Australian Government

Attorney-General's Department

Social Inclusion Division

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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

The Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department jointly provide the following supplementary information to the Senate Standing Committee on Legal and Constitutional Affairs at the request of members. This follows oral submissions to the Committee during a public hearing held in Sydney on 28 January 2010.

Additional information, including comments in response to the Law Council of Australia's supplementary submission of 31 January 2010 and the Northern Land Council's anticipated supplementary submission, will be provided shortly.

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

Yours sincerely

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Supplementary submission – Department of Families, Housing Community Services and Indigenous Affairs and the Attorney-General's Department

Native Title Amendment Bill (No.2) 2009

The Native Title Amendment Bill (No.2) 2009 contains an important measure to amend the *Native Title Act 1993* to facilitate the construction of urgently needed housing and public infrastructure on Indigenous held land which is, or may be, subject to native title. The over-crowding and poor standard of housing and public infrastructure in many remote Indigenous communities is unacceptable. It is a high priority of Government to ensure communities can benefit as quickly as possible from the $5.5 billion investment earmarked for housing and infrastructure in Indigenous communities under the National Partnership Agreement on Remote Indigenous Housing.

As outlined in our previous submissions, the Bill is a targeted measure which strikes a balance between the need to improve housing conditions and service delivery in discrete Indigenous communities while ensuring that native title rights and interests are protected.

What is a future act?

A future act is an act done after 1 January 1994 that 'affects' native title.

Division 3 of the *Native Title Act 1993* (NTA) establishes a procedural framework within which future acts may be undertaken. This 'future act regime' ensures that native title rights are taken into account by setting out procedures that must be complied with before future acts can be done. Procedural rights under the future act regime include procedural rights such as the right to comment, as well as more extensive rights such as the right to negotiate.

The future act regime also sets out the effect of the act on native title and whether a compensation liability arises as a result of doing the act.

Where will the new process apply?

The new process will only apply to future acts on land which is held by or for the benefit of Aboriginal peoples or Torres Strait Islanders. Further, as the new process is part of the future acts regime it will only apply to the areas where that regime applies.

Where does the future acts regime apply?

Section 233 of the NTA defines what a 'future act' is. Subsection 233(3) excludes from this definition an act that causes the land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under specific state and territory land rights schemes, and any acts which affect such land. These land right schemes are specified in s253 as:

- *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth)
- *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth)

- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
- *Aboriginal Lands Trust Act 1966* (SA)
- *Maralinga Tjarutja Land Rights Act 1984* (SA), and
- *Pitjantjatjara Land Rights Act 1981* (SA).

This means that neither the granting of land under these laws, nor any acts affecting such land, would be a future act. These acts are therefore not subject to the provisions outlined in Division 3 of the NTA – the future acts regime.

Accordingly, the new measure set out in the Native Title Act Amendment Bill (No.2) 2009, which seeks to introduce a new future act process into the future act regime, would also not apply to such acts.

For example, lands granted under the *Aboriginal Land Rights (Northern Territory) Act 1976,* which account for approximately 50 per cent of the Northern Territory and encompass major Indigenous communities, and communities located on the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands) in South Australia are not subject to the future act regime. The new process will not apply to these areas. It is significant that leases for public housing purposes have already been achieved in the APY Lands, and are in place or agreed in 14 of the 16 communities targeted for capital works in the Northern Territory under the Strategic Indigenous Housing and Infrastructure Program (SIHIP). These communities are all located on Indigenous held land where the future act regime does not apply.

The new process would therefore be most relevant to Queensland and Western Australia, whose land rights and equivalent schemes are not exempt from the definition of a future act under s 233(3) of the NTA, and where a number of Indigenous communities exist on land that is or may be subject to native title.

How does the new process interact with existing provisions in the Native Title Act?

At present, there is no specific subdivision in the future act regime covering public housing and infrastructure in Indigenous communities. There is also uncertainty about the application of the existing specific future acts processes to these types of development. This is a contributing factor affecting the timely delivery of housing and infrastructure in Indigenous communities.

Uncertainty about when the future acts regime is triggered

It will often be unclear whether the provision of housing and public infrastructure on Indigenous land will trigger the need to comply with the future acts regime. Statutory land rights schemes typically give a managing body the right to engage in dealings with the land. When dealing with the land within the scope of its powers, it is unclear whether a managing body's dealings will have any impact on native title, and will therefore be a future act which would need to comply with the future acts regime. In many cases, these dealings may not affect native title, because they go no further (in terms of their impact on native title) than the acts already involved in creating the underlying land interest and management body. In these cases, as the dealings would not further affect native title, they would not be future acts and would not have to comply with the future acts regime. However, substantial and costly due diligence

would be required to confirm this in every instance. Therefore, in order to be certain that acts are valid, to reduce complexity and to ensure appropriate consultation, many project proponents (particularly governments) try to comply with the future acts regime as a precautionary measure.

Uncertainty about how to comply with the future acts regime

None of the existing future acts processes are specifically aimed at public development in remote Indigenous communities for the benefit of their residents and there is uncertainty whether any of the existing targeted processes can be used. The existing future act processes are either uncertain in their application or do not have appropriate policy settings:

- Subdivision J – **public works etc on existing reserves**: The extent to which the process applies to houses and facilities on Indigenous held land is unclear. A decision by the Federal Court[1] suggests that Subdivision J would not be available for development in remote Indigenous communities because the grant of land for the benefit of an Aboriginal community is not 'particular' enough to be covered by Subdivision J. This decision has created uncertainty for project proponents.

  Moreover where subdivision J does apply and the works are 'public works', the act will extinguish native title, and the procedural rights would be limited to the right to be notified and to comment.

- Subdivision K – **facilities for the general public**: Subdivision K, which covers acts involving facilities for services to the public, is also sometimes considered a path for ensuring validity of public housing and infrastructure. However, some of the infrastructure facilities that governments intend to construct (eg houses, police stations, schools and medical clinics) may fall outside the definition of infrastructure under Subdivision K. It is also uncertain whether these facilities would be considered to be operated for 'the general public'.

- Subdivision M – **the 'freehold test':** Subdivision M could be used to compulsorily acquire native title rights and any other rights including the Indigenous land rights ownership or interest. This generally results in native title being extinguished, and the procedural rights of native title holders would be limited to whatever was available under the applicable compulsory acquisition law. Compulsory acquisition processes can also be protracted. For these reasons compulsory acquisition would rarely if ever be preferred on Indigenous held land.

The existing Indigenous Land Use Agreements (ILUA) provisions would remain as an option to progress future acts that could also be covered by the new process. However, the new process would be available in circumstances where the timely negotiation and registration of an ILUA is not possible.

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[1] *Erubam Le #1 v Queensland* (2003) ALR 312

The new process proposed in the Bill would not only remove uncertainty about the application of existing subdivisions, it would provide a more appropriate framework for the timely provision of public housing and infrastructure on Indigenous land. This is achieved by inserting a new subdivision into the future act regime specifically designed for this purpose. This allows governments to confidently proceed with the development and construction of housing and infrastructure projects on land subject to native title, while also being sure that their acts would not extinguish native title and that native title holders and claimants would be provided genuine consultation and compensation if affected.

Use of ILUA's to provide housing and infrastructure

Indigenous Land Use Agreements (ILUAs) are agreed between native title parties and a variety of government and private bodies. Given the confidential nature of these agreements, it is not possible to provide conclusive statistics on the time they generally take to complete. However, the National Native Title Tribunal, which is responsible for assisting to negotiate and register these agreements, advises parties to allow a minimum of 12 months for the negotiation and registration process.[2]

ILUAs would still be available to provide Indigenous housing and infrastructure, and in many circumstances would be the most appropriate mechanism. The new process would therefore be an additional mechanism available where there are particular circumstances that render such agreements not timely or possible to deliver necessary housing. In such cases, the new process would enable such housing and infrastructure to proceed following a four month consultation period.

The Government has consistently received advice from State Governments that native title is delaying their ability to provide such housing and infrastructure. Additional information regarding this from the West Australian and Queensland Governments is provided at **Attachments A, B and C.**

Racial Discrimination

In its submission to the current Senate Inquiry, the Australian Human Rights Commission encouraged the Government to ensure that any potentially discriminatory impacts of the Bill are fully explored.[3] It did not provide an opinion on the impact of the Bill on the *Racial Discrimination Act 1975*.

The Government sees the NTA as a special measure under the *Racial Discrimination Act 1975*. Special measures are measures taken for the sole purpose of securing adequate advancement of certain racial groups where necessary to ensure their equal enjoyment of human rights and fundamental freedoms, and which are not continued after the objectives for which they were taken have been achieved.

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[2] *ILUA or the Right to Negotiate Process? A comparison for mineral tenement applications*, National Native Title Tribunal, found at http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Booklets.aspx

[3] Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Senate Standing Committee on Legal and Constitutional Affairs, p3.

The NTA provides a framework which protects native title, prohibits the doing of some things which affect that native title, and regulates the doing of other things generally by providing for procedural rights to native title holders and for compensation. The new process is similar to the existing future acts processes in the NTA with a relatively small adjustment to meet the urgent need for housing and public infrastructure in Indigenous communities. The adjustment of the arrangements must be considered in that context, and will be part of that special measure.

There is no question that the amendment under consideration by the Parliament is solely for the benefit of the residents of Indigenous communities where new and improved housing, health, education and emergency services facilities are urgently needed.

The amendment is narrowly targeted to apply only in circumstances where public housing and facilities are to be constructed for the benefit of the residents of Indigenous communities. The new process is an important measure to ensure the rollout of major investment in Indigenous communities as part of the Australian Government's commitment to Closing the Gap.

Effect of non-extinguishment principle

Several submissions to the current Senate Inquiry argued that despite the application of the non-extinguishment principle, the proposed new process in the Bill would result in practical compulsory acquisition. The argument is that although the non-extinguishment principle would ensure native title rights and interests are not legally extinguished, and could revive following the ceasing of the act done under the new process, the actual effect of that act would mean that native title parties would not be able to practically exercise their rights for some time.

The practical effect of the non-extinguishment principle would depend on the type of act done under the new subdivision. For example, much public infrastructure that could be done under the new subdivision would have a minimal effect on the exercise of native title rights and interests. Examples include underground sewerage and water supply lines, or electricity supply. Where an act does in fact affect the exercise of native title rights and interests, the new process requires that compensation be paid to native title holders whose rights are affected.

Progress report on housing

Under the National Partnership Agreement on Remote Indigenous Housing over 150 new houses are now underway, of which 13 have been completed. The locations are 3 in Queensland, 22 in New South Wales, 35 in Western Australia, 44 in South Australia, and 50 in the Northern Territory. Over 230 refurbishments are also underway of which 118 have been completed. The locations are 11 in Queensland, 71 in Western Australia and 150 in the Northern Territory.

NATIVE TITLE AMENDMENT BILL (N0. 2) 2009

COMMONWEALTH REQUEST FOR INFORMATION

WA DEPARTMENT OF HOUSING SUBMISSION

Overview

It appears that the purpose of the Bill may be misunderstood. Its primary intention is as a correction to make valid the delivery of social housing to Aboriginal communities that may be invalid in accordance with Subdivision J under the Native Title Act. Rather than extinguishing native title as occurs under Subdivision J, the Bill provides for the "non extinguishment principle" to apply.

The Bill is therefore no radical departure from the NTA but simply enhances its intent to make valid and expedite public works delivery without permanently extinguishing native title. The alternative of negotiating ILUAs to provide for the non extinguishment principle to apply clearly adds delays to the provision of essential public works to communities. This is due to reasons including: resourcing of Native Title Representative Bodies (NTRBs); the expectations of Traditional Owners which may differ from community expectations; time, resourcing and workload issues of Prescribed Body Corporate entities (PBCs); costs and the legal nature of negotiations under the NTA.

In terms of consultation, Government agencies in Western Australia must comply with the Aboriginal Heritage Act 1972. Consultation occurs with communities and NTRBs about development proposals before construction of a public work commences to avoid any potential impact on heritage sites. If Traditional Owners have no objection to the development on heritage grounds and the non extinguishment principle can apply as intended under the Bill, then there can be confidence that the provision of essential public works can be expedited to close the gap in Aboriginal communities.

Critically the Amendment is not regarded as a replacement for ILUAs but as a mechanism to allow a more efficient delivery of facilities to Aboriginal communities where an urgent need exists.

Challenges and Examples

Western Australia has unique challenges brought about by native title. Around 93% of Western Australia is Crown land and native title claims and determinations cover at least 80% of the State. Western Australia also contains a large number (287) of comparatively small and highly dispersed and remote communities.

Experience in Western Australia is that negotiating ILUAs to facilitate the delivery of public works including social housing in Aboriginal communities is

complex, time consuming and costly, and that circumstances are very case specific. Examples include the negotiations for the delivery of Aboriginal housing and other public works at *Community A* for over two years with resolution still to be achieved. In other communities, ILUAs for two multi function police facilities and staff housing have also been progressing for over two years and are not complete. One for *Community B* is still to be signed by the native title claimants; the other at *Community C* was lodged before Christmas and may take a further 6 months before registration is completed by the National Native Title Tribunal.

A specific challenge exists in numerous communities which are comprised of both native title parties (Traditional Owners) and historical (non-traditional) residents. This situation is typical of the majority of large Aboriginal communities in Western Australia which have a history of establishment as missions or ration points, including Kalumburu, Oombulgurri, Balgo, Beagle Bay, Warmun, Bidyadanga, and communities in and around Fitzroy Crossing. In some instances, non Traditional Owners have formal land tenure.

Community A is large, overcrowded and presents a very high housing need. Despite a (now more than two years old) multi-million Strategic Interventions Package funding commitment to construct 20 houses, the Department of Housing has been unable to bring contractors to site to commence construction.

As a further example, given the evidence of high need and the view that negotiating and registering an ILUA would take too long, in 2008 *Community D* approached the Department of Housing to construct houses with the clear understanding that this would extinguish Native Title. In agreement with the community, Traditional Owners and the NTRB, the houses were developed with the resulting extinguishment over the lots to be rectified by a retrospective ILUA.

At the State level a clear impact is evident in the fact that the Department of Housing's 2009/10 Capital Works Program has been restricted to constructing new houses over sites where Native title does not exist or has been extinguished. This includes building in communities which have previously 'disturbed' lots, for example, where old housing has been demolished. Notwithstanding amendments to the NTA, this emphasis will be required to continue until new ILUAs are developed for high need communities. Housing lots of this type are in short supply.

Experience has also shown that ILUAs require a lead time for negotiation both for the Traditional Owners (who may not reside in the community), PBCs, NTRBs, historical residents and their legal representatives. For Western Australia, a realistic timeframe for the negotiation and registration of an ILUA for the construction of housing and/or other public works is over a period of 18 months to two years.

Attachment B – WA information on ILUA negotiation – Office of Native Title

NATIVE TITLE AMENDMENT BILL (N0. 2) 2009

COMMONWEALTH REQUEST FOR INFORMATION

Generally the negotiation of ILUAs in Western Australia can be complex with the circumstances affecting those negotiations being very case specific. This especially occurs when dealing with the construction of housing and infrastructure facilities in Aboriginal communities. For example, underlying sensitivities can exist where an Aboriginal community comprises of both native title parties (Traditional Owners) and historical people. These underlying sensitivities need to be accommodated and increase negotiation time. This contrasts to where communities comprise of only the one native title party and no sensitivities exist.

Owing to the case specific nature of negotiations, the period taken for respective negotiations can vary. For example, in one case the negotiation period has taken two years with the statutory registration still to be finalised. In another case, negotiations are still continuing after two years. The best case senario that has been experienced is where an ILUA was negotiated and registered in about twelve months.

From the Western Australian experience, the negotiation and registration of an ILUA for the construction of housing and/or infrastructure facilities within a twelve month period would be a minimum period. Periods of 18 months to two years would be more realistic.

In view of these timeframes, the real benefit of the amendment is that it provides certainty of timeliness which cannot be guaranteed through the negotiation of ILUAs. The amendment is not regarded as a replacement for ILUAs but as a mechanism to allow a more efficient delivery of facilities to Aboriginal communities where an urgent need exists.

The amendment is put forward by the Australian Government as another way to address native title in delivering Indigenous social housing and certain limited types of public infrastructure on Indigenous lands in Queensland.

Focusing only on the Indigenous social housing aspect of the amendment, in particular cases the other ways of addressing native title could include:

(a) compulsory acquisition of native title, in all cases;
(b) a registered Indigenous Land Use Agreement, in all cases; or
(c) where native title has not been determined, to proceed on the basis that the registration of the trustee lease is not a future act.

In the case of Mornington and Aurukun (which are not Deed of Grant in Trust land) native title could also be addressed by use of sections 24JA/JB of the *Native Title Act 1993*.

The proposed amendment offers another way that native title can be addressed.

As noted by the representatives of the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs in the Committee's transcript of 28 January 2010, the proposed amendment is meant to be timely (Ms Cattermole p 37 and Ms Nelson p 44).

Queensland would generally agree with the evidence on page 38 of the transcript of Mr Litchfield that "In a best case scenario ILUAs take a minimum of 12 months". Indeed for non-commercial negotiations, and irrespective of where the land is located, a period between 12 and 18 months between initially commencing the negotiation and the registered ILUA is quite plausible. Queensland also agrees with the next part of his statement that "Through the national partnership agreements the [Australian] government want[s] to deliver and get this security of tenure in a quicker time frame than that…".

The processes provided under the proposed amendment will take less than those 12 months.

It is Queensland's experience that there may be many reasons why obtaining a voluntary agreement from the native title party in the form of a registered Indigenous Land Use Agreement can take time.

This can include, for example, such things as:

- there are genuine differences of view in the Indigenous community which need time to be worked through before any agreement can be reached;
- the timeliness of information and responses;
- over the period there can be other things occurring in the community which can impact on the pace and the outcome of the negotiations;
- the relationship between the native title representative body and the native title party;
- whether the native title party is a prescribed body corporate, registered claimants, or there are no registered claimants;
- the willingness of the native title representative body to fund the native title party's involvement in the negotiation and otherwise prioritise and resource this negotiation as against all the other things the native title representative body is doing;
- location for meetings, as the native title party may not live in the Indigenous community;
- that requests to meet the native title party's costs of authorising the ILUA and any amounts sought for compensation and agreed under the ILUA need to be found within government; and
- the time taken for the National Native Title Tribunal to registered the agreed ILUA.

What is clear is that the ILUA process, and even with the best will in the world, makes it difficult for money which is allocated in one financial year to be expended in that same financial year where work has not yet commenced on the ILUA.

Regards

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Indigenous Services
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