CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

ABN 99 121 997 933 · ICN 268

10 November 2009

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Hallahan

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill (No. 2) 2009

Thank you for your email of 2 November 2009 inviting the Carpentaria Land Council Aboriginal Corporation ("the CLCAC") to comment on the *Native Title Amendment Bill (No. 2) 2009* ("the Bill"), which is currently under consideration by the Senate Standing Committee on Legal and Constitutional Affairs.

The purported aim of the Bill is to establish a new subdivision within the future acts regime of the *Native Title Act 1993*. It proposes a new process for the construction of public housing and facilities for Aboriginal peoples and Torres Strait Islanders in communities on Indigenous held land. Whilst the CLCAC is supportive of endeavours by governments to improve Indigenous housing and remote service delivery under the current National Partnership Agreement on Remote Indigenous Housing, we do not support the Bill.

The CLCAC simply does not see the necessity for the Bill. In most cases the proposed amendments to the *Native Title Act* will serve no function other than to provide a means to further erode native title rights and reward bureaucratic failures and incompetence. The Bill only serves to highlight the present failure of State agencies to adequately engage and consult with Aboriginal communities. Native title must be viewed as an opportunity for those delivering services to engage with Aboriginal communities to ensure that housing and infrastructure is developed in not only the most efficient and cost effective way, but also in a way that is premised on equality, free and informed decision making and mutual respect. Processes already exist in the *Native Title Act* to provide for housing and infrastructure to be delivered to Aboriginal communities in a timely fashion.

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Our concerns are set out in greater detail in the enclosed submission.

The CLCAC is also concerned with the limited amount of time that was made available to us to prepare and make a submission to this inquiry. We would be pleased to make further submissions and to appear and take questions at a public hearing should such an opportunity arise.

Yours faithfully

HELEN TAIT
CHIEF EXECUTIVE OFFICER

CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

ABN 99 121 997 933 - ICN 268

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE *NATIVE TITLE AMENDMENT BILL (NO. 2) 2009*

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INTRODUCTION

1. The Carpentaria Land Council Aboriginal Corporation ("the CLCAC") is the organisation carrying out the functions of a representative Aboriginal/Torres Strait Islander body pursuant to s203FE of the *Native Title Act* 1993 (Cth) ("the NTA") in relation to land and waters in the southern Gulf of Carpentaria.

2. The CLCAC representative body area includes land and waters the subject of Federal Court determinations recognising the existence of native title.[1] It also includes land and waters which are the subject of native title claims[2] and areas where native title is asserted notwithstanding that formal claims are yet to be lodged. The CLCAC's area includes determinations or claims adjacent to or in the vicinity of town areas and Aboriginal communities including Doomadgee, Burketown, Normanton and Gununa (Mornington Island).

3. The CLCAC is pleased to provide the following submission in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Native Title Amendment Bill (No. 2) 2009* ("the Bill").

EXECUTIVE SUMMARY

4. The CLCAC is supportive of endeavours by governments to improve Indigenous housing and remote service delivery under the current National Partnership Agreement on Remote Indigenous Housing[3] and supports other measures aimed at provided much needed housing and infrastructure in the Aboriginal communities in its representative body area. However, the CLCAC believes it is essential that Indigenous housing and remote service delivery be provided in an agreed way that implements the wishes and needs of those Aboriginal communities that the National Partnerships Agreement is intended to benefit.

5. In summary, the CLCAC does not see the necessity for the Bill. In most cases it will serve no function other than to provide a means to further erode the already limited procedural rights which exist for native title holders and claimants under the NTA, reward bureaucratic failures and incompetence, and serve to highlight the present failure of State agencies to adequately engage and consult with Aboriginal communities. Processes already exist in the NTA that allow housing and infrastructure to be delivered to Aboriginal communities in a timely fashion.

6. Native title should be viewed as an opportunity for those delivering services to engage with Aboriginal communities to ensure that housing and infrastructure is developed in not only the most efficient and cost effective way, but also in a way that is premised on equality, informed consent and mutual respect.

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[1] See *Lardil Peoples v State of Queensland [2004]* FCA 298 ('the Wellesley Sea Claim') and *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland [2008]* FCA 1855.
[2] Ada Walden & Ors on their own behalf and on behalf of the Waanyi People QUD 6022 of 1999; Murray Walden Jnr & Ors on behalf of the Gangalidda & Garawa People QUD 84 of 2004 and Walden Jnr & Ors on behalf of the Gangalidda & Garawa People QUD 66 of 2005.
[3] Copy available at http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf.

7. Although we are of the view that the Bill is racially discriminatory, the CLCAC's opposition to the Bill is not an abstract, rights based protestation. Our opposition is based on a view derived from experience and understanding of the Aboriginal communities in which we have operated for 25 years - experience which leads us to believe that this Bill will only encourage inappropriate conduct from State Governments and ultimately prove counter-productive.

8. The CLCAC strongly opposes the Bill. The Federal Government should instead work to encourage State Governments to negotiate with Aboriginal communities and seek their informed support and consent for housing and infrastructure projects by agreement, utilising those options already available under the NTA.

A BILL INTRODUCED "WITHOUT PROPER NEGOTIATION WITH TRADITIONAL OWNERS AND WITHOUT THEIR CONSENT"

9. On 13 August 2009, the Department of Families, Housing, Community Services and Indigenous Affairs ("FaHCSIA") circulated a document titled *Discussion Paper: Possible Housing and Infrastructure Native Title Amendments* dated August 2009 ("the Discussion Paper") suggesting a possible amendment to the NTA to create a new subdivision in the NTA in relation to infrastructure and housing on Aboriginal land.[4]

10. A limited number of information sessions regarding FaHCSIA's Discussion Paper were then held in capital cities and large regional centres in late August/early September 2009, with the closing date for submissions being 4 September 2009. There was no information session held in the CLCAC's region, with the nearest session held over 1000 kilometres away in Cairns. The Cairns information session was held 2 September 2009 - 2 days before submissions were due. At no time did FaHCSIA directly consult with or offer to consult with Aboriginal communities in the southern Gulf of Carpentaria. FaHCSIA's failure to consult with communities in the Gulf is concerning given that the region includes the townships of Doomadgee and Mornington Island, communities which had been identified as priority locations for the Federal Government's Remote Service Delivery Strategy.[5]

11. On 4 September 2009 the CLCAC provided a lengthy submission on the Discussion Paper, setting out our concerns with the proposed amendment. No response was received from FaHCSIA to the various concerns raised therein.

12. On 21 October 2009, the Attorney-General introduced the Bill to Parliament.

13. On 2 November 2009, the CLCAC was invited by the Senate Legal and Constitutional Affairs Committee to make this submission. At the time of writing, no date has been provided for the lodging of submissions, however, the CLCAC is advised by the secretariat that there is a possibility that the

[4] A copy of the discussion paper can be found at: http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx and http://www.alp.org.au/media/0809/msagia130.php.

5 Speech to the John Curtin Institute of Public Policy - 21 April 2009, http://www.blankpagesummit.com.au/_uploads/fckpg/files/macklin_curtin-speech_20090421.pdf.

Government may seek to have the Bill back before Parliament in November 2009 and that accordingly, submissions should be received by the Committee as soon as possible. We are further advised that no public hearings are proposed by the Committee due to time constraints.

14. Whilst the CLCAC accepts that the Minister for Families, Housing, Community Services and Indigenous Affairs wants to "get on with the job of building new houses"[6], the short timeframes that have been made available for stakeholders to comment on the Bill and the complete lack of consultation by her Government are simply unacceptable.

15. The CLCAC is disappointed at the failure of the Labor Government to ensure the time for adequate consultation prior to the introduction of new legislation that will affect important procedural rights. Labor's present position would seem at fundamental odds to that taken when Labor was in opposition during the debate on the *Native Title Amendment Bill 1997* (the *Wik* amendments). The present Government's failure to consult adequately in respect to the introduction of the Bill is even more surprising given that, in June 2007, as then Opposition spokesperson on Indigenous Affairs, Ms Macklin addressed Parliament opposing the Howard Government's *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007* on the basis that the Bill had not been negotiated with traditional owners. She argued that the Government had introduced the Bill "*without proper negotiation with traditional owners and without their consent*" and said it was "*hard to imagine that any other group of Australians would have their property rights treated in this way*". Ms Macklin told Parliament:

> *"We do not want land tenure reform being made a condition of funding for basic services. And we do not want there to be any doubt that the consent offered by traditional owners is anything but free and informed."*[7]

16. The CLCAC submits that the Federal Government has not secured the free and informed consent of Aboriginal people in respect to the Bill. On the contrary, the Federal Government has fast tracked this Bill and not undertaken proper consultation with Indigenous communities. In so doing, the Government puts at risk the objectives and proposed outcomes of the National Partnership Agreement on Remote Indigenous Housing.

THE CURRENT SCHEME UNDER THE *NATIVE TITLE ACT*

17. In his second reading speech to Parliament in recommending this Bill, the Attorney General told the House of Representatives that "...some state governments have indicated that uncertainty in relation to native title can be a barrier to meeting housing and service delivery targets" and that "[T]his is causing delays".

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6 Jenny Macklin, Minister for Minister for Families, Housing, Community Services and Indigenous Affairs, ABC Radio National Breakfast, 09/09/2009.
[7] House of Representatives Official Hansard, No.9 2007, Tuesday 12 June 2007, pp91-95, http://www.aph.gov.au/Hansard/reps/dailys/dr120607.pdf

18. The CLCAC believes this statement to be inaccurate. There has been no empirical evidence provided by the Federal government to suggest that the operation of the NTA is the cause of difficulties in delivering housing and infrastructure to Aboriginal communities.

19. Under the NTA as it currently stands, proponents can develop projects on Aboriginal land and authorise any future act by way of an agreement. This includes the provision of public housing and infrastructure. The NTA provides for alternative procedure agreements in a number of forms, and in doing so caters for situations where native title exists and where it does not.[8]

20. The CLCAC does not believe that governments have seriously tried to avail themselves of the benefits available to them under the existing agreement provisions in the NTA. Governments, both State and Federal, have failed to acknowledge the advantages of the use of agreements under the NTA, advantages which include:

    a. compensation: agreement making under the NTA is the only mechanism available whereby native title rights can be affected without creating future liabilities for the government in relation to compensation. The terms of any compensation can be clarified upfront thus enabling the costs of the project to be developed with more certainty.

    b. multiple projects: agreements under the NTA provide flexibility and allow for a range of projects to be developed and approved, rather than having them dealt with individually with separate notification required under a range of subdivisions of the NTA.

21. Even where an agreement is not pursued, the NTA already provides other mechanisms which enable the public housing or infrastructure to be built. In some instances Subdivision J will apply and, in others, Subdivision K will apply. In other instances it is open to a relevant body to compulsorily acquire land under Subdivision M. An important feature of both Subdivision K and Subdivision M is that they provide an element of equality by requiring native title holders to be provided the same rights as other landowners.[9]

22. It is unfortunate too, that in introducing this Bill to Parliament the Government has chosen to use the language of "delay" and "uncertainty" - language that has long been used to attack native title rights. As long as the procedures of the NTA are followed there is no uncertainty. Indeed, the NTA deems those activities as valid. Nor is there any reason for delay if the requirements in the NTA are approached sensibly, in good time and in good faith. The CLCAC is not aware of any instance whatsoever where native title rights have impeded the provision of public housing or infrastructure in those Aboriginal communities in which we operate. As the Aboriginal & Torres Strait Islander Social Justice Commissioner has remarked with regard to the Northern Territory Intervention:

[8] See for example, ss.24BB, 24CB and 24DB, NTA.
[9] The NTA refers to native title holders as having the same rights as the holders of "ordinary title". See reference to the definition of "ordinary title" at s253 of the NTA.

> *"This approach to native title treats native title as a hindrance rather than a necessity. Something to be legislated away where it looks like it may block a desired course of action. This is of deep concern."*[10]

THE BILL IGNORES THE SOCIAL AND POLITICAL REALITIES AND TRADITIONAL LAND HOLDINGS OF REMOTE ABORIGINAL COMMUNITIES

23. In many areas in CLCAC's region, such as on Mornington Island, the traditional laws and customs of the residents provide that every bit of the land is owned by some person or family. As a result, regardless of what legal processes are employed, building public housing and infrastructure in Aboriginal communities will raise practical problems concerning whose land should bear the burden of public housing and infrastructure for the benefit of the whole of the community.

24. Public housing and infrastructure projects in Aboriginal communities require the support of those communities to succeed. There is no doubt that the Aboriginal communities the CLCAC represents want and need better housing and infrastructure, but they also want that housing to be built in a way that addresses their specific needs with outcomes that respect their culture and property. Approached the wrong way, attempts to build housing and infrastructure in Aboriginal communities will lead to social disruption and animosity. If approached the right way, whole of community support for such projects will not be extremely difficult to obtain.

25. Empowering bureaucracies to force particular proposals on Aboriginal communities by legislation without proper negotiation will lead to great social disruption. The issue of how to manage public housing and infrastructure projects in such communities is a significant community issue. Questions relating to the recognition and application of Aboriginal laws and customs to such projects are not answered by simply providing a new mechanism in the NTA, particularly where such a mechanism will operate to override the rights and interests of traditional owners.[11] The appropriate way for such projects to progress is for them to be designed in conjunction with communities and delivered by agreement.

26. The CLCAC is concerned therefore that Bill pays no regard to the social and political realities of some of the communities in which the housing and infrastructure is to be provided. The CLCAC believes that it is this failure that will contribute to delay and uncertainty in the implementation of housing and infrastructure projects in remote communities.

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[10] Aboriginal & Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* at 207).

[11] As Maureen Tehan has remarked with regard to proposed mining projects:

> "The seeds of ongoing dispute are to be found in regimes which fail to recognise Aboriginal interests in land and fail to allow adequate time and resources for decision making about developments and protection of country. Where those interests are recognised there is increasing knowledge and understanding of the processes and effects of exploration and mining and an increasing willingness to participate in such ventures although not at the rate the mining industry would prefer."

Cited in Mick Dodson "The Mining Industry and Indigenous Land Owners – a Post-Native Title Act Analysis" Proceedings of the National Agricultural and Resources Outlook Conference, Canberra, 7-9 February 1995 p371 at 383.

THE BILL REWARDS BUREAUCRATIC FAILURES

27. In the CLCAC's view, however, the greatest impediment to the provision of public housing and infrastructure in Aboriginal communities is the failure and incompetence of the State and Territory bureaucracies that the Commonwealth uses to deliver programs.

28. 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 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.

29. This problem is often made worse as a consequence of the fact that different bureaucracies have different responsibilities for different components of the project, with some of those agencies happy to ignore native title and leave it to another department to deal with. The proposed amendment only encourages this conduct. It creates no incentive to deal with Aboriginal people up front. Furthermore, the multiplicity of bureaucracies involved all extract part of the budget for administration. There appears to be a significant Commonwealth bureaucracy that provides funding to the States, who then divide the delivery of the program among multiple agencies who each have administrative expenses, but in any event then sub-contract the management of the program to a project manager, who in turn contracts the people who will actually carry out the works.

30. The so-called consultation that occurs is often merely a cloak to conceal that decisions have already been made by Government agencies without taking any Aboriginal input into account. It is not unusual for Government departments to hold meetings, relied upon as "consultation", which are in effect only information sessions with Aboriginal people. Alternatively, opportunity is provided for Aboriginal People to engage with the issue, but no resources are provided to them to check the information or seek independent advice. In other instances notices are sent to Aboriginal organisations with an extremely tight short time frame in which to make submissions.

31. Annexure "A" to this submission is an example of the failure by the Queensland Government to implement an infrastructure project in a timely manner on Mornington Island. It is clear from that example that the delay that occurred had nothing to do with native title, but everything to do with the failure of the bureaucracy implementing the project and a flawed approach of trying to get traditional owners to enter into agreements without legal advice. The example is useful because even if the proposed amendment to the NTA was made, the delay would still have occurred because the approach by the Queensland Government was in contravention of its own cultural heritage legislation.

32. The Bill provides State government bureaucracies further legal powers to steamroll traditional owners in such circumstances. It will reward them for failure and incompetence by codifying in law an ability on their part to override the wishes of Aboriginal communities. The Bill creates an incentive for Governments to avoid trying to reach an agreement with Aboriginal people in favour of the simpler option of overriding their legal rights and interests. The policy underlying the provisions of the NTA dealing with agreement making is that discussion and agreement between Aboriginal and non-Aboriginal Australians is better than conflict and litigation. This policy applies as much to the interface of public housing and native title in Aboriginal communities as it does to other native title issues. The Bill goes against this policy.

33. In the CLCAC's view, what is required is an insistence on the part of the Commonwealth that there be reform of State bureaucracies so they are competent and successful. This should be the focus of any reform proposals regarding public housing and infrastructure in Aboriginal communities. If the Commonwealth is concerned to ensure more efficient provision of housing and infrastructure in Aboriginal communities, more effective measures might include the following:

    a. requiring State or Territory agencies that seek Commonwealth funding to deliver services in Aboriginal communities to demonstrate that they have the will and sufficient expertise to consult with the relevant Aboriginal communities and deliver the relevant programs before they receive such funding, including that they have the capacity to comply with the NTA; and

    b. making it a condition of receiving Commonwealth funding to deliver services in Aboriginal communities that the relevant State or Territory Department include Aboriginal communities early in the process of the design of such programs through a comprehensive program of consultation with native title holders at the outset of the project; and

    c. making it a condition of funding that any subcontractors engaged to manage the implementation of a project have some understanding of native title and cultural heritage laws and that they agree to abide by the same.

INADEQUACY OF CONSULTATION IN THE BILL'S PROVISIONS

34. Notwithstanding the existence of current bureaucratic failures, the Bill assumes that further overriding of the future act regime is acceptable because adequate consultation will nonetheless occur.

35. In his second reading speech to Parliament, the Attorney General told the House of Representatives that the Bill "...contains important safeguards to ensure genuine consultation with native title parties" and that "[I]t sets in place a framework for meaningful engagement with key stakeholders in decisions about other services for Indigenous communities".

36. Native title holders in the CLCAC's region are currently feeling the effects of decisions made in relation to the provision of housing without any consultation

on Mornington Island. There is currently an existing legislative requirement for the whole of Mornington Island to be transferred to a land trust under the *Aboriginal Land Act 1991* (Qld). That is a remedial measure which native title holders ought to be enjoying. In the interim the land remains the subject of a lease which still has 20 years to run. Housing is managed by the Mornington Shire Council and the land is held in trust under the lease. Without any consultation with Aboriginal people on Mornington Island, the Commonwealth is requiring that the Mornington Shire Lease to be extended by 40 years. On 7 October 2009 the Queensland Government introduced the *South East Queensland Water (Distribution and Retail Restructuring) and Natural Resources Provisions Bill 2009* into Parliament to extend the lease. This occurred despite strong objections being raised by the native title holders. No one has yet been able to explain to the CLCAC why the extension is required so urgently that consultation was not possible. Nor has anyone explained why the lease extension is a beneficial measure, other than to say that the Commonwealth requires it. Contrary to the statements made in the Explanatory Notes to the Bill, no consultation was undertaken by the State of Queensland with the native title holders and claimants in relation to the proposal. Annexure "B" to this submission is a copy of a letter sent from the CLCAC to the Queensland Minister for Natural Resources, Mines and Energy in regard to the introduction of the *South East Queensland Water (Distribution and Retail Restructuring) and Natural Resources Provisions Bill 2009* and a copy of his response.

37. If this is an example of the current approach of the Commonwealth and the State of Queensland, then it is hard to have any confidence that the Commonwealth will ensure that "genuine consultation" occurs with native title holders or claimants in relation to housing and infrastructure. Indeed, if the Commonwealth was truly committed to working with and developing meaningful relationships with native title holders and claimants, it would have already have made it a requirement of Commonwealth funding that State Governments enter into agreements with native title holders and claimants in relation to the provision of housing and infrastructure to ensure that a cooperative approach is implemented.

38. Consultation with Indigenous people that obtains their free, prior and informed consent,[12] focuses on the rights of the Indigenous people concerned[13] and takes account of their traditional laws and customs of Indigenous people regarding decision making[14] is an internationally recognised human right.[15] Just

[12] See Article 19 of the United Nations Declaration of the Rights of Indigenous Peoples A/RES/61/295 (2 October 2007) reads: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representation institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

[13] Article 27 of the International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 has been interpreted to require consultation that has such a focus. See Mahuika et al v New Zealand (547/1993), ICCPR, A/56/40 vol II (27 October 2000) 11 at paras 9.5 and 9.8 and Länsman v Finland (511/1992), ICCPR, A/50/40, vol II (26 October 1994) 66 (CCPR/C/52/D/511/1992) at para 9.6.

[14] See the judgments of the Inter-American Court of Human Rights with regard to providing alternative land to Indigenous people when their traditional lands are taken in The Case of the Sawhoyamaxa Indigenous Community v Paraguay (Judgment of March 29, 2006) at paras. 135 and 212 and The Case of the Yakye Axa Indigenous Community v Paraguay (Judgement of June 17, 2005) at paras.151 and 217.

as adequate housing is a fundamental human right that Aboriginal People are entitled to enjoy[16], Aboriginal communities want their rights in regard to consultation and free and informed consent to be upheld.

39. In the CLCAC's view, consultation 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;[17]

    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.

40. It should also be noted that a right to comment is not consultation.

41. In the CLCAC's view consultation involves the provision of accurate information to Aboriginal communities, notice that a matter is being considered, the early involvement of the community in the process, the community being given time to consider a proposal, the relevant Departments not having preconceived ideas about how projects should occur and Departments considering Aboriginal input in their approach to issues.

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[15] Such consultation is also required by ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries (June 27, 1989) Art. 6(2). An ILO committee established to examine alleged non-observance of this provision remarked:

> " .. the concept of consulting with indigenous peoples that could be affected by the exploration or exploitation of natural resources includes establishing a general dialogue between both parties characterised by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention. In addition, Article 6 requires that consultation should occur beforehand, which implied that communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies...[I]f an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention."

See Report of the Committee Set Up to Examine the Representation Alleging Non-Observance of the Indigenous and Tribal Peoples' Convention, 1989 (No.169) by Ecuador, Made by CEOSL CB 282/14/2(Nov 2001), paras. 38 & 44.

[16] International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3, entered into force 3 January 1976, entered into force for Australia, 10 March 1976. See also CESCR General Comment No 4 on the Right to Adequate Housing (13/12/1991).

[17] Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs [2009] FCA 844,

42. It is unfortunate that contrary to the position put by the Attorney-General to Parliament, the Bill simply does not include provision for consultation with native title parties or for meaningful engagement to occur in Indigenous communities.

THE BILL IS RACIALLY DISCRIMINATORY

43. 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 Australians 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.

44. Diminution of the procedural rights currently provided under subdivision J,K and M is discriminatory and should form no part of Government policy. Replacing the freehold test with a right to comment in circumstances where the rights of ordinary freeholders are not changed is racially discriminatory and contrary to international law. It could also be argued that the practical effect of the Bill is in effect to compulsorily acquire native title. Such an outcome is simply unacceptable, and stands in stark contrast to the position previously taken by Labor in Opposition in respect to the *Wik* amendments, where it was vigorously argued by Labor that the principal of non-racial discrimination be upheld.

FAILURE TO PROPERLY FUND ABORIGINAL PEOPLE SO THEY CAN RESPOND TO HOUSING AND INFRASTRUCTURE PROPOSALS

45. Critical to the adequacy of consultation by governments is that native title holders and claimants be resourced to actively participate in the decision-making process.

46. Prescribed bodies corporate ("PBCs") are established under the NTA as agents or trustees of the native title holders. Their purpose under the *Native Title (Prescribed Bodies Corporate) Regulation* 1999 is to respond to any proposals that affect the native title rights in regard to which they have responsibilities. Native title representative bodies also have obligations to act on instructions from native title claimants and sometimes from PBCs.

47. However, in an Aboriginal housing program of 5.5 billion dollars, the Commonwealth has failed to give any commitment to provide funding to PBCs and representative bodies to enable them to carry out their statutory functions of responding to, and facilitating, projects such as those having to do with public housing and infrastructure in Aboriginal communities. State Governments are also saying they have no funding to facilitate this process. Yet, both the Commonwealth and the States provide resources to consulting firms to manage the project and facilitate the program. This failure to properly resource Aboriginal People is unacceptable.

48. In the absence of native title holders and claimants being in a position to obtain advice to make informed decisions, the ability for them to approve projects or to provide informed comment, and the ability for them to avail themselves of the procedural rights they are entitled to becomes non-existent.

CONCLUSION

49. The CLCAC wants public housing and infrastructure to be provided in remote Aboriginal communities in a timely and effective manner.

50. The CLCAC urges the Senate Legal and Constitutional Affairs Committee to take into account the concerns raised above and submits that:

    a. the Bill should be abandoned; and

    b. the Commonwealth should instead focus on having State and Territory bureaucracies improve their performance in relation to the implementation of housing and infrastructure programs in remote Indigenous communities; and

    c. the Commonwealth adhere to its own policy statements and to the principle of free and informed consent to ensure proper consultation with Aboriginal communities; and

    d. the Commonwealth give consideration to the mechanisms already available to governments under the current provisions of the *Native Title Act*, particularly in respect to agreement making and the flexibility such processes can provide for the implementation of housing and infrastructure programs.

ANNEXURE "A"

Mornington Island Sewerage Facility and Land Fill

Background

The Lardil, Yangkaal, Gangalidda and Kaiadilt People have been the native title holders for the seas around the Wellesley Islands since 2004. Prior to that determination the claim had been a registered claim since 1997. At all times the State had been a party to those proceedings. The Wellesley Islands land claim resulted in a determination in favour of the Lardil, Yangkaal, Gangalidda and Kaiadilt People in November 2008. Prior to that determination it was the subject of a registered claim since 2005. The State was, at all times, a party to those proceedings as well.

The Department of Local Government wanted to build an ocean sewerage outfall system and land fill site. Both activities occurred in areas where specific people had particular interests under traditional law and customs. Both have potentially significant environmental effects. How infrastructure of this kind occurs on a small island also creates some additional considerations.

As is apparent from the Chronology below, despite being a department whose core business includes dealing with Aboriginal People, including for the purposes of providing infrastructure and housing, no attempt was made to communicate with the people with statutory responsibilities for cultural heritage and native title upfront. When contact with native title holders was attempted, and flaws in the Department's procedures identified, it was the representatives of the native title holders who tried to fix the problem. Rather than work with native title holders to do so, the Department responded by silence and inaction.

Chronology

1. The CLCAC and native title holders first became aware of the Mornington Island Sewerage Facility and Landfill with the receipt of a future act notice issued pursuant to s.24JA of the *NTA* on 2 September 2008.

2. The notice itself advised that the duration of the act would be 9 months, but did not disclose that the intention was to extinguish any native title affected by the works. Clearly the intention was for the works to be permanent.

3. At no stage prior to that Notice was either the CLCAC or the Gulf Region Aboriginal Corporation ('**GRAC**') (the relevant PBC) advised of the project or advised that negotiations were occurring with native title holders. Instead the Department approached Aboriginal people directly.

4. On 26 September 2008 the legal representative of the native title holders made a request for further information. It was noted that s.24KA was the relevant subdivision under the NTA for the area below low water mark. The letter noted that the provision of the information will enable the matter to be dealt with as "*expeditiously as possible*".

5. On 5 November 2008 (5 weeks later), the contracted manager of the project sent an email in reply providing information at the request of an officer of the Department of Local Government. That email provided some basic information in relation to the project, and also included a Cultural Heritage Agreement.

6. The difficulty with the agreement was that:

   a. it referred legislation which no longer existed, and hadn't been in existence for 5 years, and also referred to Apudthama Land Trust which is at Injinoo on Cape York;

   b. it failed to comply with the *Aboriginal Cultural Heritage Act* 2003 (Qld) ('ACH Act'); and

   c. the native title holders were clearly promised a cultural heritage management plan, but none of the procedures to enable it to be a cultural heritage management plan were followed.

7. These failures were not just technicalities. Activities carried out pursuant to a cultural heritage agreement or a cultural heritage management plan provide a complete defence to any destruction of cultural heritage. The failure to follow the scheme of the ACH Act meant that no party was protected by the Agreement. This had significant consequences for the contractors as much as anyone else.

8. As far as the CLCAC is aware, none of the Aboriginal people who signed the cultural heritage agreement received any legal advice in relation to the content of the agreement, notwithstanding that it required them to give indemnities to the Government. Representatives of the Government witnessed the signatures. The fact that the agreement contained references to legislation which had not existed obviously raises concerns of the understanding of any Aboriginal people of its contents.

9. In early November 2008 a number of telephone calls were made and an email sent by the legal representatives of the native title holders to the proponent and the Department of Local Government outlining a number of concerns with the proposal, the approach that had been taken and requesting further information from the Department. The email sent to the Department of Local Government set out in detail the inconsistency of the agreement with the ACH Act. The email also requested a copy of any environmental study.

10. No substantive response was received from the Department of Local Government

11. Some six months later, in May 2009, Crown Law (Qld) provided a draft cultural heritage agreement for consideration in relation to the proposal.

12. On 11 May 2009 the CLCAC held a meeting of GRAC and the native title holders on Mornington Island. This was the first opportunity to discuss the sewerage facility in any meaningful way with native title holders. Despite

expecting a level of general understanding of the project, the native title holders present at the meeting advised that they had not been properly consulted in relation to the project. The CLCAC was instructed to negotiate the terms of a Cultural Heritage Agreement for the sewerage outfall system and landfill site, but were instructed that the Agreement was not to be finalised until:

a. The environmental study for both proposals is provided and considered; and

b. A satisfactory explanation is given as to why options, including a recycling system, other than an outfall system is provided.

13. On 29 May 2009, the CLCAC forwarded a draft cultural heritage agreement to Crown Law and requested the information which was requested in the meeting by native title holders. The draft agreement provided reflected the standard cultural heritage agreement which has been adopted in the region. It was hoped that the use of the standard agreement would ensure a quick resolution to the matter.

14. On 11 June 2009 the CLCAC forwarded a further draft cultural heritage agreement to Crown Law.

15. On 2 July 2009 Crown Law wrote to the CLCAC advising that it was assisting the Department of Infrastructure and Planning in this matter and provided a response to the CLCAC draft cultural heritage agreement.

16. On 7 July 2009 Crown Law provided to the CLCAC background environmental reports for the project.

17. On 13 July 2009, the CLCAC participated in a teleconference with Crown Law and a representative of the Department of Local Government. It was agreed at that meeting that:

a. The Department would provide a response to a proposal to present the environmental information; and

b. Crown Law indicated it would start looking at the issue of the future act notices and in the meantime would give further consideration to the cultural heritage agreement.

18. On 23 July 2009, Crown Law provided an email which answered questions in relation environmental issues.

19. On 12 August 2009 Crown Law advised the CLCAC that the Mornington Shire Council had advised that it was willing to host the presentation on environmental issues and that they wanted to try and organise for this to occur at the end of August.

20. On 13 August 2009, Mornington Shire Council sent an email to Crown Law and others that stated:

> *" I am simply astounded that, having been advised by [name withheld] (DLGSPR) on 24 April 2009 that the project was proceeding with Native Title and Cultural Heritage issues still outstanding and that this was ostensibly confirmed in late June and more recently by [name withheld] email of 5 August, the penny has suddenly dropped that these outstanding matters are quite important to resolve! It is unacceptable that Council is now being pressured to convene a meeting because the Queensland Govt has not done the necessary legal clearances and the project is at risk of non-completion and cost over-runs. Council is not the project manager, we are the client.*
>
> *Council, through the Deputy CEO, [name withheld] and the Deputy Mayor[name withheld], informed [name withheld] of Qld Govt in March 2008 that consultation had been inadequate and not considered NT. Our advice was ignored. We are happy to meet with the CLAC and the project manager to discuss the technical issues of the project but this is not going to happen before 1 September.*

21. On 13 August 2009 Crown Law forwarded an email to the CLCAC and others advising that it was necessary for the project to commence by 25 August 2009 (ie. in 12 days time) otherwise it is not able to commence until next year. At no time prior to that email was any timeframe of that nature raised with the CLCAC.

22. At the time the 12 day deadline was raised:

    a. no explanation had been provided as to the circumstances surrounding the signing of the original documents by some Aboriginal People in relation to Aboriginal cultural heritage in the absence of legal advice;

    b. the CLCAC was awaiting the further draft of the cultural heritage agreement with the State having been considering the further draft since 11 July 2009; and

    c. no notice has been issued under the *Native Title Act* 1993 (Cth) in relation to the area the subject of the Wellesley Sea Claim as the State indicated it would.

Summary

The above chronology is telling of the inappropriateness of the proposal in the Discussion Paper. At every stage the CLCAC and native title holders have sought to deal with the matter expeditiously to avoid delay. Rather than deal with native title issues upfront and engage with Aboriginal people upfront, it was left as the last box to tick and only then would seem, after relevant contracts being entered into. Notwithstanding that there was clearly contractual obligations that needed to be complied with, the Department took no steps to address legitimate issues that had been raised, and, it would seem, deliberately avoided taking steps to deal with the native title issues.

been raised, and, it would seem, deliberately avoided taking steps to deal with the native title issues.

There can be no complaint that the relevant officers did not understand the relevant NTA procedures. The CLCAC advised them of the relevant subdivision from the outset. A year later they still had not acted on that advice.

To highlight the inappropriateness of the proposed amendment set out in the Discussion Paper, on the day the Crown Law advised that the project was to start in 12 days, they forwarded a copy of the Discussion Paper to the CLCAC. From the CLCAC's perspective that action was a statement that somehow the delays were the fault of native title holders and that the Commonwealth would be legislating the problem away.

The above project has clearly incurred costs as a result of failure to comply with legislation. These costs could have been avoided if the native title holders had been approached at the outset with their legal representatives.

Furthermore, the process would have been quicker if their representatives were properly resourced to deal with the problem. The resources required to enable them to do so would have been insignificant compared with the funds which have been wasted on the process that was adopted.

Annexure "B"

CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

ABN 99 121 997 933 - ICN 268

Our Ref: WELS1-027

FAXED 9/10/09

9 October 2009

The Honourable Stephen Robertson
Minister for Natural Resources, Mines and Energy
Level 17, 61 Mary Street
Brisbane, QLD 4000

And by Facsimile: (07) 3225 1861

Dear Minister

Extension of Mornington Shire Lease

We write to you in relation to the *South East Queensland Water (Distribution and Retail Restructuring) and Natural Resources Provisions Bill 2009* (**'the Bill'**) which you introduced into Parliament on 7 October 2009.

As you are aware, the Carpentaria Land Council Aboriginal Corporation (**'CLCAC'**) is a body carrying out the functions of an Aboriginal and Torres Strait Islander representative body for the purposes of the *Native Title Act* 1993 (Cth) (**'NTA'**).

The CLCAC writes this letter on behalf of itself as the representative body and on behalf of the Gulf Region Aboriginal Corporation (**'GRAC'**) in its capacity as the prescribed body corporate representing the Lardil, Yangkaal, Gangalidda and Kaiadilt people who are the native title holders for the land and waters in and around Mornington Island.

The CLCAC, GRAC and the native title holders we represent are concerned over the manner in which the Mornington Shire Lease has been extended, the lawfulness of the extension and how their concerns have been represented in Parliament.

Lawfulness of the Extension of Mornington Shire Lease

The CLCAC maintains that any extension of the Mornington Shire Lease, by legislation or otherwise, is unlawful and invalid in the absence of an Indigenous Land Use Agreement (**'ILUA'**). The reason for this is as follows:

Gulf Office
87 Musgrave Street
PO Box 71
Burketown, Qld, 4830
Tel: 07 4745 5132
Fax: 07 4745 5204

Cairns Office
Unit 2, 14A Aplin Street
PO Box 6662
Cairns, Qld, 4870
Tel: 07 4041 3833
Fax: 07 4041 3533
Free call: 1800 445 115

(1) With exception of the town area at Gununa on Mornington Island the entirety of the area the subject of the Mornington Shire Lease is the subject of a native title determination in favour of the Lardil, Yangkaal, Gangalidda and Kaiadilt people.[1]

(2) That determination includes the right to possession, occupation, use and enjoyment of the land and waters comprising the area the subject of the Mornington Shire Lease. The rights recognised in the determination are subject to the terms of the Mornington Shire Lease which is for a defined term. At the time of the determination 20 years remained for the lease to continue. The effect of determination is to prioritise the interests of the grantee of the lease, being Mornington Shire Council, over the interests of native title rights interests for the term of the lease.

(3) The effect of an extension of the Mornington Shire Lease is to extend that prioritisation of interest for a further 31 years. That extension clearly has the effect of impairing the use and enjoyment of the native title rights and interests that have been determined to exist for a longer period than what was otherwise provided for.

(4) To the extent that the explanatory notes to the Bill assert that "*The proposal has no impact on native title*", it is incorrect. Indeed it is because the extension of a lease can affect native title that the extension of other leases are assumed to be future acts for the purposes of the *NTA*.[2]

(5) The extension of the Mornington Shire Lease is clearly an act which affects the native title rights and interests of the Lardil, Yangkaal, Gangalidda and Kaiadilt people. Section 10, *NTA* provides that native title is recognised and protected in accordance with the *NTA*. Section 24AA, *NTA* explains that the *NTA* regulates the manner in which future acts can affect native title. It confirms that an act will be valid if it is covered by the provisions of the *NTA* and invalid if not.

(6) The extension of the Mornington Shire Lease, is not an act which is covered by any of the subdivisions in the NTA. Section 24OA provides that "*Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title.*"

We advise that on 13 August 2009 and 16 September 2009 the CLCAC advised your Department that it considered the extension of the Mornington Shire Lease to be a future act. It maintains that is the position.

Accordingly the CLCAC and GRAC on behalf of the Lardil, Yangkaal, Gangalidda and Kaiadilt people request that the Government confirm that it will take no action to give effect to the extension of the Mornington Shire Lease.

Inaccuracies in Explanatory Notes

The CLCAC and GRAC are concerned about misleading statements in the explanatory notes to the Bill.

The Aboriginal community on Mornington Island was not consulted in relation to this proposal despite being the people directly affected by it. On 13 May 2009 the CLCAC received a letter advising that an extension was being proposed. On 18 May 2009

[1] See *Lardil, Yangkaal, Gangalidda and Kaiadilt people* [2008] FCA 1855.
[2] See for example ss.24IC and 26(1A)(c), NTA.

the CLCAC wrote to the Department of Environment and Resource Management ('**DERM**') advising of the absence of any consultation and requested further information about the proposal. The CLCAC also wrote to [redacted], DERM on 16 September 2009 requesting specific information about what was proposed in the legislation and the purposes of it. No response was received to those requests.

On 1 September 2009 a meeting was held on Mornington Island which was attended by [redacted] Executive Director of Aboriginal and Torres Strait Islander Partnerships and [redacted], DERM. At that meeting traditional owners advised in very strong terms that they objected to the lease extension and the manner in which it was being pursued. [redacted] advised that the Government was not intending to consult in relation to the extension of the Mornington Shire Lease, although it was willing to consult in relation to its implementation. He advised that the decision had already been made. On 17 September 2009 we wrote to both [redacted] and [redacted] on behalf of GRAC and Lardil, Yangkaal, Gangalidda and Kaiadilt people objecting to the extension of the lease and the process upon which it was being pursued. Copies of those letters are attached for your information. We believe that they are clear in stating the objections by the Aboriginal people to what was proposed.

In those circumstances we are concerned that the explanatory notes to the Bill which you tabled in Parliament advised that:

> *"With regard to the Local Aboriginal (Aboriginal Lands) Act 1978, all parties express support for the proposed approach, provided that transfer processes under the Aboriginal Land Act 1991 continue as a matter of priority".*

That is not an accurate or fair representation of the position of the CLCAC, GRAC or the traditional owners. The CLCAC, GRAC and the native title holders of the Wellesley Islands went to considerable lengths to bring to the attention of your Department their objections to the extension of Mornington Shire Lease and the process by which it was proposed to occur. Nowhere in the explanatory notes is there any record of the concerns that had been raised on behalf of traditional owners of Mornington Island or the key representative bodies charged with acting on their behalf.

The CLCAC and GRAC understands it is open to Parliament to pass such laws as it considers fit and is not obliged to abide by the concerns of any particular group of people. However if there is a process by which the objections to a proposal are to be tabled in Parliament, people who put those concerns in writing are entitled to have those concerns properly recorded in Parliament and not have them misrepresented as supporting a proposal which they have expressly stated they do not support.

We therefore request that you correct the record in Parliament and acknowledge that the CLCAC, GRAC and the Lardil, Yangkaal, Gangalidda and Kaiadilt people had opposed the extension of the Mornington Shire Lease.

If you have any queries please contact Helen Tait on (07) 4041-3833.

Yours faithfully,

Helen Tait
Chief Executive Officer
Enc.