**LAW COUNCIL OF AUSTRALIA**

**Supplementary Submission to the Inquiry into the *Native Title Amendment Bill (No 2) 2009***

**31 January 2010**

The Law Council provides the following supplementary submission to the Senate Standing Committee on Legal and Constitutional Affairs at the request of Deputy Chair, Senator Guy Barnett, in order to clarify certain matters raised in oral submissions to the public hearings into the *Native Title Amendment Bill (No.2) 2009* ("the Bill") on 28 January 2010 ("the hearings").

During oral submissions at the hearings, the Law Council advised that the Bill may have very limited application to areas which are subject to the Northern Territory "emergency intervention", and also may not apply to many Aboriginal communities in northern South Australia.

This is because the Bill applies only to future acts done on:

- an area of Aboriginal or Torres Strait Islander held land [section 24JAA(1)(b)(i)]; or
- land held for the benefit of Aboriginal or Torres Strait Islander people [section 24JAA(1)(b)(ii)].

However, section 233(3)(b) of the *Native Title Act* 1993 (Cth) (NTA) provides that an act affecting Aboriginal/Torres Strait Islander land or waters is not a future act.

The definition of "Aboriginal/Torres Strait Islander land or waters" in section 253 of the NTA reads:

> ***Aboriginal/Torres Strait Islander land or waters*** means land or waters held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under:
>
> (a) any of the following laws of the Commonwealth:
>
> (i) the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*;
> (ii) the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*;
> (iii) the *Aboriginal Land Rights (Northern Territory) Act 1976*; or

(b) any of the following laws of South Australia:

(i) the *Aboriginal Lands Trust Act 1966*;
(ii) the *Maralinga Tjarutja Land Rights Act 1984*;
(iii) the *Pitjantjatjara Land Rights Act 1981*; or

(c) any other law, or part of a law, prescribed for the purposes of the provision in which the expression is used.[1]

Indigenous communities not affected by the Bill are those communities on land held under any of the laws set out in the above definition.

Furthermore, this Bill is expressed to have application to areas where either the non-extinguishment principle applies because the land is subject to a determination of native title, or will apply once native title is determined to exist.

This is because section 24JAA(1)(b) of the Bill mirrors section 47A(1)(b) of the NTA which operates to engage section 47A which allows prior extinguishment to be disregarded over the relevant areas.

The result is that where there is a freehold or exclusive leasehold estate held by Aboriginal or Torres Strait Islanders on land where there has been a determination of native title, the non-extinguishment principle applies so that native title is suspended entirely for the duration of that interest: see sections 238(3) and 47A(3)(b) of the NTA.

Where there is a reserve for the benefit of Aboriginal or Torres Strait Islander people on determined native title land, native title will be partially suspended for the duration of the interest: see sections 238(4) and 47A(3)(b) of the NTA.

This is complicated by the possibility of total extinguishment over areas where there were "public works" constructed on the area before 23 December 1996 – see *Erubam Le* v *Queensland* (2003) 134 FCR 155 at [91].

The scenario then is that the Bill is expressed to apply to areas where native title has been suppressed, in whole or part, or where native title may have been already extinguished by past public works.

In respect of those areas, the question arises whether there is a future act at all?

[1] There are no prescribed laws in respect of ***Aboriginal/Torres Strait Islander land or waters.***

To be a “future act”, the act in question must affect native title to some extent: see section 233(1) of the NTA.

Where native title has already been extinguished by public works the Bill will have no application as there can be no affect on native title.

In relation to land covered by freehold or a lease to which the non-extinguishment principle applies, it is difficult to see how an act of the kind provided for in section 24JAA would affect the continued enjoyment and exercise of the native title rights and interests, so long as the freehold or lease remains in place. If that is the case, then the act would not be a “future act” at all.

If the land is held as reserve land for the benefit of Aboriginal peoples or Torres Strait Islanders, then the suppression of native title under the non-extinguishment principle will be partial, and likely to be confined only to the right to control access to the land and decide the uses to which the land might be put. In that case, the new provisions may have application, as the kind of acts contemplated are likely to affect the continued existence, enjoyment and exercise of native title rights in respect of the parts of the land where the improvements are to be constructed.

The end result is that the Bill is likely to have limited practical application only to:

- those indigenous communities which are established on reserves and then only to suspend any remaining “unsuspended” native title rights, but not to extinguish them; or
- those indigenous communities on land which has not yet been determined to have existing native title.

In the latter scenario, it would be highly probable that native title would be determined to exist so that the non-extinguishment principle would have effect in relation to the whole of the land on the making of the determination. It is considered that expedition of native title determinations may be a more certain way to proceed than to introduce a further future act process with limited practical application.