ALRA* suggests a head lease would result in the relaxation of the permit system, this is clearly not the view of Tiwi who are negotiating the agreement.[28]

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[25] Senate Standing Committee on Environment, Communications, Information Technology and the Arts.
[26] See http://www.aph.gov.au/SEnate/committee/ecita_ctte/indigenous_arts/submissions/sublist.htm
[27] See page 186.
[28] Information Booklet Lease of Township of Nguiu dated 17 July 2007.

The Nguiu situation given rise to accusations that the Commonwealth Government has lied to Tiwi Island residents as it tries to get them to sign over their land for 99 years[29] and counter views from a spokesman for Federal Indigenous Affairs Minister, Mal Brough, saying that permits will be abolished for Nguiu on the Tiwi Islands even if the community signs a 99-year lease.[30] This appears to be an issue over which the Commonwealth Government is willing to risk its only section19A head lease negotiation.

Much of this disputation appears to have lost sight of the fact that addressing the issue of child abuse will require close government and community collaboration; and that there is no evidence that the permit system has anything to do with child abuse.

There are also an array of questions which go to the heart of how workable the new provisions will be. For example, who will administer the partial permit system and how will public areas be defined? A mix of discretionary and non-discretionary systems is bound to give rise to administrative difficulties, particularly at the boundary between permit and non-permit jurisdictions. How responsible is it to allow the general public onto remote access roads? And what is the likelihood that the users of access roads will accidentally stumble into outstations and transgress onto sacred sites and hunting and fishing grounds?

The failure to genuinely engage with, or attempt to address, the very deep community concerns regarding the permit changes is reminiscent of the process adopted to achieve the 2006 amendments to the *ALRA,* as reported by the Senate Community Affairs Legislation Committee.[31] The Government appears to have taken no account of submissions. This represents not only poor process, but also a waste of considerable public money and effort invested in the massive consultation efforts, especially by the Northern Territory land councils. Despite the enormous potential impact of the changes, the views of Aboriginal and non-Aboriginal stakeholders appear to have been regarded as irrelevant.

INCONSISTENCY OF LAND REFORM PROPOSALS WITH OTHER EMERGENCY MEASURES

There are a range of very obvious inconsistencies between the proposed land reform measures and other aspects of the Government's emergency response. This particularly remarkable given that the Government has endeavoured to adopt a whole-of-government approach to Indigenous affairs since 2004. In this instance, the proposed measures lack a whole-of-package compatibility – indeed, there may be direct tradeoffs between the workability of some measures with that of others. This incompatibility risks the workability of the entire package and its overarching goal of reducing child abuse in Aboriginal communities in the Northern Territory.

The Government is seeking to ban alcohol and X-rated pornographic material on Aboriginal land. However, the scrapping of the permit system particularly over road

[29] See http://www.abc.net.au/news/stories/2007/08/02/1994586.htm
[30] See http://www.abc.net.au/news/stories/2007/08/01/1993592.htm
[31] See http://www.aph.gov.au/SENATE/COMMITTEE/CLAC_CTTE/aborig_land_rights/index.htm

corridors is likely to make Aboriginal land more porous to both, as highlighted by Vince Kelly, President of the Northern Territory Police Association.[32]

The Government is also looking to enhance police levels in prescribed communities, some of which currently have no police whatsoever. However, there is a risk that policing disputes in relation to the partial scrapping of the permit system could absorb all of this enhanced policing effort.

The rationale for abolishing the CDEP and providing training to Aboriginal people is to enable all non-Indigenous jobs in prescribed communities to be taken up by local Aboriginal people. However, this is inconsistent with the objective of opening communities to the outside world and presumably to competition from outside labour.

Similarly, the objective of improve housing and living arrangements in prescribed communities and introducing 'normal' tenancy arrangements is likely to be undermined by the compulsory acquisition of townships through five year leases, since the uncertainty associated with these short-term leases is likely to discourage private finance to invest in prescribed townships.

Finally, there are issues of inconsistency relating to the governance of prescribed townships. Despite the Government's compulsory acquisition of townships for 5 years, the underlying or root title will remain with the traditional owners. This gives rise to a real risk that the authority of government business managers appointed to prescribed townships will be challenged by senior traditional owners of the township.

CONCLUSION

This report has analysed proposed reforms to the *ALRA* to be debated in the Australian Parliament during the week beginning 6 August 2007. These reforms include the compulsory acquisition of five-year leases over prescribed communities in the Northern Territory and the partial abolition of the permits system.

Of particular concern is the apparent unwillingness to subject the proposed reforms to appropriate community consultation and parliamentary review. This is particularly disturbing given the very significant impact that these reforms will have on the human rights, well-being and day-to-day lives of Aboriginal peoples. It is also disturbing given the seriousness of the stated objective of combating child abuse in Aboriginal communities. If the Government genuinely wants to address this issue, there is a compelling case for working with communities to ensure the most effective response.

A central finding of this report is that there is no evidence of any direct link between the compulsory acquisition of five year leases over prescribed townships and the problems of child abuse and dysfunction in Aboriginal communities in the Northern Territory. Furthermore the Government has provided no evidence that this measure will assist in addressing overcrowding and other housing problems that have been associated with child abuse.

[32] See http://www.abc.net.au/news/stories/2007/07/07/1972552.htm

For these reasons, the report concludes that the compulsory acquisition of five year leases in prescribed townships is unwarranted and should be vigorously opposed. As an alternative, both the Commonwealth and Northern Territory governments should seek to address acute housing and infrastructure shortages in prescribed communities using existing provisions under sections 19 and 19A of the *ALRA*.

There is similarly no evidence that the partial abolition of the permit system will reduce child sex abuse. Indeed there is a strong view tendered by the Northern Territory Police Association that such relaxation might exacerbate this problem. Moreover, there are well-founded concerns that a partial permit system will be unworkable. Under such circumstances – where there are multiple risks associated with the changes and no clear case for making them – any dilution of the permit system will merely diminish Aboriginal rights and risk further marginalizing an already marginalized group in Australian society.

Finally, the report raises serious concerns regarding the incompatibility of the proposed land and permit changes with other measures set out in the Government's national emergency response. There is a risk that this inherent inconsistency might undermine the overall workability of the Commonwealth Government's package of reforms and the very important objective of combating child abuse in Aboriginal communities in the Northern Territory.

RECOMMENDATIONS:

Given the proposed changes to the *ALRA* are in no way associated with child sexual abuse in Aboriginal communities and there is therefore no pressing urgency to pass the amendments, Oxfam Australia makes the following recommendations:

1. The legislative amendments be subjected to thorough parliamentary scrutiny – particularly a Senate Inquiry – to ensure that all stakeholders have the opportunity to contribute to the debate concerning the proposed changes and to ensure that Parliamentarians are fully apprised of their potential impact.

2. All political parties engage in a respectful dialogue with Aboriginal communities who will be affected by the proposed changes to ascertain whether there is community support for the changes.

3. The workability of the land rights amendments made in 2006 be rigorously assessed before any further reforms are introduced.

4. In the absence of all of the above, the proposed amendments be vigorously opposed and not passed by the Parliament of Australia.

Note: This briefing was prepared prior to sighting the Aboriginal Land Rights amending legislation to be tabled in Federal Parliament during the sitting week beginning 6 August 2007.

Appendix A. National Emergency Measures announced on 21 June 2007 and augmented on July 23 2007.

The emergency measures to protect children being announced today are a first step that will provide immediate mitigation and stabilising impacts in communities that will be prescribed by the Minister for Families, Community Services and Indigenous Affairs.

The measures include:

1. Introducing widespread alcohol restrictions on Northern Territory Aboriginal land.
2. Introducing welfare reforms to stem the flow of cash going toward substance abuse and to ensure funds meant to be for children's welfare are used for that purpose
3. Enforcing school attendance by linking income support and family assistance payments to school attendance for all people living on Aboriginal land and providing meals for children at school at parents' cost
4. Introducing compulsory health checks for all Aboriginal children to identify and treat health problems and any effects of abuse
5. **Acquiring townships prescribed by the Australian Government through five year leases including payment of just terms compensation**
6. As part of the immediate emergency response, increasing policing levels in prescribed communities, including requesting secondments from other jurisdictions to supplement NT resources, funded by the Australian Government.
7. Requiring intensified on ground clean up and repair of communities to make them safer and healthier by marshalling local workforces through work-for-the-dole
8. Improving housing and reforming community living arrangements in prescribed communities including the introduction of market based rents and normal tenancy arrangements
9. Banning the possession of X-rated pornography and introducing audits of all publicly funded computers to identify illegal material
10. **Scrapping the permit system for common areas, road corridors and airstrips for prescribed communities on Aboriginal land, and;**
11. Improving governance by appointing managers of all government business in prescribed communities
12. Abolition of the CDEP scheme [a further key step in the Emergency Response being implemented in the Northern Territory announced 23 July 2007]]

Source: http://www.atsia.gov.au/Media/media07/210607.aspx; and http://www.atsia.gov.au/media/media07/230707.aspx

Appendix B.

Major Communities on Aboriginal Land in the Northern Territory

Produced by Indigenous Information and Analysis Section
Department of Families, Community Services and Indigenous Affairs
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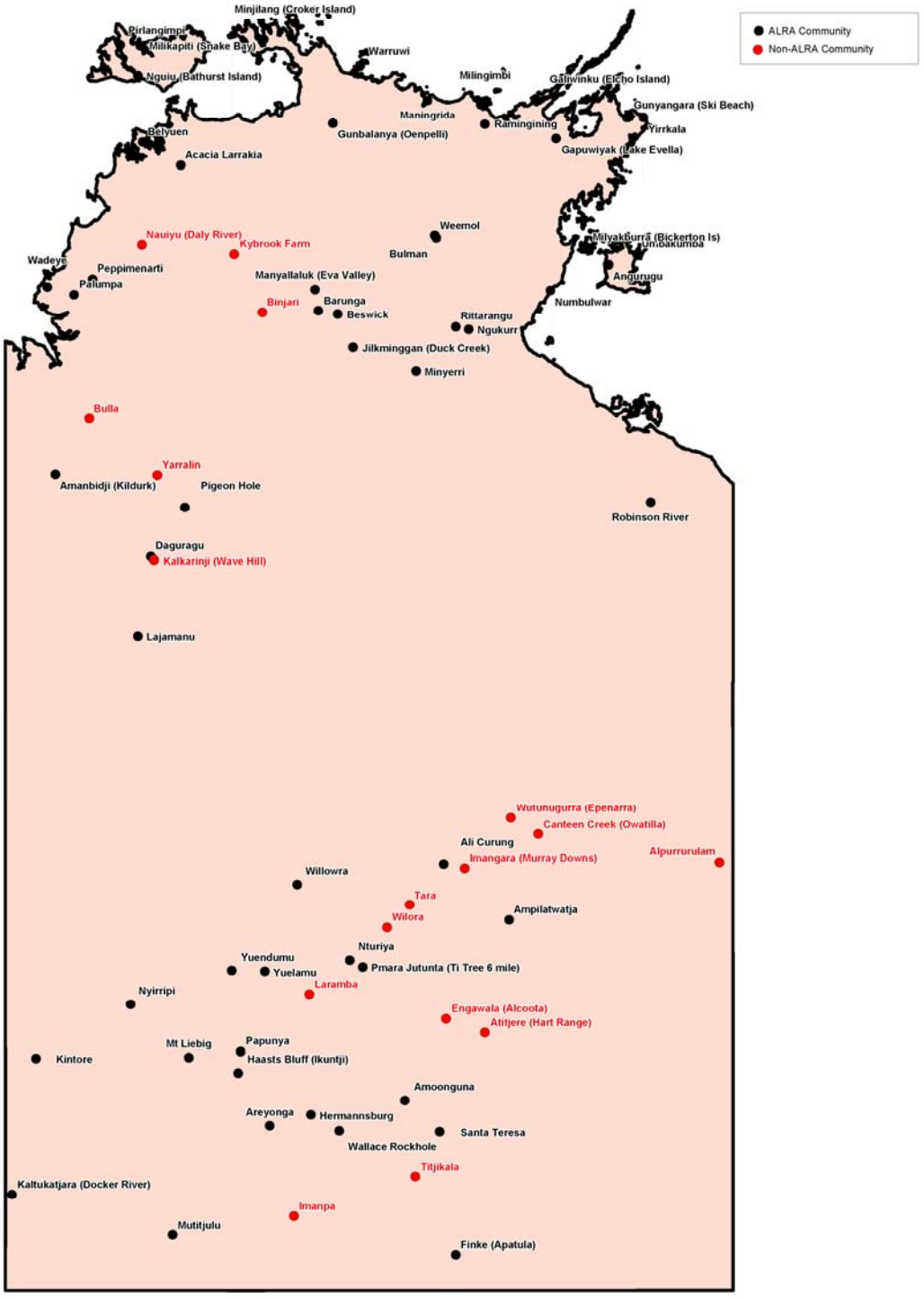
Appendix C.

Major Aboriginal Communities in the Northern Territory



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