



Native Title Amendment Bill (No. 2) 2009

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Law and Bills Digest Section

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Native Title Amendment Bill (No. 2) 2009

Date introduced: 21 October 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: The day after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Native Title Act 1993* (the primary Act or the NTA) so that the procedural rights of native title holders are curtailed when land is required for public education and health facilities, for public housing and for a wide range of other public facilities.

Background

Committee consideration

This Bill was referred to the Senate Legal and Constitutional Committee (the Senate Committee) for inquiry and report by 2 February 2010. On that date the Senate granted an extension of time for reporting until 23 February 2010. Details of the Inquiry are at http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/index.htm.

Future Acts

The Bill seeks to modify elements of the future act regime in the NTA, so a very brief explanation of this terminology is required.

The Native Title Act has always been controversial legislation, and after numerous amendments has become a notoriously complex legislative mechanism which regulates native title (a property right originally identified by the High Court in 1992).¹

The legislation has undergone numerous and extensive revisions and the ‘future act’ regime has become one of the more complex arrangements established by the NTA. It allows for prospective developments which would usually have taken place under State

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

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and Territory laws but which, since the discovery of native title and the passage of the NTA, could be circumvented by the operation of that Act – an over-riding federal law. In summary:

The future act regime (Pt 2, Div 3) provides a ‘native title clearance’ for developments that are typically undertaken pursuant to State and Territory law, and which might otherwise conflict with the protection given to native title by the NTA and/or the [*Racial Discrimination Act 1975*].²

Examples of such developments include ‘the construction of a road, the passage of a new State Water Act, the grant of a mining lease, [or] the compulsory acquisition of all interests in a given area of land’.³

Basis of policy commitment

Housing Crisis

The current government has for some time made statements defending and promoting native title, arguing for a ‘Native Title system that promotes economic and social development’ and that native title should be ‘a vehicle for social and economic development’.⁴ Nevertheless this Bill proposes to limit the protections offered to native title holders. The Government explains this on the grounds that native title protections and consequent uncertainties are hampering the construction of public housing and other public facilities for indigenous communities when these public works are urgently needed.

There are additional funds for housing (forming part of the Government’s ‘closing the gap’ program), and the availability of these funds forms the impetus for the legislation. The proposed legislation also stems from initiatives taken under the Northern Territory Emergency Intervention. According to the Native Title Council’s submission to the Senate Inquiry,

This amendment has been proposed as a result of what has come to be known as the Northern Territory Emergency Intervention (or the Intervention) initiated under the Howard Government and continued under the Rudd Government.

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2. Sean Brennan, ‘Native Title: An Overview of its Development in Australia’, in Heather McRae, Garth Nettheim et al, *Indigenous Legal Issues, Commentary and Materials*, Lawbook Co, 2009, p. 379.
 3. Ibid.
 4. See, for instance, an account of this matter in the North Queensland Land Council Native Title Representative Body Aboriginal Corporation, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, January 2010, viewed 12 February 2010, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=b5d62c29-8109-4370-8c03-1e8f431a223f> .

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The Government identifies a need to ensure that moneys designed to improve indigenous housing are spent effectively and efficiently. They point in particular to the following proposed spending:

In 2008 the Council of Australian Governments (COAG) recognised the pressing need to improve public housing and infrastructure in remote communities. It agreed to the National Partnership on Remote Indigenous Housing which sets out a new and comprehensive framework for providing more and better houses. Unprecedented funding of \$5.5 billion over 10 years will be directed to raise the standard of housing and infrastructure in remote communities. This investment will fund approximately 4 200 new houses and upgrades to 4 800 existing houses.⁵

The Government's concern regarding the housing situation is shared by many. For instance the Australian Human Rights Commission comments that it is 'acutely aware of the chronic housing shortages in Aboriginal and Torres Strait Islander communities and of the impact this situation has on the health and wellbeing of Aboriginal and Torres Strait Islander peoples',⁶ while the National Native Title Council, along with most other submissions to the Senate Inquiry, endorse an objective of 'addressing the chronic parlous state of public housing and other infrastructure in regional and remote Aboriginal and Torres Strait Islander communities.'⁷ Nevertheless both these submissions, and most of the others made to the Senate Committee's Inquiry, reject the measures proposed by the Bill as inappropriate to addressing this universally acknowledged housing problem.

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5. See both R McClelland, 'Second reading speech: Native Title Amendment Bill (No. 2) 2009', House of Representatives, Debates, 21 October 2009, p. 10468, viewed 30 October 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-10-21%2F0025%22> and the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, date? January 2010, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9>
 6. Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 27 January 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=a031d620-9f78-4129-a61d-c2b56bab2118>
 7. National Native Title Council, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=80a8d226-856e-4a3b-8c07-bb6aeb08135c>

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The Government's position on housing and the need for this Bill is resisted by many submissions for two main reasons. The first reason is that native title provisions are not necessarily the cause of delays – rather State and Territory bureaucracies and chronic neglect have led to the lack of infrastructure facing indigenous communities. The second related concern is that in any case the Bill's measures are an inappropriate response to the various difficulties experienced in this area.

The submissions to the Senate Inquiry querying the necessity for these changes, have argued that adding a new layer of complexity to the NTA will not assist matters. Thus, for instance, Australians for Native Title and Reconciliation comment in their submission that the very nature of future acts under the NTA, with its piecemeal approach, is problematic, and that adding another variant with individually tailored processes 'is merely another example of this special pleading at the expense of Indigenous rights.'⁸

Professor Jon Altman argues that

... it is incumbent on the Australian Government to provide some evidence that the future act regime of the Native Title Act is causing delay and uncertainty. The provision of such concrete evidence should be the first step in making any case for legal reform of the Native Title Act. In the absence of such evidence, it is difficult to condone any new expedited procedures that might add new layers to existing negotiation and consultation avenues and hence increase rather than decrease transactions costs and associated potential uncertainty and delay.⁹

Other submissions to the Inquiry make similar points,¹⁰ including Mr Warren Mundine, the Chief Executive Officer of NTSCORP (a body with statutory responsibilities under the Act to protect the rights and interests of Aboriginal communities in New South Wales), who commented that 'insignificant evidence has been provided with regard to the Native Title Act processes being a source of delay.'¹¹

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8. Australians for Native Title and Reconciliation, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=87f29971-87cc-4ac1-ab34-0c4fb910a097>
 9. Jon Altman, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=4aefac4d-1178-4e95-962e-d3ab0d5a8119>
 10. For instance: Cape York Land Council, Submission to the Senate Committee, op. cit., and the National Native Title Council, Submission to the Senate Committee, op. cit.
 11. Mr Warren Mundine, *Committee Hansard*, 28 January 2010, viewed 2 February 2010, <http://www.aph.gov.au/hansard/senate/committee/S12690.pdf>

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In a supplementary submission made after the Committee's hearings the Government provides some account of instances of delay caused through NTA processes (without identifying details) and argues that these illustrate the relevant processes (for instance indigenous land use agreements) are not enabling speedy responses to the housing crisis.¹²

The Northern Land Council submission also identifies situations in which the indigenous land use agreements processes have resulted in delays, giving concrete details of lengthy and frustrated procedures. However, in contrast to the Government's response, the Northern Land Council's preferred response to these delays is to streamline the processes by removing the existing requirement that indigenous land use agreements be registered (particularly where they have been certified by a registered body).¹³

It is possible to agree that there are unacceptable delays in the NTA processes and nevertheless disagree over the appropriate response or solution. A large number of submissions argue that delays cannot necessarily be laid at the door of native title holders and that more often than not they are the result of inadequate State and Territory administration and funding. Another concern is that there is a lack of support or funding for native title bodies.¹⁴

NTSCORP argues, for instance, that

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12. Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, Supplementary Submission to the Senate Standing Committee on Legal and Constitutional Affairs (No. 2), *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, February 2010, viewed 12 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=56f36abc-fd5e-4d7c-95e4-4816d90bf44e>
 13. Northern Land Council, Submission to the Senate Standing Committee on Legal and Constitutional Affairs (and the advice in an attachment and the supplementary submission), *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, January 2010, viewed 12 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=d2aaed55-4e23-4c2e-adc7-289d0d607c03>
 14. See for instance the Torres Strait Regional Authority, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, December 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=10e5d762-ea65-470f-9e9b-7adaeb4b4ce2> and the Carpentaria Land Council Aboriginal Corporation, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 12 November 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2>

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...other bureaucratic processes provide greater obstacles to the implementation of public infrastructure, housing and services, than native title rights and interests. As such, reform should be directed towards overcoming bottlenecks within bureaucracy, rather than attempting to erode native title rights. Indigenous communities should not be forced to bear the consequences of bureaucratic inefficiency.¹⁵

While the North Queensland Land Council argues that it is ‘extraordinarily premature to wind back indigenous land rights when the government has not made all reasonable attempts in both resourcing and engagement to deliver on their own policy objectives.’¹⁶ They go on to comment that ‘[t]he bill will not address State and Commonwealth Government failures in program delivery.’¹⁷

Warren Mundine commented in his evidence to the Senate Committee that

There is no evidence to show—and we argue the contrary—that Indigenous communities have been the ones that have slowed the process down. My previous experience in working with mining companies and energy companies and my experience now with native title is that the thing that really holds it up is government process...¹⁸

While Daniel Lavery, a Barrister specialising in Indigenous land issues, is even more stringent in his reflections:

It is not native title which is retarding or preventing the construction of urgently-needed housing and infrastructure. It is a result of neglect over several decades by the States and the Northern Territory, and their continuing ineptitude.¹⁹

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15. NTSCORP, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=e8cbcf54-d770-497a-b3fc-9b86884627be>
 16. North Queensland Land Council, Submission to the Senate Committee, op. cit.
 17. Ibid.
 18. Mr Warren Mundine, *Committee Hansard*, 28 January 2010, viewed 2 February 2010, <http://www.aph.gov.au/hansard/senate/commtee/S12690.pdf>
 19. Daniel Lavery, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=3b099463-ed73-496c-8cd8-a2c6740893c6>

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Position of interested parties

The Bill has not excited a significant degree of attention, however the Coalition has stated its intention of supporting the Bill, and the Australian Petroleum Production and Exploration Association's Submission to the Senate Committee also gives support to the Bill, as does the Western Australian Government and the Queensland Government. However every indigenous body that made a submission to the Senate Committee raised serious concerns about the Government's approach, as do advocates such as Professor Jon Altman, Australians for Native Title and Reconciliation, Daniel Lavery and the Law Council of Australia.

The Greens do not seem to have commented in the media, however their concern to preserve the *Racial Discrimination Act 1975* has been recently reinforced and it could therefore be assumed that they will have concerns regarding the Bill (see further, 'Race Discrimination' below).²⁰

Financial implications

The Explanatory Memorandum states that '[t]here is no direct financial impact on Government revenue from this Bill.'²¹ Certainly any financial impact that may occur due to the proposal to modify negotiating avenues for native title holders and any resultant decrease in expenditure required to reach settlement of, for instance, indigenous land use agreements, would be indirect and next to impossible to quantify.

Key issues

Indigenous Land Use Agreements (ILUAs)

There is wide spread consensus amongst the submissions to the Senate Committee that ILUAs should be the preferred vehicle for negotiating housing and other infrastructure arrangements. Thus, for instance, the Cape York Land Council's submission (endorsed by a large number of later submissions) argues:

The *Wik* amendments also provided that ILUAs over any future acts could be negotiated between government, developers and native title holders in accordance with a process that was more or less beneficial than [other] future act procedures.²²

The submission applauds the Rudd Government's 'proper focus on the importance of ILUAs as a form of agreement making in settling all forms of native title disputes – both

20. See generally the Greens website, viewed 15 February 2010, <http://greensmps.org.au/taxonomy/term/101/all>

21. Explanatory Memorandum, Native Title Amendment Bill (No. 2) 2009, p. 2.

22. Cape York Land Council, Submission to the Senate Committee, *op. cit.*

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determinations and future acts', and argues that this Bill's departure from these principles is inappropriate.²³

The Torres Strait Regional Authority argue that an ILUA has advantages in that it can '[alleviate] some burden on the limited resources of the parties whilst providing a measure of certainty as to the notification and consultation process necessary for encouraging positive relationships between the parties.'²⁴

The Australian Human Rights Commission also argues strongly in favour of indigenous land use agreements and generally promotes arrangements which involve negotiation with the relevant indigenous communities.²⁵

Race Discrimination

It is a fairly straight forward proposition to identify the provisions of the Bill as discriminating on the grounds of race. Most curtailments of native title rights will fit the pattern of a racially discriminatory act in that it will be detrimental to a particular, race based group of property holders. Certainly the majority of submissions to the Senate Inquiry identify the Bill's measures as racially discriminatory, and the Government implicitly recognises that Bill contains a particular, racially based scheme and then goes on to argue that this would not offend against the *Racial Discrimination Act 1975* (the RDA) because the Bill's provisions would qualify as a 'special measure'.

Special measures are racially specific measures taken to ensure the advancement of groups needing protection to enjoy human rights and fundamental freedoms. They are recognised under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Article 1(4) of CERD, from which the RDA's special measures are derived, provides as follows:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.²⁶

23. Ibid.

24. Torres Strait Regional Authority, Submission to the Senate Committee, op. cit.

25. Australian Human Rights Commission, Submission to the Senate Committee, op. cit.

26. CERD was adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969. Australia ratified CERD on 30 Oct 1975, <http://www2.ohchr.org/english/law/cerd.htm>

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The Australian courts have interpreted this definition as containing four elements:

- a special measure must confer a benefit on some or all members of a class;
- the membership of the class must be based on race, colour, descent, or national or ethnic origin;
- a special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and freedoms; and
- the circumstances of the special measure must provide protection to the beneficiaries which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others.²⁷

Logically a special measure must not be continued after the objectives for which it was taken have been achieved.

The purpose of securing adequate advancement for a racial group is not necessarily established by showing that the person who takes the measure does so for the purpose of conferring a benefit, if the group does not seek or wish to have the benefit. In *Gerhardy v Brown* a seminal case on this topic, Brennan J stated that 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’.²⁸

The Parliament is currently considering the nature of special measures with respect to another Bill which seeks to revise what are, arguably, discriminatory elements of the Northern Territory Emergency Legislation. Issues regarding special measures are explored in the relevant Bills Digest,²⁹ which identifies some recent commentary by the United Nations High Commissioner for Human Rights Special Rapporteur, James Anaya, after a visit to Australia:

27. *Gerhardy v Brown* (1985) 159 CLR 70 at 126, as adapted, and quoted by the Human Rights Commission,
http://www.humanrights.gov.au/social_justice/sj_report/sjreport04/Appendix2RDAandSRAs.html

28. *Gerhardy v Brown* (1985) 159 CLR 70 at 135.

29. Luke Buckmaster, John Gardiner-Garden, Matthew Thomas and Diane Spooner, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, Bills digest no. 94 2009-2010, Parliamentary Library, Canberra, viewed 6 February 2010, <http://www.aph.gov.au/Library/pubs/bd/2009-10/10bd094.pdf>

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... any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional, and necessary to achieve the legitimate objectives being pursued.³⁰

Any answer to the question of whether the Bill's measures satisfy the 'special measures' provisions would be difficult to arrive at. The Government argues that the NTA itself is a 'special measure' and that the proposed amendments provide 'a relatively small adjustment to meet the urgent need for housing and public infrastructure in Indigenous communities.'³¹ On the other hand the Cape York Land Council, National Native Title Council, NTSCORP and a range of other entities identify the proposed amendments as racially discriminatory, with the Carpentaria Land Council Aboriginal Corporation commenting:

The Bill appears to be premised on the assumption that if a project is of benefit generally, there is justification in overriding the interests of native title holders. This is of concern because such an attitude is fundamentally discriminatory. It would be unacceptable for the property rights of non-Aboriginal people in Australia to be diminished for the provision of benefits such as public housing or infrastructure. Any attempts by government to sweep away the property rights of individual non-Indigenous Australian in such circumstances on the basis that a public benefit would be provided would rightly lead to outrage and resistance. This will also be the case in aboriginal communities.³²

While the analogy is inadequate, contemplating the reactions of a suburban resident faced with having their property acquired to build a local school (or an airport) may assist in identifying differential assumptions regarding property and who should have the right to veto or receive just compensation. The suburban property owner may not be so sanguine regarding that hypothetically welcome provision of facilities if it involves the use of their land.

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30. Ibid., p. 4, quoting United Nations High Commissioner For Human Rights (UNHCHR), Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia, UNHCHR website, 27 August 2009, viewed 14 January 2010, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument>
 31. Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, Supplementary Submission to the Senate Standing Committee on Legal and Constitutional Affairs (No. 1), *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, February 2010, viewed 4 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631>
 32. Carpentaria Land Council Aboriginal Corporation, Submission to the Senate Committee, op. cit.

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When contemplating whether the Bill fits the definition of a ‘special measure’ it may also be instructive to contemplate Brennan J’s concern that a special measure be generally accepted by the community. The widespread disquiet amongst Native Title groups evinced in submissions to the Senate Committee may be of concern in this regard, as is the generally held view that the Government has progressed this Bill’s measures without sufficient consultation and without having due regard to the input of the relevant Indigenous communities. The Cape York Land Council comments

The Bill, and the August 2009 Discussion Paper, have been fast-tracked to the extent that indigenous people have had no meaningful opportunity to negotiate with the Commonwealth.³³

The North Queensland Land Council sets out its position

that this bill is a knee-jerk reaction to delays the government is experiencing meeting its promise to build public housing and infrastructure in some remote indigenous communities.³⁴

Once again a significant number of submissions argue the consultation process for this Bill was inadequate, including the Australian Human Rights Commission, Professor Altman and the Carpentaria Land Council Aboriginal Corporation.

De facto extinguishment?

The proposed amendments proceed on the grounds that they will deal with situations in which no compulsory acquisition is occurring and that the native title is simply subject to a temporary suspension which will be restored after the legislation expires or when the facilities which have been constructed cease to be used. Several submissions to the Committee argue that in fact there will be a de facto acquisition, with the Law Council of Australia commenting that

Whilst the application of the non-extinguishment principle is supported, it is submitted that long-term suppression of native title would have the same practical effect as extinguishment.

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33. Cape York Land Council, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November 2009, viewed 12 November 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=d2fb685c-44c1-4ff8-a14b-9336289cd0d6>
 34. North Queensland Land Council Native Title Representative Body Aboriginal Corporation, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, January 2010, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=b5d62c29-8109-4370-8c03-1e8f431a223f>

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There is a particular anomaly arising from the fact that Indigenous persons are potentially being required to forego their native title rights for an extended, perhaps indefinite, period in return for the provision of public housing and infrastructure on their traditional lands. In return for agreeing to a lease, Aboriginal communities will be required to pay rent and be subject to public housing policies which may not be appropriate to their particular circumstances. Moreover, there does not appear to be an associated plan for the return of native title lands on which housing or infrastructure has been built under this new process.³⁵

The Torres Strait Regional Authority, speaking of these future results, quote the Special Rapporteur, Mr James Anaya, who said that

...government initiatives to address the housing needs of indigenous peoples, should avoid imposing leasing or other arrangements that would undermine indigenous peoples' control over their lands.³⁶

The Regional Authority goes on to conclude that the effects of the Bill's measures on Native Title are likely to be long term, as does NTSCORP, who comment that the Bill 'will effectively result in the extinguishment of native title... given the permanency of acts such as public infrastructure... [p]ublic housing and infrastructure is not generally considered temporary'.³⁷ Similarly Australians for Native Title and Reconciliation comment that given the lifetime of public housing and infrastructure... 'while native title is not formally extinguished, its exercise is affected to such an extent that it may as well be'.³⁸

The Cape York Land Council submission explores the implications of these arrangements as follows:

The nature of the future acts covered by the Bill is such that they will remain for a period that will probably make it impossible for native title to ever meaningfully revive. As such, the amendments are a de facto form of compulsory acquisition but which avoid the prescribed freehold test and right to negotiate applicable under the

35. Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, December 2009, viewed 2 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=50b8cf7e-3d2b-483a-8c5c-652e856d5c13>

36. Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia, 27 August 2009, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=53&LangID=E> as quoted in Torres Strait Regional Authority, Submission to the Senate Committee, op. cit.

37. NTSCORP, Submission to the Senate Committee, op. cit.

38. ANTaR, Submission to the Senate Committee op. cit.

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NTA to compulsory acquisitions. Notably, it is not legally possible for such developments to occur on non indigenous title without triggering compulsory acquisition legislation.³⁹

In its second supplementary submission to the Senate Inquiry the Government reasserts its belief that native title will not be extinguished by measures in the Bill, saying ‘it is clear that the new Subdivision will prevent the extinguishment of native title, where it applies.’⁴⁰

Main provisions

Legislative Background

Part 2 – Division 3 of the NTA deals with ‘Future Acts’ – dealings with native title land which fall into various categories, with varying procedural approaches attached to the different types of future act (defined in section 233). Thus we have, for instance, these pre-existing subdivisions:

- Subdivision G – Future acts and primary production
- Subdivision J – Reservations, leases etc.
- Subdivision K – Facilities for services to the public
- Subdivision L – Low impact future acts

These current categories have various ways of dealing with proposals to deal with native title land, with a legislative and policy on indigenous land use agreements (ILUAs) as the preferred mechanism to facilitate future acts. An ILUA can allow future acts by agreement between the relevant parties and must be registered with the ‘Register of Indigenous Land Use Agreements’.⁴¹

This Bill proposes a new category ‘**Subdivision JA – Public housing etc**’. The coverage of this **proposed subdivision** is set out in **proposed subsection 24JAA(3)** and includes not only housing and public education and health facilities but also police facilities and emergency facilities (the section requires that they would benefit the Aboriginal people or Torres Strait Islanders living in the area), as well as a wide range of utilities.

39. Cape York Land Council, Submission to the Senate Committee op. cit.

40. Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs, Supplementary Submission to the Senate Committee, op. cit.

41. Further information regarding the ILUA process is provided by the Northern Land Council in its submission to the Senate Committee op. cit. The Cape York Land Council submission (op. cit.) is also useful for giving background information on the applicable law.

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The **proposed ‘Subdivision JA—Public Housing etc’** contains some provisions which mirror comparable Subdivisions, but also includes unique or differently formatted provisions. The Digest will focus particularly on the differences between the proposed provisions and pre-existing Subdivisions.

It is important to note that the Future Acts provisions are likely to have a restricted application and preclude a significant proportion of the Northern Territory (i.e. any land held under the *Aboriginal Land Rights (Northern Territory) Act 1976* and certain other Commonwealth legislation, and also significant parts of South Australia).⁴² There would also seem to be some uncertainty regarding the coverage of the future act regime more generally (this was discussed particularly by the Northern Land Council and the Law Council of Australia). A supplementary submission from the Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs argues that the Bill is still necessary to address uncertainties as to what might constitute a future act. In particular they argue that if there is a future act, contrary to expectations, and the appropriate procedures have not been complied with:

The consequences of the act being invalid will ultimately be borne by the entity that is constructing the housing etc. with no legal right to do so, and by the entity that purported to grant the legal right. In light of this potential risk, the Government considers that the new Subdivision is appropriate to provide certainty and ensure essential housing and infrastructure can be built.⁴³

Unlike other subdivisions, the **proposed subdivision** includes a sunset clause which would come into operation 10 years after the amendment comes into operation

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42. Section 233 of the NTA specifies that the future act regime does not apply to ‘any act affecting Aboriginal/Torres Strait Islander land or waters’, which section 253 defines as ‘land or waters held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under:
- (a) any of the following laws of the Commonwealth:
 - (i) the Aboriginal Land Grant (Jervis Bay Territory) Act 1986;
 - (ii) the Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987;
 - (iii) the Aboriginal Land Rights (Northern Territory) Act 1976; or
 - (b) any of the following laws of South Australia:
 - (i) the Aboriginal Lands Trust Act 1966;
 - (ii) the Maralinga Tjarutja Land Rights Act 1984;
 - (iii) the Pitjantjatjara Land Rights Act 1981; or
 - (c) any other law, or part of a law, prescribed for the purposes of the provision in which the expression is used.
43. Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs, Supplementary Submission (No. 2) to the Senate Committee, op. cit.

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(**subparagraphs 24JAA(d)(i) and (ii)**). The significant COAG funding for housing discussed above is currently scheduled to last for 10 years.

The **proposed subdivision**, in a comparable manner to subdivision K, would apply to areas or sites which may be of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions, but requires the presence of some Commonwealth State/Territory law which ‘makes provision in relation to the preservation or protection of areas, or sites’ that may be of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions’ (**proposed section 24JAA(1)(e)**).

Similarly to other subdivisions it is specified that the **proposed subdivision** will not apply to compulsory acquisitions of some or all of the relevant native title rights and interests (**proposed subsection 24JAA(2)**). Generally speaking such acquisitions are dealt with elsewhere in the NTA and require just terms compensation (but see above for a discussion of whether there may be a de facto acquisition).

Coverage and Consequence

As previously mentioned, **proposed subsection 24JAA(3)** specifies the sorts of activities which will be covered by the subdivision, including public housing for Aboriginal people or Torres Strait Islanders living in the area (**24JAA(3)(a)**), public education or health facilities, or police or emergency facilities (**24JAA(3)(b)**) or a broad range of facilities, including roads, jetties, lighting, communication facilities and sewerage treatment facilities (this is an extension on the pre-existing coverage in ‘Subdivision K Facilities for services to the public’ which currently only covers ‘a sewerage facility, other than a treatment facility’ (**24JAA(3)(c)**)). Importantly this proposed sub-paragraph leaves open the possibility of extending the list of facilities further by specifying it will also cover ‘things prescribed by the regulations’ (**24JAA(3)(c)(iii)**).

The directly comparable ‘Subdivision K Facilities for services to the public’ goes on to define the procedural rights of native title holders, whereas the **proposed Subdivision** does not give comparable procedural rights, instead requiring the ‘action body’ (defined in **proposed 24JAA(1)(c)** as the governmental body planning to create the housing or specified facilities) to notify the relevant native title claimant, registered native title body corporate or representative bodies and, to report on any comments received (there is a time frame of two months during which comments can be made (**proposed subsections 24JAA(10)&(11)**)). This two month timeframe commences from a time at which, in the action body’s opinion, the relevant parties should have received their notice (**proposed subsection 24JAA(12)**). Giving the action body the right to determine when the relevant parties ‘should’ have received their notice seems unique in the framework of the legislation.

If a registered native title claimant or registered native title body corporate requests consultation in writing the action body must conduct consultations, and the two month

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opportunity for comment is extended to a maximum of four months. Once again, a report must be given to the Minister, (**proposed subsection 24JAA(16)**).

The provisions regarding notice, consultation and comment are novel and quite specific with respect to some elements of the scheme, while with respect to other elements the Commonwealth Minister is given the power to determine matters by legislative instrument.

The entities who must receive notice are identified as:

- registered native title claimant
- native title body corporate
- or representative Aboriginal Torres Strait Islander body
(**proposed subsection 24JAA(10)**).

Whilst, as mentioned, it is a statutory requirement that a report be prepared as a result of these activities, there are no provisions governing response to concerns raised, nor any significant requirements that would ensure the relevant native title body or native title claimants concerns are given attention. A supplementary submission from the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs argues that:

The concept of 'consulting' has an established meaning. It is insufficient to simply 'go through the motions', and a proponent who failed to seriously engage or to consider information and arguments put forward would not in fact be 'consulting'.⁴⁴

The Torres Strait Regional Authority, however, comments that 'the right to comment as opposed to the requirement for consent does not provide native title holders with any assurance that their concerns will be taken into account'.⁴⁵

Finally **item 8** provides for compensation for acquisition of property. This provision follows a standard format which responds to a constitutional requirement that acquisitions of property be compensated for if they have not been undertaken on just terms. There would seem to be a drafting oddity here in that the section is not to be inserted into the NTA itself but will remain an item in the Schedule of the Act resulting from passage of this Bill. All the other items of the Bill's Schedule function by amending the NTA, whereas item 8, which makes no provision for incorporation into the Principal Act, will continue to function as the lone and independently active provision of the resultant Act.

There are many provisions which refer to the need for just terms compensation in the NTA, with the most comprehensive provision seeking to ensure that the compensation is

44. Ibid.

45. Torres Strait Regional Authority, Submission to the Senate Committee op. cit.

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provided by the relevant governmental authority and confining the statutory right to take action to the Federal or High Court (Section 53—Just terms compensation). It seems odd that **item 8** has not been incorporated into the relevant Subdivision or somewhere in the NTA itself. The Explanatory Memorandum makes no comment on this drafting decision. In general it would seem a desirable outcome to have all provisions incorporated into the Principal Act rather than being left in what should become, effectively, a spent piece of amending legislation. From a purely pragmatic point of view the difficulties of tracing the relevant statutory provisions is increased under this proposed legislative arrangement.

Specific concerns regarding the Bill's provisions

A large number of submissions recommend that the Bill be rejected. There are, however, some submissions which make more detailed recommendations regarding specific changes they would like to see. Thus, for instance, the Western Australian Government suggests addressing problems that could arise given the proposed requirement that a report to a Minister be in a form that can be stipulated by legislative instrument. It argues this could introduce further uncertainty and potentially further delays. The submission suggests the possibility that a report 'may be deemed as not fully complying with the Commonwealth Minister's requirements' could jeopardise the validity of the act. They are also concerned that these provisions do not specify time frames for the Commonwealth Minister to respond, if the Minister ever does respond, and that the requirements regarding the reporting process have great potential to create further delays.⁴⁶

The Queensland Government notes that the Bill

does not state that the consultation should be undertaken with a view to reaching agreement to the doing of the act. This is something that could be set out explicitly in the legislative instrument to be made by the Commonwealth Minister.⁴⁷

There are other concerns regarding uncertainties which could arise as a result of the innovative aspects of the regime, and also the potential inadequacies of the regulation of the consultation. The Carpentaria Land Council Aboriginal Corporation's perspective may be useful in this context:

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46. Western Australian Government, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, January 2010 (?), viewed 12 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=8c3a0f62-f5e6-4915-a5b1-203829bf4eeb>
47. Queensland Government, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)*, November/December 2009, viewed 12 February 2010, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=1a692ae9-def5-4dd2-9cfe-e70ba24fc63a>

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[C]onsultation requires effective and genuine engagement with Aboriginal people. Consultation does not occur:

- a. by meeting with Aboriginal people to tell them what has been already decided
- b. by meeting with Aboriginal people to discuss a stated issue but then raising a completely different issue with that Aboriginal community which they did not have notice of, or time to consider
- c. where Aboriginal people are pressured to decide an issue a particular way under threat of a negative impact or sanctions
- d. where discussion papers and other proposals are issued with very short time frames in circumstances where many Aboriginal organisations do not have the resources to respond to such short time frames or
- e. where consultation sessions are held in capital cities hundreds or thousands of kilometres away from the relevant Aboriginal community making it impossible for members of that community to attend.⁴⁸

Another issue which the Law Council of Australia identifies as needing to be addressed by the legislation is the current ‘lack of an associated plan for the return of native title lands on which housing or infrastructure has been built under this new process.’⁴⁹

Concluding comments

It is unfortunate that the interests of native title holders and the need for the development of infrastructure are being pitted against each other. While these two interests need not necessarily coincide there should presumably be good opportunities for negotiation, an opportunity which is not being tapped.

The Bill would seem to have been prepared in haste and the Committee process has been important to draw out hitherto unexplored issues, including an array of suggestions for amendments to the Bill. The nearly unanimous rejection of the Bill by native title holder representative bodies must be of concern.

The Carpentaria Land Council Aboriginal Corporation recount an all too believable story of problems encountered in negotiation procedures:

In the CLCAC’s experience, government agencies often seem to view native title issues as simply a box to tick in the development process. Unfortunately, it is also

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48. Carpentaria Land Council Aboriginal Corporation, Submission to the Senate Committee op. cit.
 49. Law Council of Australia, Submission to the Senate Committee op. cit.

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often left as the last box to tick. Rather than go to native title holders and their representatives to develop proposals upfront, the project is developed, consultants retained, contracts entered to, and then, when the project is about to commence the native title process commences. This has the inevitable consequence that the native title holders are only provided with input into a proposal at a point where it is essentially concluded. This makes any consultation a farce and makes consultations subject to strict timeframes coupled with the pressure of cost blow-outs.⁵⁰

The story shows all too graphically how badly managed consultation can be destructive. In its quest to ensure the large-scale construction of housing and facilities for Indigenous communities the Government will need to monitor the effective delivery of another large-scale infrastructure project. While the need to deliver the facilities is imperative there is also a need to balance this with the long-term impacts of legislative change.

50. Carpentaria Land Council Aboriginal Corporation, Submission to the Senate Committee op. cit.

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