Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Native Title Amendment Bill (No2) 2009 (Cth)

Torres Strait Regional Authority

21 December 2009

INTRODUCTION

TSRA made a submission in response to the discussion paper concerning the housing amendments to the *Native Title Act 1993* (Cth) (**NTA**) released on 13 August 2009 (**Discussion Paper**). Please refer to the TSRA's submission for:

- an outline of TSRA's functions in the Torres Strait;
- a overview as to the breadth of native title determinations in the region, and
- a discussion of the Infrastructure ILUA currently being negotiated to facilitate the expedited delivery of community infrastructure.

For the purpose of this submission, the TSRA highlights the following elements of the Infrastructure ILUA.

INFRASTRUCTURE ILUA

The NTO is currently negotiating a template "infrastructure ILUA" with the TSIRC who holds the Deed of Grant in Trust for 12 communities in the Torres Strait. The proposed ILUA is designed to:

- allow the TSRA and TSIRC to carry out future acts which are part of, or relate to, the construction, establishment, operation or maintenance of community facilities, including the construction of residential housing;
- allow the TSIRC (as trustee) to grant a trustee lease to facilitate the construction and establishment of a community facility;
- validate the infrastructure projects captured under the ILUA;
- ensure the non-extinguishment principle applies;
- allow the parties to agree to an appropriate consultation process concerning major future acts; and
- set out a compensation regime which allows the PBC to provide notice to make a claim for compensation within two months of receiving a works notice.

In addition to providing a legal process to meet the requirements of the NTA, the Infrastructure ILUA alleviates 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. We view this as consistent with the Government's stated intention to make engagement with Indigenous

communities central to the design and delivery of programs and services.

NATIVE TITLE AMENDMENT BILL (NO2) ("THE BILL")

In its Discussion Paper Submission, the TSRA welcomed additional government funds for the purpose of residential housing and generally did not oppose the proposed amendments to the NTA. However, we note that the Discussion Paper stated that "*public housing and infrastructure in remote Indigenous communities could proceed only following genuine consultation with native title parties on the nature and location of the proposed project*".

The TSRA has had the opportunity to review the Native Title Amendment Bill (No2) and makes the following comments.

THE BILL DOES NOT ENSURE "GENUINE CONSULTATION"

Presumably, "genuine consultation" requires a proponent to provide information sufficient for native title holders to provide informed comments in relation to proposed activities affecting native title which will be taken into account and addressed by the proponent.

It is unclear what constitutes "consultation" under the proposed amendments. Although there is a minimum consultation period of 4 months should a native title party require it, at this stage the Bill fails to ensure that consultation will be adequate as our current understanding is that requirements concerning consultation may be imposed by legislative instrument by the Commonwealth Minister, yet to come into existence. We note that the proponent is accountable to the Commonwealth Minister by providing a consultation report and being subject to any requirements imposed by the Minister, however native title holders are denied the opportunity to confirm whether the information provided was appropriate, sufficient and easily understood.

Additionally, 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.

The minimal and ineffective consultations conducted by the State for the review of the *Torres Strait Islander Land Act 1991* (Qld) provide a snapshot of the potential for proponents to carry out consultations that are completely ineffective and fall short of "genuine consultation". For further information as to the difficulties experienced during the consultations, please refer to the attached copy of a letter addressed to the Honourable Stephen Robertson and copied to the Honourable Jenny Macklin. Despite the TSRA's request for a second round of community consultations to overcome the shortfall of the first round of consultations, the State to date has failed to carry out a second round of community consultations on the outer islands in the Torres Strait.

By removing the incentive to negotiate ILUAs, native title holders are denied the opportunity to negotiate and engage with proponents and subsequently develop partnerships with proponents and government. The TSRA is also concerned that merely providing native title holders with an opportunity to comment is the most

minimal right afforded to native title holders and we find this exasperating given the Rudd government's current view to seek innovative approaches to native title-agreement making to deliver broader, more practical outcomes to Indigenous Australians.

SKEWING NATIVE TITLE AS A PROPERTY RIGHT

The NTO witnesses a certain irony in carrying out its functions within a region where a significant percentage of land is recognised as native title land. NTO staff are familiar with proponents who appear to view the NTA merely as legislation imposing minimal statutory obligations that operate as a burden to proponents rather than recognition of an indigenous property rights system that operates concurrently with State created property laws. The result of this is that proponents who adopt this approach do not engage in meaningful ways with native title holders. This leads to protracted or stalled negotiations rather than a finalised ILUA which can provide the foundations for strong partnerships between stakeholders of remote service delivery projects.

Such outcomes are reflected in the submission by the Island Industries Board (**IIB**) in response to the Discussion Paper whereby the IIB suggests that the issue of compensation has protracted negotiations for its matters in the Torres Strait. Confusingly, despite suggesting that native title holders should be denied the opportunity to seek compensation (refer to the statement by IIB in its submission "Food security for all remote Torres Strait communities is too important to be held hostage to the self interest of the few"), the IIB concludes that its infrastructure should be included in the proposed amendments to the *NTA* which, as contemplated in the Discussion Paper and now evident in the Bill, provides for native title holders to seek compensation. This illustrates a common misunderstanding as to the purpose and operation of the *NTA* and the proprietary value of native title which unfortunately delays the occurrence of constructive negotiations.

The TSRA is concerned that by providing an expedited future acts process that fails to require proponents to engage in adequate consultation and to address the concerns of native title holders through good faith negotiation, the proposed amendments will promote the "rubber stamp" approach to native title matters by discounting the rights afforded under the NTA and further distinguishing them from the rights afforded to ordinary freehold land owners.

As raised by the Cape York Land Council (**CYLC**) in its submission concerning the Bill, there is a real risk that this will undermine traditional law, governance and government structure in indigenous communities as indigenous participation is undermined. In contemplating the amount of resources committed to the recognition of native title and the enhancement of traditional governance in the Torres Strait, the TSRA questions the economic sense of the proposed amendments. Additionally, undermining traditional law and governance seriously risks community division as future acts are progressed.

UNDERMINING CURRENT ILUAS

Current negotiations for the proposed infrastructure ILUA display a genuine willingness of proponents and native title holders to promote the expedient delivery of community services whilst alleviating some burden on resources for all stakeholders. Further, there are a number of ILUAs that are also in the process of being

negotiated with respect to other infrastructure projects. The TSRA is of the view there is a real risk that the proposed amendments may undermine and disrupt this valuable process where the affected parties agree as to what constitutes appropriate consultation.

LACK OF CONSULTATION REGARDING THE BILL

The TSRA notes that the Bill has been introduced without direct consultation with communities in the Torres Strait. Further, due to the tight timeframes of releasing the Discussion Paper and Bill and the due dates for comment, the NTO has not had an opportunity to consult and obtain the views of native title holders.

This outcome is inconsistent with Article 19 of the Declaration of the Rights of Indigenous Peoples which states that

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

RACIAL DISCRIMINATION

By replacing the freehold test with a right to comment where the rights of freeholders are not changed is racial discrimination and inconsistent with the *Racial Discrimination Act 1975* (Cth). We refer to and support the comments of the CYLC in its submission concerning the Bill in this regard.

SUPPORTING LONG TERM FUTURE ACTS

Although the proposed amendments maintain the non-extinguishment principle, the NTO has been advised that the Commonwealth Government requires minimum 40 year term leases for community housing. We note that on conclusion of his recent visit to Australia, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr James Anaya, stated 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*[1]".

The TSRA is of the view that the proposed amendments support the "imposition" of long term leases and undermine indigenous people's control over their lands by replacing the freehold test and only providing the right to comment to native title holders. This is particularly inequitable given the long term affect on native title rights and interests. The TSRA does not oppose 40 year leases for community housing, however believes

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[1] *"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.unhchr.ch/huricane/huricane.nsf/0/313713727C084992C125761F00443D60?opendocument

that native title holders should be genuinely consulted and be able to negotiate the implantation of long term leases.

RECOMMENDATION

The TSRA welcomes expedited procedures for the implementation of community infrastructure but is of the view that native title holders must have a participatory role by being fully consulted about the proposed amendments and ensuring that relevant parties negotiate within reasonable timeframes concerning community infrastructure.

Accordingly, the TSRA recommends direct consultation with native title holders to investigate how community infrastructure projects may be expedited without unjustly compromising on the rights of native title holders.

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Chairman
Torres Strait Regional Authority