The Western Australian Government Submission

to the

Senate Standing Committee on Legal and Constitutional Affairs

about the

Native Title Amendment Bill (No 2) 2009

Introduction

The Western Australian Government welcomes the Commonwealth Government's initiative to amend the *Native Title Act 1993* (Cth) (NTA) through the Native Title Amendment Bill (No 2) (NTAB (No 2)). The NTAB (No 2) will introduce a new process to assist with the delivery of public housing and infrastructure to Aboriginal peoples and Torres Strait Islanders in communities on Indigenous-held land.

The proposed amendments are intended to complement the objectives of the National Partnership Agreement on Remote Indigenous Housing (NPARIH) of increasing the supply of new houses, and thereby reducing the overcrowding in remote Indigenous communities. It is estimated that with funding provided by the Commonwealth through the NPARIH will enable Western Australia to refurbish over 1000 houses as well as to build more than 295 new houses.

The Western Australian Government is involved in constructing and maintaining residential and non-residential building projects for the use and benefit of Aboriginal people. Often this occurs on Crown reserves set aside for the use and benefit of Aboriginal inhabitants under the control of the Aboriginal Lands Trust (ALT). Typically these Crown reserves are the subject of a lease from the ALT to an Aboriginal community body. A requirement of these leases is that their purpose must be for the use and benefit of the Aboriginal inhabitants.

Following the Federal Court's decision in *Erubam Le v State of Queensland 2003* the Western Australian Government sought legal advice about the steps necessary to avoid inadvertently extinguishing native title and to ensure the validity of the actions taken. Based on this legal advice the Western Australian Government negotiates Indigenous Land Use Agreements (ILUAs) with the relevant native title parties so as to apply the non-extinguishment principle to the construction of housing and public works.

However, the time taken to negotiate and have the ILUA registered has delayed the delivery of some urgent public works that the Western Australian Government has undertaken. The finalisation of these arrangements can be particularly complicated where native title is yet to be determined and locating the relevant parties to an ILUA can be problematic.

The proposed amendments:

- avoid extinguishing native title;
- provides a consultative mechanism with native title bodies corporate/claimants; and
- ensures acts undertaken by the process can be legally valid.

For these reasons, the new process provides the possibility of a speedier alternative to ILUAs that is consistent with the overall principles of the NTA.

The Western Australian Government supports the aims of the proposed amendments of assisting in overcoming delays in the delivery of housing and public works. It intends to make use of the new process to expedite the delivery of some public housing and infrastructure projects for the benefit of Aboriginal peoples in this State. However, where appropriate, the Western Australian Government will continue to use ILUAs to finalise native title arrangements. The proposed new procedure would only be used in specific cases where timing is critical and would be undertaken in consultation with the native title parties.

Issues

There are three matters about the NTAB (No 2) that the Western Australian Government wishes to bring to the Senate Committee's attention.

1. Widening the activities covered by Subdivision JA

The first matter is that some consideration should be given to widening the types of activities covered by Subdivision JA.

Proposed section 24JA(3) lists the types of activities that are covered by subdivision JA, and these include public housing for Aboriginal people (paragraph (a)) and public education, public health, police and emergency facilities (paragraph (b)).

The Explanatory Memorandum to the Bill specifically indicates that the new Subdivision JA is not intended 'to cover housing for community service staff or for private ownership'.

The provision should be amended so as to also include housing intended to be used by the staff providing the community services (including government employees) listed in paragraph (b).

While it is appreciated that the intention of the proposed subdivision is to focus on public housing for Aboriginal people or Torres Strait Islanders, in practical terms ensuring the availability of housing for community staff and Government employees is closely bound up with the successful delivery of these other community services in remote areas.

In this, the largest of Australia's States, often ALT lands can be in exceedingly remote locations where no private housing market exists or is not within commutable distance. In such circumstances, the housing of staff is frequently critical to ensuring that services are successfully delivered to the relevant Indigenous community. In order for a benefit for Aboriginal people to be derived from the construction of a new facility it is crucial that accommodation also be available for any government employees operating the facility. Typically housing will be required for teachers, police and health personnel.

If community service housing is not provided for in the Bill, then it is expected that there will be a delay in the delivery of these vital community services. The Western Australian Government will have to proceed with an ILUA process before the staff housing can be provided.

2. Ten-year sunset clause

Another matter is the proposed ten-year sunset clause.

Section 24JAA(1)(d)(ii) specifies that any act covered by the subdivision is to be done or commenced within ten years of the amendments coming into operation. That is, the Bill links the use of the proposed subdivision to the ten-year funding period under the current NPARIH and so introduces a sunset clause for the new process.

It appears that the Bill treats the new subdivision as an extraordinary procedure. The Western Australian Government's view is that the new subdivision should not be the subject of a time restriction.

No argument is made in the Explanatory Memorandum as to why the new subdivision is linked to the NPARIH. It is expected that governments around Australia will continue to seek to access this process after ten years for the following reasons:

- The process is designed to assist in expediting the delivery of housing and infrastructure. In such circumstances why artificially restrict the application of the new process to ten years?
- These governments will have ongoing obligations to deliver housing and infrastructure to Indigenous communities and it is therefore likely they will wish to access the new subdivision after the ten year period has passed.
- The Commonwealth and the State are involved in ongoing discussions in relation to a Commonwealth requirement that Aboriginal bodies corporate in Western Australia on certain land tenures will need to grant a lease of up to 40 years to the State or enter into an irrevocable housing management agreement with the Western Australian Housing Authority for up to 40 years in order to qualify for NPARIH funding.
- Given that the Commonwealth itself is entering into 40-year lease arrangements with Indigenous communities it too may benefit from using the new subdivision beyond the ten year limit.

Instead of the proposed sunset clause, the Western Australian Government proposes that the Bill be amended to include a provision requiring a review to be undertaken at the end of the ten-year period where the success of the new process can be determined and consideration can be given as to whether there is an outstanding need for the process to remain in place.

3. Report to Commonwealth Minister

Section 24JAA(5)(d) provides that the relevant act will be invalid if it is done or commenced before a report is provided to the 'Commonwealth Minister in accordance with subsection (16)'.

The report must also comply with the requirements of the legislative instrument made by the Commonwealth Minister.

However, there are concerns about the uncertainty that may be created by this requirement. Furthermore, overcoming this uncertainty may introduce delays that undermine the intended benefits of introducing the new process.

Subsection 16 introduces an additional administrative process that must be complied with before the act is valid. However, scenarios may arise where the administrative process may not be satisfied, thus jeopardising the validity of the act. For example, the report may be deemed as not fully complying with the Commonwealth Minister's requirements. This may be a particular risk if the requirements are changed and the operational officers in the various government agencies are unaware of the change.

In the above scenario, the relevant future act will be invalid even though the claimant or body corporate may have been fully consulted in accordance with the other provisions of the subdivision. That is, their rights under the subdivision have been fully accorded.

Arguably the most important aspect of the subdivision (as with any of the other provisions in the NTA) is that the rights and interests of the claimant or body corporate are adequately protected. However, the requirement to provide a report to the Commonwealth Minister is more of an administrative nature, and is not of the same magnitude as protecting the native title rights and interests.

If section 24JAA(5)(d) remains in the Bill it may lead to a potentially cumbersome process where the uncertainty may only be resolved once the State receives a document of approval by the Commonwealth Minister that the report provided was in accordance with the legislative instrument.

The Bill does not specify a time frame within which the Commonwealth Minister should indicate agreement that the report is in accordance with the legislative instrument, nor indeed that the Commonwealth Minister is required to (and therefore would) provide such an assurance.

Given that the introduction of the amendments are to assist in the delivery of public housing and infrastructure, the report to the Commonwealth Minister requirement prior to the commencement of the relevant future act risks introducing significant delays (e.g. to the commencement of the building of the public housing).

If the intend of the report is to ensure that native title claimants/holders rights and interests are protected, then it is relevant to note that the Western Australian Government already has consultation processes to address the *Aboriginal Heritage Act 1972* (WA). Western Australian Government agencies consult with traditional owners as well as the local population to secure a heritage clearance before any development commences. These clearances are required for all proposed works in Aboriginal communities, whether subject to the proposed Subdivision 24JA or not.

While it is appreciated that the Commonwealth Government would wish to monitor the compliance with the new process, this desire does not justify making the provision of a report the pre-condition for the validity of the future act. Furthermore, introducing significant legal uncertainties about the status of acts where the new process is employed will undermine the aim of the amendments.

Conclusion

The matters outlined above are important to ensuring that the Western Australian Government will be able to make full use of the proposed new subdivision and expedite the delivery of housing and infrastructure to remote Indigenous communities where timing is a crucial issue.