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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
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Re: Native Title Amendment Bill (No. 2) 2009

On 4 September 2009 I provided the following brief submission to the Department of Families, Housing, Community Services and Indigenous Affairs on a Discussion Paper 'Possible housing and infrastructure native title amendments' prepared by the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs and dated August 2009.

As is the case with all such bureaucratic calls for submission the receipt of my submission was duly acknowledged and its contents neither acknowledged nor taken into account as the contents of the Discussion Paper were quickly converted into the Bill that the Senate Legal and Constitutional Committee is now reviewing. This seems to be the emerging pattern in policy making, to pay lip service to open consultation and then to proceed unimpeded with reform.

While I do not have anything to add to the brief commentary I provided to the Department of Families, Housing, Community Services and Indigenous Affairs' review process, I again submit my comments on the Discussion Paper as below for your Committee's consideration.

Yours sincerely

6 November 2009

Caroline Edwards
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By email

I provide the following brief submission on the brief Discussion Paper 'Possible housing and infrastructure native title amendments' prepared by the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs and dated August 2009.

The Discussion Paper begins by asserting that the current state of housing and public infrastructure at remote Indigenous communities is unacceptable and notes significant COAG commitments in terms of funding and housing provision targets to address this problem through National Partnerships on Remote Indigenous Housing and Remote Service Delivery. A commitment to community engagement including with native title holders and claimants of remote communities is then articulated. The Discussion Paper briefly outlines the existing future act regime in the native title legislation that can trigger a series of rights varying from negotiation to consultation depending on the particular form that a determination might take.

Somewhat inexplicably, the Discussion Paper then asserts that there is uncertainty about these future act processes in relation to the timely provision of public housing and infrastructure. No empirical evidence is provided for this assertion; perhaps none exists as the COAG proposal to deliver public rather than community housing at remote Indigenous communities is a very recent initiative only announced in November 2008.

On the basis of a hypothetical proposition of possible delay, the Discussion Paper proposes amendment to the Native Title Act that will allow a set of expedited procedures in relation to the provision of public housing and infrastructure (sometimes, as at p.2, referred to as housing and public infrastructure). It is far from clear what these expedited procedures might entail, but presumably the regular mention of the word 'consultation' will mean that a key element will be the dilution of the right to negotiate to a less potent right of consultation for native title holders or claimants.

In the context of the Rudd Government's housing reform agenda this potential dilution of leverage is predicated on two other issues. The first is a frequent obfuscation of the rights of land owners of remote communities (under land rights or native title laws) with the rights of the broader and usually demographically larger immediate community of residents. It might be better to recognise that while these sets of people frequently overlap, they have differing and at times competing rights and interests as they do in the broader community.

The second appears to be an Australian Government commitment to avoid making lease payments to owners of remote townships, while insisting that long term leasing to the state will be a pre-requisite for the provision of any social housing. This parsimonious approach is not raised in the Discussion Paper, although mention is made of the legal requirement to pay compensation for any impact on native title rights, but presumably again, only once such rights are established at law. A similar trend is evident in housing agreements being made in the Northern Territory under s.19 of the Aboriginal Land Rights Act whereby 40 year leases are being negotiated there, without any lease payments to traditional owners. In situations where payments have been negotiated under s.19A head leasing agreements, these payments have come from the Aboriginals Benefit Account, an

account that should be utilised on the advice of an Advisory Committee not to accommodate the policy imperatives of the government of the day.

In 1995, and in relation to possible amendment to the Native Title Act, I heard the then Prime Minister Paul Keating state 'Beware the whispered word workability'. These proposed amendments seem to fall within the ambit of Keating's warning. On one hand, it is possible that the proposed expedited procedures will actually add a further layer of complexity to the Native Title Act that already has sufficient options for the negotiation of future acts including recourse to Indigenous Land Use Agreements. This includes risks arising over time from proliferation of operating environments and standards underpinning the creation and maintenance of significant state-owned infrastructure assets. On the other hand, potential problems with the current statutory framework are being asserted rather than demonstrated.

Recent events in the Northern Territory under the Strategic Indigenous Housing and Infrastructure Program indicate that administrative hurdles and state accountability might be the first order barriers to the timely and cost-effective delivery of public housing and infrastructure. Under these circumstances, it seems presumptive of the Discussion Paper to assert that uncertainty in relation to future act aspects of the Native Title Act are contributing negatively to the timely delivery of public housing and infrastructure in remote Indigenous communities.

I make only one broad recommendation in light of the omission from the Discussion Paper of a rigorous problem definition and policy analysis that would normally precede consideration of reform options. At a time in Indigenous affairs when we hear a great deal about evidence-based policy making 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.

Yours sincerely

04 September 2009