

# MINUTE

## Department of Families, Housing, Community Services and Indigenous Affairs



MaPS.Net PDR Id	MN09-000640
Due Date	25 March 2009
Critical Date	<b>31 March 2009</b>
Consultation	Group Manager Yes
	Deputy Secretary Yes
	State Manager (NT) Yes
	Group Manager (Legal) Yes
	Group Manager (OIPC) Yes

To the Minister for Families, Housing, Community Services and Indigenous Affairs for decision

Subject: Five-year leases and the *Racial Discrimination Act 1975 (RDA)*

Critical Date: 31 March - to provide timely drafting instructions to OPC.

Purpose: To recommend an approach to the five-year leases.

Issue: Preliminary legal advice from the Australian Government Solicitor (AGS) indicates that, absent the RDA exemptions, there would be a significant risk that the five-year leases would be found to be inconsistent with the RDA. The Department has developed a proposed approach of administrative and legislative measures that aim to reduce the risk that a court would find the five-year leases not to be a special measure within the meaning of the RDA.

Various administrative measures are already or will shortly be in place including the payment of rent, lease boundary reductions and a commitment to transition to a voluntary leasing regime.

Supplementary legal advice from AGS on 2 March 2009 indicates that these administrative mechanisms would assist in the characterisation of the five-year leases as a special measure, particularly viewed in the context of their temporary nature during a transitional period but that a range of minor legislative mechanisms should also be considered as these would form the basis of a stronger argument. AGS have advised that the addition of these measures will reduce the risk that a court will find the five-year leases not compliant with the RDA. They also note that depending upon the process of consultation during the RDA consultations this risk may be reduced further.

A full list of measures under consideration is included in the **Additional Information**.

The supplementary advice from AGS also considered whether a formal consultative mechanism would assist characterisation of the five-year leases as a special measure. We do not recommend proceeding with a legislative amendment to establish such a mechanism in relation to the five-year leases as our legal advice indicates that a consultative mechanism which falls short of requiring consent might not strengthen the argument sufficiently to justify the considerable diversion of resources away from the central, long term aim of securing voluntary leasing arrangements. The Department is of the view that a formal mechanism would be prohibitive in terms of cost and resources, especially considering the five-year leases will only be in place for a relatively short time, and could cause delays in the roll out of essential services and facilities - the very problems the five-year leases were designed to counter. The Department's administration of the five-year leases already includes an informal consultative process on land use approvals which goes some way to providing a consultative mechanism.

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An alternative option available to you at any time pursuant to the NTNER Act is to terminate the five-year leases. A decision whether to lift the leases or to rely upon the administrative and proposed legislative measures to reduce the risk of inconsistency with the RDA need not be made until the eve of passage and/or commencement of the legislation which removes the exemptions.

The Department recommends that the minor legislative measures outlined in this brief be prepared for possible inclusion in the Spring 2009 Bill to make the NTER Act compliant with the RDA. Inclusion of these legislative measures into the Bill will not guarantee that the five-year leases will be RDA compliant. AGS advises that although the proposed measures will reduce the risk of inconsistency, the risk remains moderate to high.

**Recommendation:**

- 1. That you note the bundle of administrative mechanism being adopted in relation to the five-year leases. (Noted) Please Discuss
- 2. That you agree to the preparation of the legislative measures in relation to five-year leases proposed in this brief to define the permitted use and object of the five-year leases, require guidelines concerning land use and enshrine the commitment to transition to voluntary leases as quickly as possible. (Agreed) / Not Agreed
- 3. That you note the capacity to decide whether to lift the leases or argue "special measure" at any time up to passage of the legislation removing the RDA exemptions. (Noted) Please Discuss

*J. Marshall*  
26.3.09

*Carole Edwards*

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**Comments (MO use)**

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Signature: ..... Date: .....

**Ratings Box**

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Rating	Quality	Timeliness
Unsatisfactory		
Satisfactory		
Good		

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### Additional Information

#### Special Measures: Administrative and Legislative Measures

The proposed administrative and legislative measures and those measures already in place aim to support the position that the five-year leases are a special measure. The administrative and legislative measures assist in demonstrating that the five-year leases confer a benefit to the communities and that the intended purpose of the five-year leases is securing the adequate advancement of the beneficiaries so that they enjoy equally with others, human rights and fundamental freedoms and that the protection given to the communities by the leases is necessary.

#### *Existing measures*

Outlined below is a list of measures that are already in place or in train which support the position that the five-year leases are a special measure within the meaning of the *Racial Discrimination Act 1975* (RDA).

This list assumes that at some point in the future the RDA exemption for the five-year leases will be lifted under legislation that has successfully passed Parliament and by the time the legislation commences some five-year leases still remain (have not yet been replaced by voluntary leases).

- Provision or facilitation of benefits to the residents of 64 remote communities subject to the five-year leases including:
  - Community Clean Ups
  - Safe houses
  - GBM accommodation
  - Asbestos management
  - New public housing system including proper tenancy management and
  - Housing refurbishments under the Strategic Indigenous Housing and Infrastructure Program (SIHIP).
- Administrative land use approval process in place for the transparent allocation of lots including a process of informal consultation and a register of land use.
- All five-year leases to be transitioned to long term voluntary leases as quickly as practicable.
- Five-year lease boundaries have been reduced substantially (effective 1 April 2009) having regard to the area required for the Australian Government to undertake beneficial activities.
- Commitment to no new five-year leases without consent.
- Rent independently determined and paid; provision for negotiation with Land Councils on any claimed balance between rent paid and full compensation (meeting in full the specific recommendations of the NTER Review Board in relation to five-year leases).

#### *Possible additional legislative measures (together with appropriate second reading, explanatory memorandum references)*

- Define permitted use and object of the five-year leases:
  - limit permitted use to measures to improve the well-being of residents of the affected communities and to expressly exclude mining or other development inconsistent with the continuing operation of the area as a town; and
  - require the administration of the leases to be conducted consistently with respect for Aboriginal culture.
- Require guidelines to govern the land use approval process.
- Enshrine in legislation the intended transition to voluntary leases. This amendment to be accompanied with public release of a plan of rolling negotiations to achieve voluntary leases for all 64 communities

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covered by five-year leases by 2012. This could include necessary actions by the Australian Government by certain timeframes, e.g. a leasing offer to be made to every five-year lease community by at least 12 months before the August 2012 expiry of the five-year leases.

The preliminary legal advice also notes that there would be a risk that a court would find that s 10(3) of the RDA applies to five-year leases, meaning a special measures argument would not assist. The supplementary advice also emphasises that all administrative and legislative action must be developed so as to be clear that the Commonwealth holds the rights conferred by the five-year leases and will exercise those rights for the benefit of Indigenous people in the townships, but not manage them 'on behalf of' the traditional owners. This aspect may reduce the risk that the five-year leases can not comprise a special measure as they deal with the management of Indigenous property rights without consent as prohibited by section 10(3) of the RDA.

The Department will monitor the risks described above as the legislative measures are prepared, introduced and debated. We will brief you at the appropriate time on factors that are relevant to the decision of whether to lift the leases or to retain the leases and, if necessary, defend any litigation brought on the basis that the five-year leases are a 'special measure'. Such factors will include:

- the legal advice at the time
- that status of implementation of the various administrative measures especially payment of rent and transition to voluntary leases; and
- attitudes of community members toward the five-year leases, particularly in relation to
  - the payment of rent;
  - five-year lease boundary reductions;
  - the transition to voluntary leasing arrangements;
  - the provision of housing;
  - and other relevant community developments.