Toeholds on Country: Aboriginal Community Living Areas in the Northern Territory .

By Greg Marks

Introduction

A package of three bills (the 'Stronger Futures legislation') to implement the *Stronger Futures in the Northern Territory* policy framework was introduced into the Federal Parliament on 23 November, 2011.[1] The legislative package repeals the *Northern Territory National Emergency Response Act 2007* (Cth) ('the Intervention'). The bills contain a wide range of provisions relating to school attendance, social security payments, liquor restrictions, store licensing, town camps, Community Living Areas, the role of customary law and pornography restrictions. The Minister for Families, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, in introducing the legislation, stated that:

> Together, these bills form a part of our next steps in the Northern Territory, undertaken in partnership with Aboriginal people and the Northern Territory government.[2]

The Intervention, now transmogrified by the oddly named 'Stronger Futures' legislation, will run for approximately the next 10 years. The Stronger Futures legislation package was referred to the Senate Standing Committee on Community Affairs. The Senate Committee received a large number of submissions, mostly critical, in whole or in part, of the legislation.[3]

This article deals with one specific part of this wide-ranging legislative package. The focus here is 'Part 3 – Land Reform' of the Stronger Futures in the Northern Territory Bill 2011 (Cth) ('the Bill'). Within Part 3, 'Division 3 – Community living areas' is of considerable concern: in particular clause 35 'Modifying NT laws in relation to community living areas'.

What are Community Living Areas?

Community Living Areas (CLAs) in the Northern Territory are the areas that have, generally, been excised from pastoral leases for the benefit of Aboriginal people.[4] Whilst granted on a living needs rather than a traditional ownership basis, they nevertheless largely reflect traditional ownership and connection to country in the pastoral areas of the Northern Territory. In the pastoral districts there was little or no reservation of land for Aboriginal purposes when leases were allocated. Aboriginal communities were left landless and Government had no means to provide housing and infrastructure. The basis for the excision response to this land deprivation is found in the 1971 Gibb Committee Report, which recommended that:

> ...in appropriate areas land be obtained by excision, or by sub-lease from the pastoralists for Aboriginal communities for limited village, economic and recreational purposes *to enable Aborigines to preserve traditional cultural ties and obligations* and *to provide the community with a measure of autonomy*. (emphases added) [5]

CLAs are perceived by Aboriginal people as small pieces of land that have been returned to them out of the totality of the land that they lost with the advent of pastoralism. Pastoralism came quite late to some parts of the Territory, as recently as the 1920s and even later.[6] Before that, the quiet possession and enjoyment of their lands by the Aboriginal owners, at least in some parts of the Territory, had often been largely undisturbed. With pastoralism they lost heavily. The CLAs granted since the 1970s represent at least a modicum of return of ownership and control for the traditional owners of the country concerned. They are a toehold on their former territories.

The integrity and autonomy of these toeholds are now threatened by the provisions of the Bill. There are over 100 CLA communities in the Northern Territory,[7] ranging in size from quite large townships to smaller family or clan-based communities. These excised pockets of Aboriginal land are fundamental to the continued viability, coherence and well-being of Aboriginal people in large parts of the Northern Territory.

The proposed legislation

The rationale of the provisions dealing with CLAs (and similar provisions in respect of town camps) is, according to Minister Macklin, as follows:

> The bill provides the Australian government with the ability to make regulations removing barriers in Northern Territory legislation to leasing on town camp and community living area land.
>
> Currently, there are restrictions on how this land can be used—even where the community agrees that they want to put it to different uses.
>
> This will enable the Aboriginal landholders of town camps and community living areas to make use of their land for a broader range of purposes, including for economic development and private home ownership.[8]

This part of the proposed Stronger Futures legislation package has, to an extent, been out of the public view. Contentious matters such as Income Management and conditionality of social security benefits linked to school attendance (Improving School Enrolment and Attendance through Welfare Reform Measure, known as SEAM) have drawn much attention. However, the 'Land Reform' provisions in respect of CLAs are potentially very important in the longer term.

CLAs are the responsibility of the Northern Territory Government and are established under Northern Territory legislation. The Bill establishes a 'contingency' power of the Commonwealth to enable it to take over, at an indeterminate time in the future, by regulation, responsibility for the land planning and use of CLAs. It is important to note that the Commonwealth does not take over that responsibility immediately by the enactment of the legislation. The Bill simply provides the Commonwealth with the power to do so whenever it so wishes. On the face of it, this is an odd arrangement.

Division 3 is designed to bring CLAs more fully within the purview of the Commonwealth's policy as asserted through the Intervention. In particular, the objective is to pursue the Commonwealth's 'secure tenure' and 'voluntary' leasing regime, which includes individualising home ownership and facilitating third party leases for economic development.[9] That is to say, the Commonwealth is keen to further 'roll out' the land reform policies which have characterised the Intervention to date. These policies have met considerable Aboriginal opposition. There is a question whether extension of such policies to the small CLAs is appropriate.

The intent of these provisions is to pressure the Northern Territory Government itself to implement Intervention policies in respect of these communities. If the Northern Territory Government proves tardy, the threat is that the Commonwealth will move to take over these Northern Territory functions. Thus the Explanatory Memorandum to the Bill notes:

> If Northern Territory reforms are implemented in a manner which meets the Government's commitment to more flexible land tenure arrangements, Commonwealth regulation will not be necessary.[10]

In response to this none-too-subtle approach, the Chief Minister of the Northern Territory Government, the Hon Paul Henderson MLA, has warned that:

> If the Commonwealth were to come in over the top and say, 'The Territory government and the land councils are taking too long; we're going to come in over the top and legislate for you,' they will get the same reaction from Indigenous people on the ground and in the land councils as when the intervention occurred.[11]

In order to achieve its objectives, the scope of the planning powers that can be assumed by the Commonwealth under the Bill in respect of CLAs is wide. Thus, clause 35(1) provides that the Commonwealth may make regulations encompassing all aspects of CLA land management and use:

> 35. (1) The regulations may modify any law of the Northern Territory relating to:
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> (a) the use of land; or
> (b) dealings in land; or
> (c) planning; or
> (d) infrastructure; or
> (e) any matter prescribed by the regulations;
>
> to the extent that the law applies to a community living area.

The Parliament is in effect being asked to agree to powers which are so wide as to have no clear boundaries and which can be applied, at the discretion of the Executive, at an indeterminate time in the future.

The Central Land Council has observed:

> To delegate such extensive power over an important reform agenda to the executive creates difficulties because it requires the Aboriginal landowners and the land councils to unreservedly trust the executive to devise an appropriate reform agenda at an unspecified point in time.[12]

Consultation requirements

Before making such regulations, clause 35(4) provides that the Commonwealth Minister must consult with:

- the Government of the Northern Territory; and
- the Land Council for the area; and
- the Aboriginal owner of the CLA *if the owner requests to be consulted* about the making of the regulations in question (emphasis added).

The Minister *may* also consult with anyone else (the example given in the Explanatory Memorandum is the Northern Territory Cattlemen's Association).

The provision about consultation with the owner, incidentally, contrasts with the same relevant provision in respect of town camps (clause 34(8)(b)) where the Aboriginal lessee must be consulted *without any need to first request such consultation*. This appears to be an odd discrepancy as it provides a different order of consultation rights between town camps and CLAs. Town camps have a higher degree of consultation rights than CLA communities.

Significantly, failure to consult as required by the Bill, does not invalidate any regulations made (clause 35(5)). In fact, there appears to be no avenue of appeal or redress in respect of any regulations made.

Concerns

Concerns with the legislation centre around consultation and consent, security of title and community control.

There are two levels of concern about consultation. Firstly, there is the development of the legislation itself. Despite the Government's assertions that it has consulted widely about the Stronger Futures legislation, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) information does not appear to indicate that *these particular CLA provisions*, despite their significance, were raised and discussed with Aboriginal people in the Northern Territory at all, let alone with CLA communities, in any of the consultation processes.[13]

A basic human rights regime provides that important legislation potentially bearing directly and significantly on the lives of Aboriginal people must be explained fully, the views of Aboriginal people sought, and, preferably, their informed consent obtained.[14] This does not appear to have happened in this case. If the relevant consultation has not taken place, the legislation would need, in this respect, to be deferred or repealed pending such consultation in order to achieve consistency with Australia's international human rights obligations.

Secondly, at the level of regulations, the provision for consultation and consent envisioned in the Bill, should the Commonwealth Government actually decide to make such regulations, is weak.

The owner, that is the Aboriginal CLA community, has to *request* consultation following public notification of the proposed changes to the CLA. Public notification, mentioned in the Explanatory Memorandum (although not included in the Bill) can be ineffective in remote areas, especially given low levels of literacy. In this legislation there is a reverse onus on the CLA owner in respect of consultation. It would appear more appropriate to mandate consultation with the owner, as is the case with town camps in the same legislation.

It should be noted that the provision for consultation with the appropriate Land Council may provide some safeguard, but the Land Council is not the owner. These owners may prefer to speak for themselves, albeit with assistance from the Land Council if they wish. That is to say, the provision for consultation with the Land Council, whilst helpful, does not replace the right of the owner to be consulted.

Similarly, assurances from Government officials that intentions around any future consultations are bona fide are of little consequence. What matters is what is in the legislation. These considerations are borne out by the following comments from an official to the Senate Inquiry:

> We have had conversations with both the NLC and the CLC since their submissions were made. The conversations we have had, particularly around the assurances in the consultation process for any regulations that might be passed, have satisfied them that there is a process in place. I would not go so far as to say that they would withdraw their suggestions around amendments as such, but we have talked to them about a consultation process, and they are satisfied with where we are heading with that.[15]

However, officials come and go. To meet the requirements of informed consent, appropriate provision needs to be reflected in the legislation.

Security of title and community control

The provisions are potentially disempowering for the owners of the CLAs. It is difficult to imagine that mainstream owners or lessees of property would be subject to potential radical change to purposes and uses of their land without enforceable safeguards. The provisions do not appear to meet the requirements of 'special measures'[16].

Problems may potentially arise in, for example, the subdividing or leasing of what are often small areas. There is a clear danger to the communal nature of the title and indeed community control. The Australian Lawyers Alliance has made the point in respect of these provisions that:

> Certainty in ownership is the bedrock of Australian property law, to the extent that "just terms" for property acquisition lies in the constitution. The variation of property laws via these clauses undermine the certainty of Indigenous interests in land.[17]

In fact, the CLAs, subject to such wide-ranging regulation, would, arguably, revert to *de facto* reserve status. The characteristics of ownership, including a level of control, decision-making power and certainty, will have been diminished.

Conclusion

CLAs are an important part of the land base for Northern Territory Aboriginal people. The potential in this legislation is for the Aboriginal owners of CLAs to be marginalised. To date the CLA communities do not appear to have been consulted. This does not augur well for the future. The wide scope of regulations that can be made under the legislation poses a threat to the integrity of the CLAs.

Underlying these concerns, there is the question of whether these provisions are necessary at all given that excisions are the responsibility of the Northern Territory Government, that no real case appears to have been made out for any urgency and that any necessary changes to the management of CLAs (for example to provide for some forms of public infrastructure not covered presently) can be effected by relatively minor changes to existing legislation.

The proposed provisions are in danger of being discriminatory. There is the apparent lack of consultation about the development of the legislation. There is also the weakness of the consultation rights available should regulations be proposed to be made. The paternalism inherent in the provisions in the legislation relating to CLAs does not sit well against instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.

The Stronger Futures Bill represents a potential and significant threat to Aboriginal people in respect of the precarious toehold on country provided by excisions, that is, Community Living Areas.

[1] The bills were the Social Security Legislation Amendment Bill 2011 (Cth); the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth); and the Stronger Futures in the Northern Territory Bill 2011 (Cth).

[2] Jenny Macklin MP, 2nd Reading Speech, 'Stronger Futures in the Northern Territory Bill 2011 (Cth)', 23 November 2011 <http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/14965034-cdb8-4a26-98aa-26c862a1cd0e/0030/hansard_frag.pdf;fileType=application%2Fpdf>.

[3] See submissions to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related bills* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm>.

[4] A few also have been excised from National Parks.

[5] Professor C A Gibb, Department of the Interior, *The Report of the Committee to Review the Situation of Aborigines on Pastoral Properties in the Northern Territory* (Govt. Press, 1971), quoted in Bruce Reyburn, 'The Forgotten Struggle of Australia's Aboriginal People', *Cultural Survival* (online), 24 February 2010 <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/australia/forgotten-struggle-australias-aboriginal-people>.

[6] See, eg., Margaret Ford, *Beyond the Furthest Fences* (Seal Books, 1978).

[7] See Central Land Council, Submission No 347 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related bills* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm>.

[8] Jenny Macklin MP, above n 2.

[9] See Stronger Futures in the Northern Territory Bill 2011 (Cth) s 33, 'Object of this Part'.

[10] See Revised Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth) Part 3 – 'Background', p 24.

[11] Evidence to Senate Committee on Community Affairs Legislation, Darwin, 24 February 2012 (Paul Henderson) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/22e597e2-671f-405c-90b7-bcab321ceab1/0000%22>.

[12] Central Land Council Submission, above n 2, 2.

[13] The Explanatory Memorandum advises that: 'During the Stronger Futures in the Northern Territory consultations, housing discussions considered home ownership, including how to encourage greater private home ownership' and similarly in respect of business opportunities. However, it should be noted that such discussions were *not* directly about changes envisaged in this legislation in respect of CLAs. See Explanatory Memorandum, supra footnote 10.

[14] See Gregory Marks, 'Indigenous Peoples and the Right to Free, Prior and Informed Consent', for Amnesty International Australia, 2010.

[15] Evidence to Senate Committee on Community Affairs Legislation, Canberra, 1 March 2012, 42 (Sally Moyle) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/00403cc9-35dc-4cfb-86ab-87ca376c7e79/0000%22>.

[16] For a discussion of the requirements for such measures to be considered 'Special Measures' see Gregory Marks, 'Race Discrimination, Special Measures and the Northern Territory Emergency Response', for Amnesty International Australia, 2009. <http://www.amnesty.org.au/images/uploads/aus/AMN1719_SpecialMeasuresBriefing03.pdf>.

[17] Australian Lawyers Alliance, Submission No. 319 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related bills* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm>.