



National
Native Title
Council

*spirit
of
Change*

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By Email: legcon.sen@aph.gov.au

Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
The Senate

Dear Mr Hallahan

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

Please find attached the submission of the National Native Title Council (NNTC) to the Native Title Amendment Bill (No 2) 2009.

The NNTC is the peak body of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSs) from around Australia being formally incorporated in November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

This submission prepared by Cape York Land Council clearly outlines the concerns of NTRBs/NTSs in relation to the proposed amendments that we feel will undermine the adequate provision of procedural rights for traditional owners to decisions affecting their land.

In supporting the CYLC submission the NNTC makes the following points.

1. The NNTC does not consider that the Native Title Act needs to be changed to provide for the proposed amendments when there are already provisions capable of addressing the situation. People want new housing and so would be prepared to negotiate expeditiously. We consider that the Government has not demonstrated or properly articulated the need for these specific changes.
2. The NNTC reiterates its view that ILUAs are the best mechanism for negotiating housing and infrastructure developments and compensation regimes for the impact on native title (there is no question that this process should be preconditioned by heritage protection) and securing beneficial outcomes for native title holders.
3. The NNTC is concerned that there may be a detrimental effect on the current negotiations for tenure changes, in particular the negotiations being undertaken on

Palm Island that are in an advanced state. There is a distinct possibility that the Queensland Government would walk away from those negotiations and instead utilize the new provisions to fast track the impairment of native title without compensation.

4. The Commonwealth has insisted on minimum 40 year security of tenure for the public housing provider on Aboriginal reserve land before they will provide the new housing funding to the States and Territories. This will effectively result in practical extinguishment of native title, which should be recognised and compensated for.
5. The NNTC would be concerned if any objection to the proposed amendments was portrayed as oppositional to the provision of housing for Indigenous communities. This has occurred in the past, for example opponents to provisions of the Northern Territory Intervention were unfairly portrayed by some as being soft on child abuse.
6. The NNTC is also concerned that the Bill is racially discriminatory as outlined in the submission of CYLC.

“The Bill is Racially Discriminatory

- Current future act provisions relevant to public housing, schools, hospitals and associated infrastructure maintain the original NTA standard that native title is subject to the freehold test. **Replacing the freehold test with a right to comment where the rights of freeholders are not changed is racial discrimination** and contrary to the *Racial Discrimination Act 1975* ('RDA') and international law.
- **The principle of non racial discrimination in future act dealings was the touchstone of the original NTA both for the then Labor Government and for indigenous leaders.** During negotiations for the original NTA, Indigenous leaders consented to the validation of all government acts potentially invalid under the RDA in exchange for the principle that all future acts would be treated in a non-racially discriminatory manner by granting native title holders rights equivalent to a freehold title holder (or the freehold test). This balance in the NTA was severely wound back in the 1998 *Wik* amendments, amendments which were opposed by the Labor Opposition and by indigenous representatives. During the three Parliamentary inquiries into the *Wik* Bill, the Labor Opposition consistently demanded the return of the non-racially discriminatory treatment of future act rights.
- **The original NTA explicitly maintained the operation of the RDA, except in relation to the discriminatory validation provisions.** This provision was repealed by the *Wik* amendments which suspended the operation of the RDA except for the performance of functions and exercise of powers under the NTA. **Therefore, the only reason that this Bill can be introduced without explicitly requiring that the RDA be suspended is because the RDA has already been suspended by the Howard Government,** a provision again opposed by the then Labor Opposition.
- **The Rudd Government has promised to reinstate the RDA to the Northern Territory intervention legislation in the 2009 Spring Sittings** as part of the new approach to indigenous issues based upon mutual respect and on the basis that the Government takes its responsibilities under United Nations human rights conventions very seriously.

- **Bill relies on a view that s51 (xxvi) of the Constitution (the races power) can make laws which detrimentally affect the right of indigenous peoples.** The Labor Party in Opposition during the *Wik* debates called it ‘morally repugnant, socially divisive and would endanger the process of reconciliation’ to use the power inserted by the 1967 referendum to pass a racially discriminatory Bill.”

Clearly, a process of proper engagement with traditional owners in relation to activities on their land will achieve a timelier and effective outcome for the provision of much needed housing.

The NNTC would also be happy to provide further information about its submission should this be required.

Yours sincerely

Brian Wyatt
Chairperson