



National
Native Title
Council

12 February 2010

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

*spirit
of
Change*

ABN 32 122 833 158

Level 1
63 Adelaide Terrace
East Perth WA 6004
PO Box 3058
Perth WA 6832

Tel: +618 9263 8700
Fax: +618 9218 9449

Dear Committee Members

Explanatory Note: Proposed Changes to Native Title Amendment Bill (No 2) 2009 (Cth)

Addressing the chronic parlous state of public housing and other infrastructure in regional and remote Aboriginal and Torres Strait Islander communities is an objective that the National Native Title Council (NNTC) strongly supports. In submissions made to the Senate Committee on Legal and Constitutional Affairs the NNTC denounced the suspension of native title rights to achieve these goals. The problems surrounding the lack of infrastructure and housing existed before native title was a part of the Australian legal environment and thus the NNTC firmly rejects any purported causal link between the two. Although the NNTC supports the policy objective, it does not support the mechanism to achieve that goal. To curtail such hard fought rights to address governmental failings is unjust not to mention unnecessary.

The NNTC is of the firm view that the suspension of native title as envisaged by the Bill is tantamount to practical extinguishment and de facto compulsory acquisition, as such a mere right to comment and/or consult is a highly inappropriate means of resolving such critical matters. The preferred mechanism to resolve native title issues involving public housing and related infrastructure on Indigenous held lands is via negotiated outcomes utilizing current legislative tools with a strong preference for ILUAs. ILUAs guarantee certain outcomes while providing a real opportunity for broader land settlement. Further, ILUAs are available where there is no current claim, or if a claim is not registered. This saves money and reduces the risk for abuse of process.

As indicated in our submission to the Discussion Paper and then again to the Senate Inquiry, the NNTC strongly supports the use of ILUAs and believes engagement and negotiation is the best way to ensure the delivery of houses in a timely and just manner. The NNTC would therefore clearly prefer that the current Bill before Parliament be rejected outright. This is also the position put forward by a number of key stakeholders as indicated by the overwhelming majority of submissions received for the Senate Inquiry.

However, should the amendments proceed as currently proposed the NNTC recommends an approach that would run parallel to the ILUA process; the alternative would respect the rights of native title holders and registered claimants whilst achieving the policy objectives. The newly proposed s24JAA would attract the right to negotiate and simply invoke

Subdivision P with its attendant processes, decision-making criteria and practice. The NNTC submits that the following simple amendment to the existing Bill would afford minimum safeguards to protect the rights of Traditional Owners; harness the current institutional practice and experience in the National Native Title Tribunal, NTRB system and State Parties; and facilitate an agreement-making environment. It does this whilst also achieving the policy objectives and creating legal certainty.

The NNTC's proposal for an amendment to the *Native Title Amendment Bill (No. 2) 2009*, as well as a marked up version for ease of reference, are detailed in the attached document.

I trust you find this additional information useful for your purposes, however if you have any queries or require any further information please do not hesitate to contact me at your convenience.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brian Wyatt', written in a cursive style.

Brian Wyatt
Chairperson

A Bill for an Act to amend the *Native Title Act 1993*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Native Title Amendment Act (No. 2) 2009*.

2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to public housing etc.

Native Title Act 1993

1 After paragraph 24AA(4)(f)

Insert:

(fa) section 24JAA (public housing etc.);

2 At the end of section 24AB

Add:

(3) However, if, apart from subsection (2), a future act could be covered, to any extent, by both section 24JAA and section 24KA, then:

(a) if the act is notified in accordance with subsections 24JAA(10) to (12), it is not covered, to that extent, by section 24KA; and

(b) if the act is not notified in accordance with subsections 24JAA(10) to (12), it is not covered, to that extent, by section 24JAA.

Note: This allows for things, such as the construction of roads and electricity transmission or distribution facilities, to be done under either Subdivision JA or Subdivision K when done in connection with housing or facilities covered by Subdivision JA.

3 After Subdivision I of Division 3 of Part 2

Insert:

Subdivision JA—Public housing etc.

24JAA Public housing etc.

Coverage of Subdivision

(1) This Subdivision applies to a future act if:

(a) it relates, to any extent, to an onshore place; and

(b) it relates to:

(i) an area over which a freehold estate exists or a lease is in force, or that is vested in any person, where the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of

Aboriginal peoples or Torres Strait Islanders; or

(ii) an area that is held expressly for the benefit of, or held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and

(c) it either:

- (i) permits or requires the construction, operation, use, maintenance or repair by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities (the *action body*), of any of the things listed in subsection (3); or
 - (ii) consists of the construction, operation, use, maintenance or repair by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities (the *action body*), of any of the things listed in subsection (3); and
- (d) it is done or commenced as follows:
- (i) if the act is covered by subparagraph (c)(i)—it is done within the period of 10 years beginning on the day on which the *Native Title Amendment Act (No. 2) 2009* commences;
 - (ii) if the act is covered by subparagraph (c)(ii)—it is commenced within the period of 10 years beginning on the day on which the *Native Title Amendment Act (No. 2) 2009* commences; and
- (e) a law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of areas, or sites, that may be:
- (i) in the area in which the act is done; and
 - (ii) of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.

Compulsory acquisitions not covered

(2) To avoid doubt, this Subdivision does not apply to a future act that is the compulsory acquisition of the whole or part of any native title rights and interests.

Public housing etc.

- (3) For the purposes of paragraph (1)(c), the things are as follows:
- (a) public housing provided for Aboriginal people or Torres Strait Islanders living in, or in the vicinity of, the area;
 - (b) any of the following that benefit those people:
 - (i) public education facilities;
 - (ii) public health facilities;
 - (iii) police facilities;
 - (iv) emergency facilities;
 - (c) any of the following provided in connection with housing or facilities covered by paragraph (a) or (b):
 - (i) things listed in subsection 24KA(2);
 - (ii) sewerage treatment facilities;
 - (iii) things prescribed by the regulations.

Note: This subsection does not mean that facilities that benefit Aboriginal people or Torres Strait Islanders could not also benefit other people.

Validation of act

~~(4) If this Subdivision applies to a future act, then, subject to Subdivision P (which deals with the right to negotiate), the act is valid.~~

Non-extinguishment principle

~~(5) The non-extinguishment principle applies to the act.~~

Compensation

~~(6) If any native title holders would be entitled to compensation under section 17(2) for the act on the assumption that it was a past act referred to in that section, the native title holders are entitled to compensation for the act in accordance with Part 2 Division 5.~~

Who pays compensation

Deleted: (4) If this Subdivision applies to a future act, then, subject to subsections (5) and (6), the act is valid.¶

¶
 (5) An act to which this Subdivision applies is invalid to the extent that it affects native title unless:¶
 (a) if the act is covered by subparagraph (1)(c)(i)—before it is done; or¶
 (b) if the act is covered by subparagraph (1)(c)(ii)—before it is commenced; the action body;¶
 (c) gives notice of, and an opportunity to comment on, the act in accordance with subsections (10) to (12); and¶
 (d) provides a report to the Commonwealth Minister in accordance with subsection (16).¶

¶
 (6) An act to which this Subdivision applies is invalid to the extent that it affects native title if:¶
 (a) if the act is covered by subparagraph (1)(c)(i)—it is done before; or¶
 (b) if the act is covered by subparagraph (1)(c)(ii)—it is commenced before; the end of the consultation period.¶

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(7) The native title holders may recover the compensation from:

- (a) if the act is attributable to the Commonwealth:
 - (i) if a law of the Commonwealth provides that a person other than the Crown in right of the Commonwealth is liable to pay the compensation—that person; or
 - (ii) if not—the Crown in right of the Commonwealth; or
- (b) if the act is attributable to a State or Territory:
 - (i) if a law of the State or Territory provides that a person other than the Crown in any capacity is liable to pay the compensation—that person; or
 - (ii) if not—the Crown in right of the State or Territory.

Definitions

(8) In this section:

registered native title rights and interests means native title rights and interests described in an entry on:

- (a) the Register of Native Title Claims; or
- (b) the National Native Title Register.

4 After section 25(1)(aa)

Insert:

(ab) acts covered by section 24JAA (which deals with public housing etc);

5 Section 222 (after table item dealing with procedural right)

Insert:

public education facilities 253
public health facilities 253
public housing 253

6 Section 253

Insert:

public education facilities means education facilities operated by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities.

7 Section 253

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public health facilities means health facilities operated by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities.

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public housing means housing operated by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities.

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(10) The action body must:

- (a) notify each of the following, in the way determined, by legislative instrument, by the Commonwealth Minister, that the act is to be done:
 - (i) any registered native title claimant in relation to land or waters in the area;
 - (ii) any registered native title body corporate in relation to land or waters in the area;
 - (iii) any representative Aboriginal/Torres Strait Islander body in relation to land or waters in the area; and
- (b) give them an opportunity to comment on the act.

The notice must:

- (a) specify a day as the *notification day* for the act; and
- (b) contain statements to the effect that:

- (i) comments on the act; and
- (ii) requests under subsection (13) to be consulted about the act; must be made within the period of 2 months that begins on the notification day.

(12) The notification day must be a day by which, in the action body's opinion, it is reasonable to assume that all notices under subsection (10) in relation to the act will have been received by, or will otherwise have come to the attention of, the persons who must be notified under that subsection.

Consultation
(13) Any registered native title claimant or registered native title body corporate may, in writing, request to be consulted about the doing of the act so far as it

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Deleted: consultation period means the period that:

- (a) begins on the notification day; and
- (b) ends:
 - (i) if no claimant or body corporate requests under

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(1) If the operation of this Act would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person other

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