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## **Proposed Compulsory Acquisition of Alice Springs Town Camps**

### **Submission to The Hon Jenny Macklin MP Minister for Families, Housing, Community Services and Indigenous Affairs**

This submission is made by the Human Rights Law Resource Centre (**HRLRC**) in relation to the proposed compulsory acquisition of the Alice Springs Town Camps by the Minister for Families, Housing, Community Services and Indigenous Affairs (**Minister**).

The Minister has sent a notice to Alice Springs Town Camp residents that she is considering exercising her power under section 47 of the *Northern Territory National Emergency Response Act 2007* (Cth) to compulsorily acquire the Town Camps.

The HRLRC strongly urges the Minister not to exercise her extraordinary power to compulsorily acquire the Alice Springs Town Camps. The section 47 power must not be exercised because to do so would:

- 1. be in breach of a number of Australia's international obligations to respect and promote the human rights of Aboriginal Australians;**
- 2. not be effective in achieving the Federal Government's objective of improving the lives of the residents of the Alice Springs Town Camps;**
- 3. seriously damage and undermine the relationship between the Federal Government and Aboriginal Australians; and**
- 4. be likely to severely damage Australia's international reputation.**

These concerns are expanded upon below.

**1. The proposed compulsory acquisition would breach a number of Australia's international human rights obligations**

Compulsory acquisition of the Alice Springs Town Camps would breach a number of Australia's fundamental international obligations to respect and promote the human rights of Aboriginal Australians. These obligations are contained in a number of major international human rights treaties to which Australia is a party.<sup>1</sup>

**(a) The proposed compulsory acquisition would be discriminatory**

Compulsory acquisition would be targeted at, and impact specifically on, the Aboriginal people residing in the Alice Springs Town Camps. This raises concerns in relation to the right to equality and freedom from discrimination, which is an integral component of the international human rights normative framework.

The obligation of all Australian governments to guarantee, in law and in practice, equal and effective protection against discrimination is enshrined in numerous international human rights treaties to which Australia is a party, including articles 2 and article 26 of the *ICCPR*, and articles 2 and 5 of the *CERD*.

In addition to being enshrined in international human rights treaties, the norm of non-discrimination constitutes a peremptory (or non-derogable) principle of customary international law.<sup>2</sup>

It is significant that already this year four key human rights mechanisms of the United Nations human rights system have indicated that the Northern Territory Intervention measures are discriminatory and are in breach of Australia's international human rights obligations. The Committee on the Elimination of All Forms of Racial Discrimination,<sup>3</sup> the Human Rights Committee,<sup>4</sup> the Committee on Economic, Social and Cultural Rights,<sup>5</sup> and the Special Rapporteur on the Rights of Indigenous Peoples<sup>6</sup> have each expressed concern that the measures of the Northern Territory

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<sup>1</sup> These include the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on the Elimination of All Forms of Racial Discrimination (CERD)*, the *Convention on the Elimination of Discrimination against Women* and the *Convention on the Rights of the Child*.

<sup>2</sup> See, eg, K Parker and L B Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 411, 441–2.

<sup>3</sup> UN Committee on the Elimination of All Forms of Racial Discrimination, Urgent Action Letter to the Australian Government dated 13 March 2009 in relation to the Northern Territory Emergency Response, available at <http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf>.

<sup>4</sup> Concluding Observations of the Human Rights Committee: Australia (March 2009) UN Doc CCPR/C/AUS/CO/5, available at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc>.

<sup>5</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia (May 2009) UN Doc E/C.12/AUS/CO/4, available at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>.

<sup>6</sup> Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (27 August 2009), available at <http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf>.

Intervention are racially discriminatory and called for the immediate reinstatement of the *Racial Discrimination Act 1975* (Cth) (***Racial Discrimination Act***).

The particular impact that compulsory acquisition would have on the Aboriginal residents of the Alice Springs Town Camps (in the absence of the acquisition being a “special measure”, as discussed below) renders the measure discriminatory.

**(b) *The proposed compulsory acquisition would not constitute a “special measure”***

“Special measures” are initiatives that are taken in favour of certain groups in order to achieve, substantively, the equal enjoyment or exercise of human rights and fundamental freedoms.

The Minister’s proposed compulsory acquisition of the Alice Springs Town Camps cannot properly be considered to be a “special measure” for the purposes of the *CERD*, or indeed the *Racial Discrimination Act* if it were justiciable. Regardless of the current suspension of the *Racial Discrimination Act*, Australia remains under an international obligation to comply with the requirements and standards enshrined in the human rights treaties to which it is a party, as well as with the customary international law norm of non-discrimination.

The proposed compulsory acquisition could not be considered to be a “special measure” because:

- (i) **it would not be for the benefit or advancement of the Alice Springs Town Camp residents.** Measures taken with neither consultation nor consent cannot meaningfully be said to be for the “advancement” of a group of people.<sup>7</sup> Further, as discussed below in section 2, it is very unlikely that compulsory acquisition will result in the Federal Government’s objective to improve Aboriginal disadvantage being achieved.
- (ii) **it does not involve the consent (or, at the very least, participation) of the affected communities.** Special measures require the participation of the affected group in their formulation.<sup>8</sup> Specifically in relation to Indigenous peoples, no decisions directly relating to their rights and interests should be taken without their *informed consent*.<sup>9</sup> Indeed, sections 8(1) and 10(3) of the *Racial Discrimination Act* would preclude management of Aboriginal owned property by other persons without consent from qualifying as a special measure.

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<sup>7</sup> *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J.

<sup>8</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: Special Measures* (2009).

<sup>9</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 23*.

In *Gerhardy v Brown*,<sup>10</sup> Brennan J considered the question of what constitutes “advancement”:

"Advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. *The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.*  
[emphasis added]

- (iii) **it would not be temporary.** In the event that all rights, titles and interests over the land are vested *permanently* in the Commonwealth, the measure would fail to comply with the requirement that a “special measure” be temporary in nature.

In light of the above, compulsory acquisition of the Alice Springs Town Camps would not fulfil the criteria required to be considered a “special measure”.

**(c) *The proposed compulsory acquisition would deny residents their right of self-determination***

While there are various definitions of the meaning of “self-determination”, at the very heart of the concept is the principle that individuals must be provided with the opportunity to participate in decision-making about matters which directly affect them. This right is enshrined in article 1 of the *ICCPR* and article 1 of the *ICESCR*, and is a fundamental tenet of the UN Declaration on the Rights of Indigenous Peoples.

The proposed compulsory acquisition would have the effect of denying Alice Springs Town Camp residents the opportunity to continue to be involved in decision-making processes.

The history of the Alice Springs Town Camps is one of a long struggle for land rights and the right of self-determination. Compulsory acquisition would strip the Town Camp residents of these fundamental rights, which have a particular importance for Aboriginal peoples.

Government initiatives to address the housing needs of Aboriginal peoples should avoid imposing leasing or other arrangements that would undermine Aboriginal peoples being provided with the opportunity to participate in decision making about matters which directly affect them.

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<sup>10</sup> (1985) 159 CLR 70 per Brennan J at 136.

**(d) *The proposed compulsory acquisition would deny residents their land rights***

Maintaining the rights of Aboriginal peoples to their land is of central importance to Aboriginal peoples' socio-economic development, self determination and cultural integrity. Rather than proceed with compulsory acquisition, continued efforts must be made by the Federal Government to resolve, clarify and strengthen the protection of Aboriginal land. Government initiatives to address the housing needs of Aboriginal peoples should avoid imposing leasing or other arrangements that would undermine Aboriginal peoples' control over their lands.

**2. The proposed compulsory acquisition would not be effective in achieving the Federal Government's objective of improving the lives and opportunities of the residents of the Town Camps**

**(a) *The Federal Government's significant financial investment will not be effective in addressing Aboriginal disadvantage***

The Federal Government is investing significant financial resources in remote Indigenous housing and infrastructure services in Aboriginal communities. For this, the Government should be commended. However, there is a widespread interest – for Aboriginal and non-Aboriginal people alike – to ensure that such investment is effective and results in the improvement of the conditions of disadvantage that are currently suffered by Aboriginal people.

Report after report, including the *Little Children are Sacred* report, has reaffirmed the fundamental principle that the key to success in the implementation of any measures intended to improve the lives of Aboriginal peoples must involve the genuine participation and cooperation with those communities for whom the benefits are intended.

The inevitable effect of a paternalistic, top-down approach to the situation of Aboriginal Australians will result in the further disempowerment of Aboriginal people and communities.

**(b) *Any measures to address Aboriginal disadvantage must involve the participation of affected communities***

The informed and active participation of people who are marginalised or disadvantaged in the development and implementation of laws, policies and practices to address that disadvantage is crucial in both an instrumental and developmental sense. In an instrumental sense, the participation of stakeholders is more likely to result in the development and implementation of laws and policies that are targeted, efficient, effective and meet people's needs. In a developmental sense, the participation of stakeholders can contribute to individual and community empowerment.<sup>11</sup>

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<sup>11</sup> See generally, Mark Considine, *Making Public Policy: Institutions, Actors, Strategies* (2005) 186–206.

As the UN Office of the High Commissioner for Human Rights has written in their *Guidelines on a Human Rights Approach to Poverty Reduction Strategies*:

Lack of political rights is both a cause and a consequence of poverty. Socially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalization...Active participation in political decision-making processes plays a role in expanding political freedoms and empowering people, which in turn contributes towards combating social exclusion and political marginalization.<sup>12</sup>

For strategies to be effective, Aboriginal communities must be empowered, have ownership of the programs and be provided with sufficient support to enable them to run effectively. If the Federal Government's approach to Indigenous housing is implemented without community consent and ownership, there is a risk that such measures will be resisted.

The only way to develop responsibility among Aboriginal people is to give them responsibility. Participation by Aboriginal people, and the development of a genuine and proper partnership between the Federal Government and Aboriginal people, will yield much greater success than the adoption of a top down, paternalistic approach.

Investment should be made in human capital so that communities are developing the capacity to deal with their own issues and problems and have the skill sets necessary to ensure their own well-being. There is no reason why this cannot be achieved within the scope of the Government's existing policy with respect to Aboriginal housing.

Instead, compulsory acquisition is likely to end the potential for any constructive dialogue between Aboriginal people and the Federal Government. Rather than proceed with compulsory acquisition, the Federal Government must empower and work with communities.

**(c) *The exercise of the compulsory acquisition power would not be in accordance with the nature of the power***

The Northern Territory Intervention legislation was enacted with the purported aim to protect Aboriginal children in the Northern Territory from sexual abuse and family violence. The power to compulsorily acquire Aboriginal land is one of a number of "immediate, broad ranging measures to stabilise and protect communities" in response to the "national emergency" confronting the welfare of Aboriginal children in the Northern Territory.<sup>13</sup>

Well over two years have now passed since the introduction of the Northern Territory Intervention measures. It is therefore difficult to justify that such "emergency" powers must now be immediately exercised to address such serious issues.

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<sup>12</sup> UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 48.

<sup>13</sup> *Ibid.*

Furthermore, no adequate justification has been provided by the Minister for the proposed exercise of the section 47 power. There is no evidence that the drastic measure of compulsory acquisition will have the effect of improving Aboriginal disadvantage.

Rather, the evidence to date under the Northern Territory Intervention has been to the contrary. Since the taking of compulsory 5-year leases over other Aboriginal communities, there have been very few, if any, discernible improvements in housing for Aboriginal people and little, if any, evidence has emerged that the compulsory leases over Aboriginal land have led to improving the disadvantage faced by Aboriginal communities.

**Instead, the power has been used to intimidate and threaten Aboriginal people.**

As the letter from Gilbert + Tobin, lawyers for Tangentyere Council, sent to Minister Macklin dated 24 May 2009 makes clear:

The Housing Associations have agreed to enter into the subleases for the simple reason that you have threatened them with compulsory acquisition if they do not enter into the subleases.

...

Indeed, this ultimate risk of compulsory acquisition has hovered in the background throughout the protracted negotiations. That risk was made abundantly clear when you issued notice that you were considering these compulsory acquisitions.

It is clear that there is very justification for the Minister to take the drastic step and potentially injurious step of compulsorily acquiring the Alice Springs Town Camps.

### **3. The proposed compulsory acquisition will seriously damage and undermine the relationship between the Federal Government and Aboriginal Australians**

The draconian range of Northern Territory Intervention measures have already led to affected Aboriginal communities and peoples expressing their feelings of hurt, anger, betrayal and disbelief.<sup>14</sup> Indeed, the Review Board expressed its view that resistance to the imposition of the Intervention “undercut the potential effectiveness of its substantive measures”.<sup>15</sup>

In light of its severe implications, compulsory acquisition of the Alice Springs Town Camps is highly likely to seriously damage and undermine the relationship between the Federal Government and Aboriginal Australians. This likelihood is particularly concerning in light of the Rudd Government’s commitment to a relationship of mutual respect, mutual resolve and mutual responsibility with Aboriginal Australians, as expressed in the formal Apology and in Australia’s endorsement of the UN Declaration on the Rights of Indigenous Peoples.

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<sup>14</sup> See, for example, *Northern Territory Emergency Response Review Board Report*, 30 September 2008.

<sup>15</sup> *Northern Territory Emergency Response Review Board Report*, 30 September 2008, 8,

Compulsory acquisition would be at odds with the Federal Government's purported commitment to a renewed relationship of mutual respect and genuine partnership with Aboriginal Australians. Rather, as discussed in the previous section, compulsory acquisition is likely severely limit the Government's purported aims of addressing the disadvantage faced by Aboriginal peoples.

**4. The proposed compulsory acquisition is likely to severely damage Australia's international human rights reputation.**

For the reasons outlined in this submission, the HRLRC considers that compulsory acquisition of the Alice Springs Town Camps is highly likely to severely damage Australia's international reputation and undermine its aspirations to be regarded as an international human rights leader.

To date, the Northern Territory Intervention measures have already drawn criticism from a number of respected international human rights mechanisms. Proceeding with compulsory acquisition is an extremely drastic step with severe implications, and is likely to draw significant criticism by the international community.

The HRLRC strongly urges the Minister not to compulsorily acquire the Alice Springs Town Camps and to engage in a far more fair, reasonable and culturally appropriate approach to resolving the very serious disadvantage faced by Aboriginal people in the Alice Springs Town Camps, and indeed all Aboriginal communities throughout Australia.

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