CHAPTER 2

Overview of the Bill

2.1 This chapter provides a brief background to the Native Title Amendment Bill (No. 2) 2009 (Bill), and then outlines its purpose and key provisions.

Background

2.2 In 2009, the Productivity Commission published data indicating that, in 2006, Indigenous people were 4.8 times more likely than non-Indigenous people to live in overcrowded housing, with overcrowding highest in very remote areas (65.1 per cent).[1]

2.3 These findings were preceded by a Council of Australian Governments (COAG) decision to improve public housing and public infrastructure in remote Indigenous communities. In 2008, COAG agreed to the National Partnership on Remote Indigenous Housing, establishing a 10-year remote Indigenous housing strategy aimed at:

- significantly reducing severe overcrowding in remote Indigenous communities;
- increasing the supply of new houses and improving the condition of existing houses in remote Indigenous communities; and
- ensuring that rental houses are well maintained and managed in remote Indigenous communities.[2]

2.4 The strategy is intended to be a central plank in achieving the targets of the 'Closing the Gap' policy:

> The Government intends that [this] and other closing the gap initiatives be developed and delivered in partnership with Indigenous Australians. A fundamental principle underpinning the National Partnerships is that engagement with Indigenous men, women and children and communities should be central to the design and delivery of programs and services. The Government is committed to ensuring that vital investment in housing and community infrastructure proceeds expeditiously and in a manner

1 SCRGSP (Steering Committee for the Review of Government Service Provision) 2009, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission, Canberra, pp 9.3-9.11.

2 National Partnership on Remote Indigenous Housing, Part 2, para 11.

> consistent with its commitment to work in partnership with Indigenous Australians.[3]

2.5 On 13 August 2009, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) released a discussion paper titled *Possible Housing and Infrastructure Native Title Amendments*. The discussion paper stated that the Australian Government was considering amending the *Native Title Act 1993* (Act) to include:

> …a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need for an Indigenous Land Use Agreement.[4]

2.6 FaHCSIA's consultation process ended on 4 September 2009, and on 21 October 2009 the Bill was introduced in the House of Representatives. Its aim is to provide:

> a process to assist the timely construction of public housing and a limited class of public facilities by or on behalf of the Crown, a local government body or other statutory authority of the Crown for Indigenous people in communities on Indigenous held land.[5]

2.7 At present, the Act establishes a procedural framework within which acts that would affect native title (future acts) may be undertaken (the future acts regime). The future acts regime requires native title rights and interests to be considered as pre-requisites to the validity of future acts, and is contained in Division 3 of Part 2 of the Act. The Bill would primarily amend these provisions with the insertion of the new process described above.

Purpose and key provisions

2.8 The Bill comprises Schedule 1 only, and its key amendments are as follows:

- insertion of two provisions defining how the new subdivision (containing the new future acts process) would interact with existing subdivisions of the future acts regime;

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3 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 1; Attorney-General's Department & Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments*, August 2009, pp 4-5; and the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 21 October 2009, p. 10468.

4 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments*, August 2009, p. 5.

5 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 1; and the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 21 October 2009, p. 10468.

- insertion of a new subdivision which:
  - defines the future acts to be covered;
  - addresses the effect on validity of a failure to comply with procedural requirements;
  - sets out other consequences of future acts; and
  - sets out the procedural rights of native title parties in relation to future acts;
- insertion of three new definitions – *public education facilities*, *public health facilities* and *public housing* – into section 253 of the Act;[6] and
- provision of just terms compensation for any acquisition of property.

Interaction with existing legislation

2.9 The first two items of Schedule 1 of the Bill would insert two provisions into the Act, defining how the new subdivision would interact with existing subdivisions. Item 1 would include the new process among the list of future acts processes which can validate a future act. Item 2 would provide that a future act notified under the new subdivision would be covered by that subdivision, notwithstanding that it could also fall within the coverage of Subdivision K (facilities for services to the public).

2.10 The Explanatory Memorandum states that item 2 would provide flexibility for future acts to be dealt with in a single process under the new subdivision instead of Subdivision K:

> For example, this allows a single consultation process under Subdivision JA to deal with both a housing development covered by Subdivision JA, and the necessary supporting facilities such as streets and power, water and sewage facilities which might otherwise be covered by Subdivision K.[7]

Insertion of the new process

2.11 Item 3 of the Bill would insert the key amendment – new Subdivision JA – into the future acts regime. It comprises four distinct groups or categories of provisions: coverage of the new subdivision; failure to comply with procedural requirements; other consequences of future acts; and procedural rights of native title parties.

Coverage of the new subdivision

2.12 New subsections 24JAA(1)-(3) would define the future acts to be covered by the new subdivision. The requirements set out in the Bill are that the future act:

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6 Items 4-7.

7 Explanatory Memorandum, p. 4.

- relates, to any extent, to an onshore place;
- relates to an area of Aboriginal or Torres Strait Islander held land, or land held for the benefit of Aboriginal or Torres Strait Islander peoples;
- must be done or commenced within 10 years of the commencement of the new subdivision; and
- must facilitate or consist of the establishment of specific types of facilities 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).

2.13 There must also be a federal, state or territory law providing for the preservation or protection of areas, or sites in the area, where the future act is to be done that may be of particular significance to Aboriginal and Torres Strait Islander peoples in accordance with their traditions.[8]

2.14 Consistent with the stated policy objectives, only specific types of facilities could be provided or facilitated by future acts under the new subdivision:

- public housing for Aboriginal and Torres Strait Islander peoples living in, or in the vicinity of, the area;
- public education, public health, policy and emergency facilities that benefit Aboriginal and Torres Strait Islander peoples; and
- facilities provided in connection with the aforementioned facilities (as listed in subsection 24KA(2), sewerage treatment facilities, and as prescribed by regulations).[9]

2.15 The Bill explains, by way of a note, that this provision would not prevent facilities that benefit Aboriginal and Torres Strait Islander peoples from incidentally benefiting other people, and the Explanatory Memorandum provides an illustrative example:

> A public health clinic established primarily for the local Indigenous community but which also provided services to non-Indigenous community staff would be covered by Subdivision JA. A further example is the establishment of a fire department which may service the surrounding region as well.[10]

2.16 The new subdivision would not apply to future acts which constitute a compulsory acquisition of the whole or part of any native title rights and interests.[11]

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8 Proposed subsection 24JAA(1); and Australians for Native Title and Reconciliation, *Submission 6*, p. 5.

9 Proposed subsection 24JAA(3).

10 Explanatory Memorandum, p. 5.

11 Proposed subsection 24JAA(2).

Failure to comply with procedural requirements

2.17 The current future acts regime contains a number of separate processes for different types of future acts, and the procedural requirements for each process also differ. For many future acts, there is a requirement to notify native title parties and to give them an opportunity to comment on a proposal. In other cases, the requirement is to negotiate in good faith with the native title party with a view to obtaining their consent to the proposal (with recourse to arbitration if agreement cannot be reached).[12]

2.18 New subsections 24JAA(4)-(6) would address the effect on validity of a failure to comply with procedural requirements. Under the new subdivision, a future act would be deemed valid, subject to the following pre-conditions:

- the action body:
  - giving notice of the future act, and an opportunity to comment on the future act, in accordance with notice requirements;
  - providing a report to the Commonwealth Minister in accordance with report requirements; and
- the future act being done or commenced after the end of the consultation period.[13]

Other consequences of future acts

2.19 New subsections 24JAA(7)-(9) set out other consequences of a future act being covered by the new subdivision, including:

- the non-extinguishment principle applying to the future act;
- an entitlement to compensation under Division 5 of Part 2 for native title holders who would be entitled to compensation under subsection 17(2) for the future act, if the act were assumed to be a past act referred to in that section; and
- the recovery of compensation from the federal, state or territory government to whom the future act is attributable, unless legislation otherwise attributes responsibility for compensation.

Procedural rights of native title parties

2.20 New subsections 24JAA(10)-(18) set out the proposed procedural rights of native title parties, consisting of notice, consultation, and reporting requirements.

2.21 An action body would have to notify any registered native title claimant, any registered native title body corporate and any representative Aboriginal or Torres

12 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 3.

13 Proposed subsections 24JAA(4)-(6).

Strait Islander body in relation to land or waters in the area of the proposed future act. The minister would determine, by legislative instrument, the content of the notification. An action body would have to give notice recipients an opportunity to comment on the proposed future act.[14]

2.22 The notice would have to specify a day as the *notification day* for the proposed future act, and contain a statement to the effect that comments on the proposed future act, and consultation requests, must be made within two months of the notification day. The action body sets the notification day, a day by which, in its opinion, it is reasonable to assume that all notices have been received by, or come to the attention of, the notice recipients.[15]

2.23 The Explanatory Memorandum does not indicate how an action body is to make this assessment, but it does explain the rationale for the provision as follows:

> This gives native title parties the option to provide feedback to the action body about a proposal while allowing it to proceed quickly should they consider further consultation is unnecessary.[16]

2.24 Any registered native title claimant or registered native title body corporate would be able to request in writing to be consulted about the conduct of the proposed future act so far as it affects their registered native title rights and interests.[17] Upon receipt of a valid request, the action body would have to consult with the registered native title claimant or registered native title body corporate about ways of minimising the proposed future act's impact on registered native title rights and interests in relation to land or waters in the area and, if relevant, any access to the land or waters, or the way in which any thing authorised by the proposed future act might be done.[18] There is no mandatory requirement for the action body to incorporate feedback from the claimant or body corporate.

2.25 The action body would have to comply with any requirements determined by the minister's legislative instrument.[19] The Explanatory Memorandum provides a useful exploration of what this might entail:

> The legislative instrument may specify requirements as to the manner of consultation and matters to be deal with through consultation. It may, for example, require the action body to hold one or more face-to-face meeting[s] with native title claimants or body corporate[s] who have requested consultation, provide translators during consultation, or address issues of the design, location and nature of the proposed act. The

14 Proposed subsection 24JAA(10).

15 Proposed subsection 24JAA(11).

16 Explanatory Memorandum, p. 6.

17 Proposed subsection 24JAA(13).

18 Proposed subsection 24JAA(14).

19 Proposed subsection 24JAA(15).

> Commonwealth Minister will be able to refine these requirements in light of the experiences of action bodies and native title parties over time and having regard to differing projects and community circumstances.[20]

2.26 In the second reading speech, the Attorney-General told the parliament:

> The new process strikes a balance between the urgent need to engage meaningfully with native title parties and protect native title rights and interests. It also contains important safeguards to ensure genuine consultation with native title parties. It sets in place a framework for meaningful engagement with key stakeholders in decisions about housing and other services for Indigenous communities.[21]

2.27 The Bill would also require the action body to provide the minister with a written report on the things done in compliance with notice and consultation requirements for each proposed future act. The report would have to comply with any requirements determined, by legislative instrument, by the minister. Again, the Explanatory Memorandum indicates the potential breadth of any such instrument:

> The instrument may, for example, require the report to cover information as to whether or not a claimant or body corporate requested to be consulted, and whether or not comments were received by the action body in relation to the act. It may also outline the steps taken by the action body to consult with native title parties about the proposed act, for example whether a meeting was held with claimants and bodies corporate.[22]

2.28 There would be no requirement for the minister to publish the report.[23]

2.29 The remaining provisions proposed in item 3 of the Bill relate to procedural requirements concerning multiple action bodies, multiple future acts and definitions of *consultation period* and *registered native title rights and interests*.[24]

2.30 The definition of *consultation period* provides for consultation to have occurred two months after the *notification day* if no requests for consultation are received in the required time. If one or more claimants or bodies corporate have requested to be consulted about the future act, the period ends four months later, or at such earlier time as each party notifies in writing that it has been consulted (but not earlier than two months).

2.31 According to the Attorney-General's Department and FaHCSIA in their joint submission:

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20 Explanatory Memorandum, pp 6-7.

21 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 21 October 2009, p. 11.

22 Explanatory Memorandum, p. 7.

23 Proposed subsection 24JAA(16); and Torres Strait Regional Authority, *Submission 13*, p. 2.

24 Proposed subsections 24JAA(19).

> This time-frame compares favourably with the existing 'right to negotiate', which allows a minimum of six months for parties to negotiate *and* reach agreement on a broad range of matters including royalty-like payments, and with the time periods under which extensive housing related community engagement has been conducted under the Strategic Indigenous Housing and Infrastructure Program.[25]

Just terms compensation for acquisition of property

2.32 Item 8 of the Bill would provide for just terms compensation for any acquisition of property that might result from enactment of the Bill. The item states that if the operation of the Act would result in an acquisition of property (to which section 51(xxxi) of the Constitution applies) from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person. If the amount of compensation is not agreed, the person may institute proceedings in a court of competent jurisdiction for a determination of reasonable compensation.[26]

2.33 Throughout the inquiry, submissions and witnesses raised concerns in relation to some key provisions of the Bill. Chapter 3 discusses these concerns.

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25 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 3.

26 Item 8.