Australian Government

Attorney-General's Department

Social Inclusion Division

09/28346-03

9 February 2010

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Inquiry into the Native Title Amendment Bill (No.2) 2009

As foreshadowed, the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department jointly provide the following additional supplementary information to the Senate Standing Committee on Legal and Constitutional Affairs at the request of members.

A joint supplementary submission from the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs was provided to the Committee on 3 February 2010. The joint supplementary submission and this additional supplementary information follow oral submissions to the Committee during a public hearing held in Sydney on 28 January 2010.

Please do not hesitate to contact me if you require further clarification or additional information in relation to the Bill.

Yours sincerely

Katherine Jones
First Assistant Secretary
Telephone: (02) 6141 4790

GOVERNMENT RESPONSE TO SUBMISSIONS FROM THE NORTHERN LAND COUNCIL AND LAW COUNCIL OF AUSTRALIA

The Northern Land Council (NLC) and the Law Council of Australia (Law Council) have both made written submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill (No. 2) 2009 (the Bill). The AGD/FaHCSIA supplementary submission dated 3 February 2010 addressed some aspects of the Law Council's supplementary submission. This further submission addresses the remaining aspects of the Law Council's supplementary submission, and the issues raised in the NLC's submission.

Uncertainty addressed by the Bill

The NLC and Law Council submissions both raise the issue of whether the acts which may fall within the new Subdivision will be future acts. The NLC submission, in particular, implies that there is no 'legal uncertainty' which needs to be addressed by the new Subdivision. It refers to certain High Court and Federal Court decisions which it claims support its view.

The NLC and Law Council submissions correctly point out that many things which may otherwise be covered by the new Subdivision (e.g. an act that permits the construction of housing) may not be future acts. In many cases those acts will not 'affect' native title. In those circumstances, the new Subdivision will have no application as the new Subdivision will only apply to future acts.

However, the Government is aware that amongst stakeholders, including some state governments, there are differing views about whether the acts referred to in the new Subdivision will 'affect' native title, and therefore be future acts. Some stakeholders take the view that there will be no future act. Others consider that there is a risk that the acts concerned will be future acts and require compliance with the future acts regime.

The High Court and Federal Court decisions referred to by the NLC do not remove the uncertainty expressed by some stakeholders who are responsible for constructing such housing and infrastructure. For example, the decision of the Full Federal Court in *Erubam Le V Queensland* (2003) 202 ALR 312 proceeded on the basis of some agreed facts which may have affected the outcome.

Importantly, if the view that there is no future act proves to be incorrect, the relevant act will be invalid, unless the future acts regime has otherwise been complied with, which in many cases will be unlikely. 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.

Native title will not be extinguished

The NLC submission states that although it is intended that native title is not extinguished by, for example, the grant of a lease for public housing in Queensland on DOGIT (deed of grant in trust) land, legally extinguishment will occur. This is said to follow from the view that because the act concerned is not a future act, the non-extinguishment principle which the new Subdivision would apply will have no application to the act concerned.

However, it is clear that the new Subdivision will prevent the extinguishment of native title, where it applies. If the act concerned is a future act to which the new Subdivision applies, the non-extinguishment principle will apply with the result that native title will not be extinguished. On the other hand, if the act concerned is not a future act this will be because the act does not 'affect' native title and accordingly it will not extinguish native title. Relevantly, if, as the NLC submits, the act concerned would extinguish native title, it will be a future act. This is because a 'future act' is an act that affects native title (s 233 of the *Native Title Act 1993*), and an act affects native title if it extinguishes the native title rights and interests (s 227). However, extinguishment is prevented where the new Subdivision is satisfied, because the non-extinguishment principle will apply.

Subsequent reservations of Crown land for the benefit of Aboriginal people and Torres Strait Islanders

The NLC submission suggests that, as currently drafted, the Bill leaves open the possibility of governments subsequently reserving Crown land for the benefit of Aboriginal people and Torres Strait Islanders during the 10 year period in which the new Subdivision would apply. This would then enliven the new Subdivision for certain future acts done on or in relation to that land.

The new Subdivision would not apply to the act of reserving Crown land itself. The reservation of Crown land would need to comply with the future acts regime to the extent that it affects native title. For example, reserving Crown land might require an Indigenous Land Use Agreement or a compulsory acquisition (done in accordance with the *Native Title Act 1993*). Accordingly, the Government does not expect that the Bill will result in State and Territory governments reserving Crown land for the benefit of Aboriginal people and Torres Strait Islanders merely to enliven the new Subdivision.

Where the new Subdivision is enlivened, it will provide a process to assist the timely construction of public housing and a limited class of public facilities for Aboriginal people and Torres Strait Islanders.

Application of s 47A to extinguishment by public works

The NLC Submission makes reference to the application of s 47A in relation to the extinguishment of native title by public works. The Government is of the view that this is a broader native title issue distinct from the subject and focus of the Bill.