

**Request for Urgent Action under the
International Convention on the Elimination of All Forms Racial Discrimination
in relation to the
Commonwealth Government of Australia**

Update

11 August 2009

Prepared by the Authors' legal representatives

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1. Background

1.1 Request for Urgent Action

1. On 28 January 2009, a group of senior Aboriginal people residing in Prescribed Areas in the Northern Territory who are subject to the measures of the Northern Territory Emergency Response (**Northern Territory Intervention**) sent a Request for Urgent Action (**Request**) to the Committee on the Elimination of Racial Discrimination (**Committee**). The Request asked the Committee to invoke its urgent action procedure, alleging a flagrant breach by the Commonwealth of Australia (**Australia**) of its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (**Race Convention**).

1.2 Urgent Action Letter

2. On 13 March 2009, the Committee sent an urgent action letter to the Australian Government, requesting that it submit further details and information on the following issues no later than 31 July 2009:
 - (a) progress on the drafting of the redesigned measures, in direct consultation with the communities and individuals affected by the Northern Territory Intervention, bearing in mind their proposed introduction to the Parliament in September 2009; and
 - (b) progress on the lifting of the suspension of the *Racial Discrimination Act 1975* (Cth).

1.3 About this Update

3. This Update, prepared on behalf of the Authors,¹ seeks to provide further information to the Committee on actions taken by Australia since the Urgent Action Letter dated 13 March 2009.

2. Executive Summary

4. Despite almost five months having passed since the Committee sent its Urgent Action Letter:
 - (a) consultation with the affected communities and individuals has been manifestly inadequate;
 - (b) there has been very little progress in the drafting of redesigned measures of the Northern Territory Intervention; and
 - (c) suspension of the operation of the *Racial Discrimination Act 1975* (Cth) remains in force.
5. The Authors remain extremely concerned that the measures of the Northern Territory Intervention, as outlined in the Request for Urgent Action dated 28 January 2009, continue to constitute serious, massive and persistent racial discrimination against Aboriginal people in the Northern Territory.

¹ Details of the Authors of the Request for Urgent Action are repeated in the Schedule to this Update.

6. Of specific concern is the Australian Government's attempt to use the threat of compulsory acquisition of land to coerce Alice Springs Town Camp Housing Associations into handing over control of their land to the Australian Government for a period of 40 years. This issue is explained in further detail in section 5 of this Update.
7. The Authors also note that concerns about the Northern Territory Intervention measures have been expressed by both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights in their recent reviews of Australia's compliance with the respective Convention rights and obligations.² Both Committees were concerned about potential negative impact on the realisation of the rights of Indigenous peoples and regretted that the measures were adopted without sufficient and adequate consultation with the indigenous peoples concerned.

3. Inadequate Consultation and Lack of Informed Consent

8. The Authors note that the Urgent Action Letter dated 13 March 2009 refers to the Australian Government providing information that it is in the process of redesigning key Northern Territory Intervention measures, in consultation with affected indigenous communities, to ensure their consistency with the Racial Discrimination Act.
9. The Authors submit that the consultation process instigated by the Australian Government cannot be capable of retrospectively 'transforming' the measures of the Northern Territory Intervention into special measures. Even if such transformation were possible, the Authors contend that the consultation process currently being undertaken by the Australian Government is manifestly inadequate and incapable of facilitating informed consent mandated by General Recommendation 23 for the following reasons:
 - (a) there has been very limited consultation;
 - (b) the consultation process itself is inadequate; and
 - (c) there are concerns about the Australian Government's motives with respect to the consultative process.
10. These concerns are discussed further below.

3.1 Limited scope of consultation process

11. The consultation process does not provide the opportunity for Aboriginal people in the Northern Territory to participate in the design and implementation of special measures but merely provides an opportunity to comment on a Government discussion paper that outlines proposed changes to a limited number of the existing measures.

² *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2 April 2009), available at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (22 May 2009), available at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>.

12. For example, the Government proposes to create an 'opt out' procedure, whereby people who fulfil certain criteria can apply for exemptions to compulsory income quarantining. This is highly offensive to a number of Aboriginal people, given the invocation of schemes throughout Australia in the early 1900s that allowed for 'mixed blood' Aboriginal people who fulfilled certain criteria to apply for exemptions to Protection Acts and regulations, so long as they agreed to relinquish ties with their families and communities. The exemption certificates, commonly known as 'dog tags' were issued in an era where legislators considered they knew best what was required for the advancement of Aboriginal people.

3.2 Inadequacy of the consultation process itself

13. Inadequate notice is being provided to Aboriginal people in remote communities, in particular leaders of communities complained they were not informed of meetings in a timely manner and as a result were not able to attend the meetings. There are additional concerns that notice of meetings is being restricted to 'supporters' of the Northern Territory Intervention.
14. Meetings have also been criticised for failing to clarify their purpose and for not adequately explaining the existing measures of the Northern Territory Intervention and proposed amendments.
15. The consultation is occurring in the context of the Government continuing to exercise coercive powers under the Northern Territory Intervention legislation, unfettered by the Race Convention or the Racial Discrimination Act. It is not a genuine endeavour to create a new co-operative and negotiated approach to dealing with the problems that led to that intervention. Accordingly, when properly analysed, the current consultation process is the antithesis of what is required for a 'special measure'. It is no more than an occasion for those attending to say what they want to say. There is no proper process for any response to those persons or any negotiation with them by the Government.

3.3 Concerns about the Government's motive in implementing consultation

16. In late March 2009, the Minister received advice from the Department of Families, Housing, Community Services and Indigenous Affairs (**Department**) that recommended against formal consultation with Aboriginal people in the Northern Territory in respect of the compulsory acquisition of their land through five year leases under the NTNER Act.³
17. The Department advised that certain administrative mechanisms would assist in the characterisation of five year leases as special measures but that a 'consultative mechanism that falls short of requiring consent might not strengthen the argument sufficiently' to justify its implementation. The Department warned that a formal consultative process would be 'prohibitive in terms of costs and resources' and 'could cause delays in the roll out of essential services and facilities.' The Department noted the existence of an 'informal consultative process on land use approvals which goes some way to providing a consultative mechanism.'⁴

³ Briefing document from the Department of Families Housing Community Services and Indigenous Affairs to the Minister for Families Housing Community Services and Indigenous Affairs (25 March 2009) available at http://www.nit.com.au/downloads/files/Download_211.pdf.

⁴ Ibid.

18. The Authors submit that the advice illustrates a lack of commitment to a genuine consultation process leading to informed consent but suggests that the consultation process was initiated in order to avoid any legal challenges to the Australian Government's actions.

4. Continued Suspension of the Racial Discrimination Act

19. The suspension of the operation of the *Racial Discrimination Act 1975* (Cth) remains in force with respect to the measures of the Northern Territory Intervention. As a result of the continued exclusion of the Racial Discrimination Act, affected individuals remain unable to challenge the racially discriminatory measures of the Northern Territory Intervention. Also, the highly publicised continuation of those measures has necessarily had a chilling effect on the government's consultation process.

5. Threatened Compulsory Acquisition of Alice Springs Town Camps

5.1 The Alice Springs Town Camps

20. The current Alice Springs Town Camps have their origin in 'illegal' fringe camps on the outskirts of Alice Springs inhabited by Aboriginal people since before Alice Springs was gazetted as a town in 1888. From the 1860s, pastoral stations were established around permanent water supplies, forcing Aboriginal people from their traditional lands. Families were also drawn into fringe camps by the practice of removing Aboriginal children of mixed origin to an institution in Alice Springs.
21. Sustained attempts to remove the fringe camps from Alice Springs including legislation restricting the movement of Aboriginal people; the forced removal of residents and destruction of their homes on at least four occasions; only Aboriginal people with employment permits being permitted to enter Alice Springs during daylight hours; denial of basic services; and establishment of ration stations and settlements 'out bush' were not successful in forcing people from the camps. As illegal settlements, fringe camps were not eligible for basic services and facilities. People lived in humpies made from whatever materials they were able to obtain, without water or electricity until the 1970s.
22. By the 1970s, fringe camp residents demanded legal title to secure housing, services and facilities. Residents formed Housing Associations and applied for leases over their land. In 1977, the Housing Associations formed an umbrella organisation, Tangentyere Council, which is constituted by 18 Housing Associations to provide a variety of services to the Town Camps. Tangentyere Council Executive consists of the Presidents of each of the Housing Associations, a member of the Women's Committee and a member of the Four Corners Committee, which comprises senior Aboriginal law people who advise on the integration of traditional law in Executive responsibilities.

23. Of the 19 Town Camps, two are not covered by leasehold. The remainder are covered by Special Purposes Leases granted to Aboriginal Housing Associations in perpetuity or Crown leases granted in perpetuity to Aboriginal Housing Associations.
24. Aboriginal campers did not have the right to camp anywhere but had to consider certain relationships and rights and responsibilities. However, because the location and internal planning of each camp is according to different criteria to those used by non-Aboriginal planners, it has appeared as haphazard and uncontrolled. Town Camps tend to comprise small groups of closely related people and are positioned according to the direction of their home country with additional factors dictating position such as local dreaming tracks, traditional and social factors, advice of Alice Springs' traditional owners and historic factors. Dispute over the positioning of Town Camps were largely resolved in consultation with the traditional owners, the Arrernte.

5.2 Threatened Compulsory Acquisition

25. On 24 June 2008, members of the Executive of Tangentyere Council voted unanimously to enter into 40 year sub-leases with the Australian Government, with further negotiations about the management of housing to be undertaken with mutual goodwill.⁵ An Agreed Work Plan was adopted by the Tangentyere Council, the Housing Associations and the Australian and Northern Territory Governments, whereby \$5.3 million was granted to the Council for urgent upgrades. A final offer of \$100 million for housing and infrastructure with an additional \$25 million for service upgrades in Alice Springs was made in April 2009.
26. On 24 May 2009, the Minister for Families, Housing, Community Services and Indigenous Affairs (**Minister**) announced that the State party was commencing the process of compulsorily acquiring certain Alice Springs Town Camps under s 47(1) of the Northern Territory Emergency Response Act (**NTNER Act**). The Minister cited the failure of negotiations in relation to the 40 year sub-leases to be granted to the Government over the Town Camps.
27. The State party contends that the subleases are necessary to provide 'secure tenure' necessary for planned infrastructure and essential services. The Minister emphasised that the current leases were not granted under the Northern Territory land rights legislation and are not based on traditional ownership. The Minister announced and has repeatedly restated that the time for negotiations was over.
28. Negotiations failed in relation to tenancy management and decision making powers of the Housing Associations under the proposed arrangements. The State party insists that the tenancy management is to be conducted by the Northern Territory Housing Authority (**Territory Housing**), a non-Aboriginal controlled organisation. The Housing Associations are concerned at Territory Housing's poor reputation in relation to public housing for Aboriginal people in the Northern Territory.
29. The Minister commenced a consultation process in relation to the compulsory acquisition process giving the Housing Associations and interested parties until 28 July 2009 to make submissions and stating that she would not make a decision on compulsory acquisition until 4 August 2009.

⁵ See http://www.tangentyere.org.au/news/2008_Leases_on_Town_Camps.htm.

30. On 24 July 2009, the Minister rejected the Tangentyere Council's request for further negotiations in relation to the subleases, stating that there would be no further revisions of the sublease and that the time for negotiations is now over.
31. On 29 July 2009, the solicitor for the Tangentyere Council wrote to the Minister explaining that the Housing Associations were prepared to enter into the proposed 40 year sub-leases for the 'simple reason' that they had been 'threatened with compulsory acquisition' and that the loss of tenure over these lands was 'abhorrent' and they 'could not run the risk that it might occur.' The letter noted the Government's rejection of the Housing Associations' many requests for terms and conditions designed to protect the interests of the Housing Associations, tenants and residents. It observed that the contention that 'time had run out' was incorrect as the timetable was completely within the control of the Government.

5.3 Failure to protect particular interests of residents

32. One of the Authors and a resident of the Mount Nancy Town Camp, Barbara Shaw, has, together with other Alice Springs Town Camp residents (**Applicants**), issued legal proceedings in the Federal Court of Australia on behalf of Town Camp residents seeking injunctions restraining the Minister from exercising the power to compulsorily acquire the Town Camps and restraining the Housing Associations and the Minister from entering into the 40 year sub-leases.
33. Temporary injunctions were ordered by the Federal Court on 6 August 2009 and a full hearing of the issues will be heard on 28 and 31 August 2009. A copy of the judgment of Goldberg J of the Federal Court dated 6 August 2009 is provided with this Update.
34. The Applicants contend that they have not been given notice at all, or an opportunity to be heard on how their rights, interests or legitimate expectations might be affected by the proposed decisions. In particular, there has been no indication of what leasing arrangement residents will be expected to enter into with Territory Housing in the event of either the 40 year sublease or compulsory acquisition.
35. The Applicants are concerned that their existing culturally appropriate current tenancy arrangements with Housing Associations will be terminated. For example, the rules to be followed by 'house bosses' have been created in consultation with the Women's Committee and the Four Corners Committee and only then are adopted by Housing Associations. The residents have specific concerns that their ability to express themselves as Aboriginal people with particular lifeways and cultural obligations will be impacted upon. The potential for impact, for example, on the ability to accommodate visiting family and friends, potentially in large numbers; fulfil obligations to young men after initiation into the law when they are 'painted up'; howl and cry for sorry business and swap houses; cook kangaroo in the backyard; speak 'language' and paint with friends in the front yard is of concern and represent the subject matter of complaints that Aboriginal tenants have faced with Territory Housing.
36. As described above, notwithstanding the existence of statutory leases, the Alice Springs Town Camps represent a culturally specific and unique Aboriginal form of tenure obtained after sustained attempts to remove the Town Camps and their residents, embodying Town Campers' resolve to express their right to self-determination. This is exemplified by the fact that these statutory leases did not extinguish native title rights. In a similar way, the tenancy arrangements with the current Housing Associations embody vibrant cultural expression that is potentially under threat by the State party's actions.

37. The Minister's coercive, rather than co-operative and negotiated, approach to the Town Camps in the exercise of her Northern Territory Intervention powers is not a special measure. It appears to be an endeavour by the Minister to take control of the Town Camps using the current Northern Territory Intervention powers prior to the government's reinstatement of the Racial Discrimination Act. There can be little doubt that upon that reinstatement the Minister would not be able to take control of the Town Camps by exercising or threatening to exercise coercive power.

6. Details relating to the Authors, Legal Advisers and State Party

6.1 Information on the Authors

The Authors are a number of Aboriginal people residing in Prescribed Areas in the Northern Territory who are subject to the measures of the Northern Territory Intervention. Their details are as follows:

Name	Aboriginal community
Barbara Shaw	Mount Nancy Town Camp, Alice Springs
Geoffrey Shaw OAM	Mount Nancy Town Camp, Alice Springs
Harry Nelson Jakamarra	Yuendumu
Valerie Martin Napaltjarri	Yuendumu
Peggy Brown Nampitjimpa OAM	Yuendumu
Johnny Miller Japangardi	Yuendumu
Ronnie Agnew	Knuckey's Lagoon town camp, Darwin
Philip Goodman	Palmerston Indigenous Village, Darwin
Neparrnga Gumbula	Galiwinku
Elaine Peckham	Outstation, Alice Springs
Irene Fisher	Katherine
Rosalie Kunothe-Monks OAM	Utopia
Yingiya Guyula	Millingimbi/Gapuwiyak
Matthew Dhulumburrk	Millingimbi
Keith Lapalung	Millingimbi
Jane Miyatatawuy	Millingimbi
Munyarirr Gurrulpa	Ramangining
Peter Ganbung	Ramangining
Ronnie Barramala	Ramangining

The Authors reside in a number of the 73 Prescribed Areas targeted for intensive application of the Northern Territory Intervention measures.

6.2 Information on Counsel

The Authors have engaged the following qualified legal practitioners to assist in the preparation of this Communication:

Name: Mr Ron Merkel QC
Address: Melbourne Chambers
235 Queen Street
Melbourne Victoria 3000
AUSTRALIA

Name: Mr George Newhouse
Address: Surry Partners Australia
Level 1, 483 Riley Street
Surry Hills NSW 2010
AUSTRALIA

Name: Mr Ben Schokman
Address: Human Rights Law Resource Centre
Level 17, 461 Bourke Street
Melbourne Victoria 3000
AUSTRALIA

6.3 Address for Correspondence

Please address all correspondence in relation to this Request for Urgent Action to:

Mr George Newhouse
Surry Partners Australia
Level 1, 483 Riley Street
Surry Hills NSW 2010
AUSTRALIA

T: + 61 2 9318 6400

F: + 61 2 9318 6499

E: george.newhouse@surrypartners.com.au

6.4 State party against which the Communication is directed

The Request for Urgent Action is made against the Commonwealth of Australia.

The State party ratified the Race Convention on 30 September 1975 with one reservation to article 4(a).

The Race Convention came into effect in Australia on 30 October 1975 with the commencement of the operation of the Racial Discrimination Act.