CHAPTER 3

Key Issues

3.1 Submitters and witnesses recognised the need for improved public housing and public infrastructure for Indigenous communities throughout Australia and, on this basis, largely supported the objectives of the Bill. However, this support did not extend to the way in which the Bill seeks to achieve its objectives.

3.2 This chapter discusses key issues raised throughout the inquiry, including:

- the need for a new future acts process;
- operation of the *Racial Discrimination Act 1975* in the context of the Bill;
- the application of the non-extinguishment principle; and
- the procedural rights of native title parties.

The need for a new future acts process

3.3 In October 2009, the Attorney-General introduced the Bill into the parliament, explaining that it was necessary due to 'uncertainty in relation to native title' which, in turn, has delayed housing and service delivery targets.[1]

3.4 While not clear on its face (nor articulated in either the Explanatory Memorandum or Second Reading Speech), the Bill primarily applies to Western Australia and Queensland. In these states, two regimes apply: the federal native title regime and state-based land rights regimes. As the Attorney-General's Department (Department) explained:

> Legal uncertainty exists because you do have these two different [regimes]—you have a land rights regime and you have native title over the top, and the interaction between the two is not necessarily clear. That is why in some cases people proceed with the future acts regime. There might be an argument that the land rights might have extinguished native title and therefore the future acts regime does not apply, but out of an abundance of caution…where there is uncertainty people usually proceed with the future acts regime. You then get into this situation of which parts of [that] regime would apply…and so then if you use particular provisions that then do not apply or are found not to apply, the act would be invalid, which then leads

1 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 21 October 2009, p. 10468.

> you into, in many cases, the choice between compulsory acquisition or an Indigenous land use agreement.[2]

3.5 In addition to legal uncertainty, the Department and FaHCSIA emphasised the partnership between federal, state and territory governments, and the Australian Government's need to support its counterparts in achieving the COAG targets for the Closing the Gap strategy, as justification for the Bill:

> In some cases, those states where this is going to have the primary application—that is, in WA and Queensland—have said clearly [that native title] is an issue and they are the deliverers. The Commonwealth as the primary funder and a partner in this agreement needs to take heed of and has taken heed of those concerns. This amendment…is designed to address that.[3]

3.6 The Department and FaCHSIA informed the committee that, in their view, ultimately the Bill would achieve the targets of the Closing the Gap strategy, consistent with the *Native Title Act 1993* (Act) and the government's approach to working in partnership with Indigenous peoples:

> [The new subdivision] allows governments to confidently proceed with the development and construction of housing and infrastructure projects on land subject to native title, while also being sure that their acts would not extinguish native title and that native title holders and claimants would be provided genuine consultation and compensation if affected.[4]

3.7 However, a number of submitters and witnesses did not accept these arguments. Instead, they claimed that the way in which the Bill seeks to achieve its outcomes is not justified. They submitted: there is no evidence to support the assertion that native title issues delay the provision of public housing and public infrastructure to Indigenous communities;[5] the Act already provides certainty in respect of future act

---

2 Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 38. Also see Mr John Litchfield, Acting Branch Manager, Land Reform Branch, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 38; Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, pp 4-5; and Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, pp 2-3.

3 Ms Amanda Cattermole, Group Manager, Office of Remote Indigenous Housing, FaHCSIA, *Committee Hansard*, 28 January 2010, pp 35-36; and Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 4.

4 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 4.

5 For example, Professor Jon Altman, *Submission 1*, pp 2-3; Carpentaria Land Council Aboriginal Corporation, *Submission 3*, pp 5-6; Mr Daniel Lavery, *Submission 8*, Attachment 1, p. 11; and Ms Krysti Guest, Senior Legal Officer, Cape York Institute, *Committee Hansard*, 28 January 2010, pp 23-24.

processes, including those acts contemplated by the Bill;[6] and the Bill has such limited application that it will have minimal practical effect.[7]

Lack of evidence of need

3.8 NTSCORP, a NSW and ACT native title representative body, told the committee:

> For us the key objection to the bill is that there is insignificant identification of the need for the amendments...In fact, we would argue the other case: in our experience on the ground on a day-to-day basis we find that the [existing] processes work quite well and that when people are willing to sit down and negotiate the process moves along very quickly. There are cases where people are not willing to sit down with Indigenous groups and have those conversations but even most of those cases move along very quickly.[8]

3.9 NTSCORP gave evidence that, in the context of Indigenous Land Use Agreements (ILUAs), negotiations occur quickly between Indigenous peoples, the private sector, developers or other communities, as compared to negotiations with state/territory governments.[9] Supporting those comments, the Cape York Institute (CYI) added:

> These kinds of agreements do not have to take a long time; they can be done very quickly. Doing that obviously creates goodwill and respect. I think people—I am not sure why—have it in their minds that native title agreements are going to take a long time. Agreements of these kinds happen all the time in non-Indigenous places. People have agreements over land, housing and such constantly—just normal commercial dealings. There is no magic in native title and it does not need to take a long time to get the parties to the table; you can really do it very quickly.[10]

3.10 The Northern Land Council (NLC) questioned the legal, rather than the factual, basis on which uncertainty is claimed by the government. NLC's evidence to the committee was that there is no apparent legal uncertainty, and it suggested that perhaps the alleged uncertainty is more technical in nature, which in turn would lead to uncertain outcomes.[11]

---

6 Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 5; Australians for Native Title and Reconciliation, *Submission 6*, p. 3; and NTSCORP, *Submission 10*, p. 4.

7 Law Council of Australia, *Supplementary Submission 14*, p. 3; and Northern Land Council, *Submission 16*, p. 2.

8 Mr Warren Mundine, CEO, NTSCORP, *Committee Hansard*, 28 January 2010, pp 2 & 8.

9 Mr Warren Mundine, CEO, NTSCORP, *Committee Hansard*, 28 January 2010, p. 3.

10 Ms Krysti Guest, Senior Legal Officer, Cape York Institute, *Committee Hansard*, 28 January 2010, pp 26-27.

11 Mr Ron Levy, Principal Legal Officer, Northern Land Council, *Committee Hansard*, 28 January 2010, pp 16-18.

Existing future acts processes, including the use of ILUAs

3.11 At present, the Act provides for specific future acts conducted in compliance with procedural requirements to be deemed valid. Some of the future acts processes contained in Division 3 of Part 2 of the Act include:

- ILUAs – Subdivisions B-D;
- reservations, leases, et cetera – Subdivision J;
- facilities for services to the public – Subdivision K; and
- acts passing the freehold test – Subdivision M.

3.12 A number of groups referred to these various provisions,[12] but emphasised that, ideally, the Australian Government should be focussing upon greater use of ILUAs rather than introducing a new future acts process as proposed in the Bill.[13]

3.13 The Australian Human Rights Commission (AHRC), and others, submitted that overcoming disadvantage in Indigenous communities, including addressing chronic housing shortages, can best be pursued through agreement-making and by working in partnership with Indigenous peoples, rather than by diminishing the rights of traditional owners through a new future acts process. These groups cautioned that the process proposed in the Bill could detract from the Australian Government's goal of building new partnerships and stronger relationships with Indigenous peoples.[14]

3.14 NTSCORP similarly endorsed agreements negotiated in good faith and was one of many submitters to promote the advantages of ILUAs:

> The process of negotiating ILUAs requires genuine consultation and provides for a more even distribution of bargaining power and negotiations in good faith. Importantly, ILUAs provide flexibility and certainty to all parties. Further, the process of negotiating ILUAs facilitates a decision-making process in which respect for Indigenous communities is central. Such a process provides an opportunity for the Federal Government to become a model participant in the consultation process.[15]

---

12 For example, Professor Jon Altman, *Submission 1*, p. 3; Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 5; and Ms Krysti Guest, Senior Legal Officer, Cape York Institute, *Committee Hansard*, 28 January 2010, p. 23.

13 For example, Carpentaria Land Council Aboriginal Corporation, *Submission 3*, pp 3 & 8; NTSCORP, *Submission 10*, p. 9; Mr Kim Hill, CEO, Northern Land Council, *Committee Hansard*, 28 January 2010, p. 17; and Ms Raelene Webb QC, Member, Indigenous Legal Issues Committee, Law Council of Australia, *Committee Hansard*, 28 January 2010, p. 29.

14 Australian Human Rights Commission, *Submission 11*, pp 4-5; National Native Title Council, *Submission 5*, p. 1; and North Queensland Land Council, *Submission 17*, pp 12-13.

15 NTSCORP, *Submission 10*, p. 8.

3.15 In NTSCORP's view, the Bill undermines the ILUA process by legislating an alternative process which 'shortcuts important safeguards and diminishes Indigenous communities' opportunity to reach an agreement which recognises their interests.'

3.16 This idea also appeared in the evidence received from Australians for Native Title and Reconciliation (ANTaR). ANTaR's submission focussed upon the principle of equitable treatment, and stated that native title holders and claimants should have the same legal rights as other property owners:

> …except where compulsory acquisition and other government processes derogate from their rights in the same way as for other property owners, their rights should only be affected with their consent. Validity for future acts through an Indigenous Land Use Agreement (ILUA) is consistent with this approach.[16]

3.17 Some submissions questioned the extent to which governments have availed themselves of the existing future acts processes. It was suggested that, if timeliness is the justification for the Bill, then the existing processes could be improved to deliver better outcomes. In particular, the committee heard that template ILUAs would be one such option:

> …if delays and uncertainty are cited as the reasons for the proposed amendments, then the development of template ILUAs, together with better resourcing of Representative Bodies and parties to such ILUAs, should be considered as a means for expediting the process...Providing template ILUAs specifically targeted at public housing and infrastructure projects is a good starting point for negotiations between native title holding groups, registered claimants and governments, and has the potential to provide timelier outcomes, whilst still maintaining the flexibility and certainty ILUAs provide.[17]

3.18 The National Native Title Council (NNTC) also supported exploring the use of template ILUAs, arguing that 'there is lot of intelligence and experience on the ground that we could avail ourselves of.'[18]

Department and FaHCSIA response

3.19 In their submission, the Department and FaHCSIA rejected the suggestion that existing future acts processes could consistently achieve the Bill's objectives. The

---

16 Australians for Native Title and Reconciliation, *Submission 6*, pp 3-4; Cape York Land Council, *Submission 2*, p. 11; Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 5; NTSCORP, *Submission 10*, pp 6 & 8; and Torres Strait Regional Authority, *Submission 13*, pp 3-4.

17 NTSCORP, *Submission 10*, p. 9; and Australian Human Rights Commission, *Submission 11*, p. 6.

18 Mr Kevin Smith, Deputy Chair, National Native Title Council, *Committee Hansard*, 28 January 2010, p. 11; and Mr Kim Hill, CEO, Northern Land Council, *Committee Hansard*, 28 January 2010, p. 19.

departments acknowledged the availability of the ILUA process, but maintained that the proposed future acts process is necessary to provide for public housing and public infrastructure in 'circumstances where the timely negotiation and registration of an ILUA is not possible or timely.'[19] Further:

> …even in a best case scenario ILUAs include a necessary statutory registration test period et cetera. In a best case scenario ILUAs take a minimum of 12 months. Through the national partnership agreements the government wants to deliver and get this security of tenure out in a quicker time frame than that, but that involves genuine consultation with the people affected, which includes the community where the urgent infrastructure is being delivered but also any native title holders or, more generally, claimants who may be claiming an interest in that land.[20]

3.20 Given the confidential nature of ILUAs, the departments were not able to provide conclusive statistics on the time generally taken to complete an ILUA however, departmental officers advised that the new future acts process will be more expeditious than ILUAs.[21] State governments confirmed this evidence.

3.21 The Queensland Government estimated that it would take the processes provided for in the Bill less than 12 months to complete, whereas:

> For non commercial negotiations, and irrespective of where the land is located, a period between 12 and 18 months between initially commencing the negotiation and the registered ILUA is quite plausible.[22]

3.22 The WA Government submitted:

> Experience in Western Australia is that negotiating ILUAs to facilitate the delivery of public works including social housing in Aboriginal communities is complex, time consuming and costly, and that circumstances are very specific. Examples include the negotiations for the delivery of Aboriginal housing and other public works at *Community A* for over two years with resolution still to be achieved. In other communities, ILUAs for two multi function police facilities and staff housing have also been progressing for over two years and are not complete. One for *Community B* is still to be signed by the native title claimants; the other at

---

19 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 5; and Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 3.

20 Mr John Litchfield, Acting Branch Manager, Land Reform Branch, FaHCSIA, *Committee Hansard*, 28 January 2010, pp 38-39. See also Ms Amanda Cattermole, Group Manager, Office of Remote Indigenous Housing, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 39.

21 Ms Amanda Cattermole, Group Manager, Office of Remote Indigenous Housing, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 40; and Ms Sally Nelson, Principal Legal Officer, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, pp 44-45.

22 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 4 and Attachment B, p. 1.

> *Community C* was lodged before Christmas and may take a further 6 months before registration is completed by the National Native Title Tribunal.[23]

3.23 The WA Government told the committee that lengthy negotiations in Community A, an area of very high housing need, have delayed implementation of a housing project to which millions of dollars have been committed. In another example, Community D approached the government to immediately construct houses with the resulting extinguishment of native title to be remedied by a retrospective ILUA. The WA Government stated:

> For Western Australia, a realistic timeframe for the negotiation and registration of an ILUA for the construction of housing and/or other public works is over a period of 18 months to two years.[24]

3.24 In its supplementary submission, the NLC told the committee:

> The Commonwealth's evidence and the concerns of State Governments are confirmatory of the NLC's longstanding position and concerns regarding the ILUA registration process. Legislative reform to remove the ILUA registration requirement – at least where certified by a representative body – would greatly improve the capacity of governments to timeously deliver urgent public housing in Aboriginal/Islander communities by agreement.
>
> …
>
> It appears that the vast majority of ILUAs are registered without objection, however, the parties are precluded from benefiting from their executed agreements for six months.[25]

3.25 Notably, the Department emphasised that the new future acts process is not intended to replace existing processes or ILUAs. Instead, it would comprise another option to assist governments in the expeditious delivery of public housing and public infrastructure:

> This proposed amendment is targeted at housing. It is not a replacement for any of those provisions [that is, Subdivisions K and M] and it is not a replacement for ILUAs; it is something that is another tool that can be used by governments in seeking to provide housing. It is for those situations where perhaps an Indigenous land use agreement might not be the most timely way of proceeding. Yes, they can be negotiated within a 12-month time frame, but that is not always the case.[26]

---

23 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, pp 1-2.

24 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, Attachment A, pp 2-3.

25 Northern Land Council, *Supplementary Submission 16a*, pp 7-8.

26 Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 35.

3.26 The WA Government, which negotiates ILUAs for the construction of housing and public works, submitted that the new process would provide a speedier alternative to ILUAs whilst remaining consistent with the overall principles of the Act:

> …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;
> - provide a consultative mechanism with native title bodies corporate/claimants; and
> - ensure acts undertaken by the process can be legally valid.[27]

3.27 The WA Government added:

> …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.[28]

3.28 The committee asked some witnesses for a response to the view that the new future acts process would be an additional option only. The response of the NNTC was forthright, and indicative of the level of trust expressed in submissions by native title representative bodies toward government:

> …when you introduce an option like this to expedite a process, why would you go down the ILUA line? Really, this is the reason why they actually want to push through certain matters. I cannot see ILUAs being put on the table. Once you provide a more attractive offer to one party which has the stronger bargaining position why would you go down an ILUA?[29]

Limited application

3.29 At the public hearing, witnesses drew the committee's attention to another issue which they said would affect achievement of the Bill's objectives. These witnesses told the committee that the Bill has such limited application that it would not be capable of achieving the Australian Government's stated objectives.

---

27 WA Government, *Submission 15*, p. 2/ See also Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 1.

28 WA Government, *Submission 15*, p. 3.

29 Mr Kevin Smith, Deputy Chair, National Native Title Council, *Committee Hansard*, 28 January 2010, p. 13.

3.30 The Law Council of Australia (Law Council) carefully examined the provisions of the Bill, the Act and various state and territory legislation. It submitted:

> …the bill only applies to future acts done on an area of Aboriginal or Torres Strait Islander held land, or land held for the benefit of Aboriginal or Torres Strait Islander people…Section 233(3) of the Native Title Act provides that an act done on certain Aboriginal and Torres Strait Islander land established under laws of the Commonwealth and South Australia is not a future act.
>
> The land that is not affected by the bill is held under, particularly, the Aboriginal Land Rights (Northern Territory) Act and two other Commonwealth pieces of legislation, the Aboriginal Land Grant (Jervis Bay Territory) Act and the Aboriginal Land (Lake Condah and Framlingham Forest) Act...The other areas that this bill cannot apply to, because of section 233(3), is land that is held under the South Australian acts: the Aboriginal Lands Trust Act 1966, the Maralinga Tjarutja Land Rights Act and the Pitjantjatjara Land Rights Act…[30]

3.31 In addition, the Law Council stated that the areas remaining within the scope of the Bill are already covered by the non-extinguishment principle, meaning that native title is either wholly or partially suspended for the duration of the legal interest (freehold, leasehold or reserve held for the benefit of Indigenous peoples). In its view:

> 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.[31]

3.32 The Law Council questioned the necessity of the Bill at all given its very narrow application, arguing that it would serve little purpose. The Law Council also made the point that the Bill would actually disadvantage native title claimants because the ordinary future act process may be set aside:

> The difficulty with the Bill is that it places native title claimants, who have yet to receive a native title determination, at a disadvantage compared with traditional owners who have already received a native title determination. Native title claimants will be placed in a position of greater disadvantage because the ordinary "future act" process may be set aside, removing any requirement for negotiation of an Indigenous Land Use Agreement, which would be indicative of consent. It is clear that there will be no requirement

---

30 Ms Raelene Webb QC, Member, Indigenous Legal Issues Committee, Law Council of Australia, *Committee Hansard*, 28 January 2010, p. 28; and Northern Land Council, *Submission 16*, p. 2.

31 Law Council of Australia, *Supplementary Submission 14a*, p. 3.

> for good faith negotiation and consent under expedited process proposed under the Bill.[32]

3.33 The NLC also commented on the limited application of the Bill. It highlighted that neither FaHCSIA's discussion paper nor the Explanatory Memorandum had clearly set out the scope of the Bill's effect:

> Buried within the discussion paper is an indication that the bill applies only to some kinds of native title land. Certainly our understanding, when the discussion paper was released before the bill was released, was that it would apply to all native title land. In fact, it only applies to land which is subject to a statutory scheme to benefit Aboriginal people, like land rights act schemes, not for the Northern Territory but elsewhere, or to land that is reserved...I think there was a lot of confusion at the time of the discussion paper. Most people I spoke to at the time believed it applied to all native title land. I am not sure it is widely realised that this applies to land only where native title coexists—in other words, only to non-exclusive native title rights which are subject to a statutory scheme.[33]

Department and FaHCSIA response

3.34 Officers of the Department and FaHCSIA acknowledged and did not contest the evidence given by the Law Council and NLC. When asked by the committee why the Bill's application had not been clarified earlier, including in their joint submission, FaHCSIA officers advised that 'it was probably an oversight.'[34] Instead, departmental officers were was keen to explain why it was necessary for the Bill to have a limited application, that is, to distinguish between states and territories which are subject to a single regime and those which are not:

> This legislation is only really targeted where the future act regime applies, and the future act regime, as we know, does not apply to the Northern Territory land rights act land, APY land in South Australia and a few other smaller bits of legislation. This is clearly applied to, most importantly, the large discrete communities in Western Australia and Queensland…Where there is not a clear future act process, the only clear way to go might be some form of compulsory acquisition, which is a policy no government wants to adopt. It is putting in a process that delivers fair consultation. But this is all in addition to the necessary land rights process, where a lease or

32 Law Council of Australia, *Supplementary Submission 14b*, p. 2.

33 Mr Ron Levy, Principal Legal Officer, Northern Land Council, *Committee Hansard*, 28 January 2010, p. 16.

34 Ms Amanda Cattermole, Group Manager, Office of Remote Indigenous Housing, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 40.

> something equivalent may be given. This is an urgent targeted measure to address that bit of uncertainty.[35]

3.35 The department told the committee that the Bill will not be of limited practical effect. Their position was that the Bill targets discrete but significant Indigenous communities on Indigenous held land in remote areas. Accordingly, the number of affected people in these communities may be much larger than suggested by some witnesses.[36]

Operation of the Racial Discrimination Act 1975 (in the context of the Bill)

3.36 A second key issue raised in submissions was whether the Bill contravenes the *Racial Discrimination Act 1975* (RDA). At present, existing future acts provisions relating to public housing, education, health and associated infrastructure grant native title holders property rights equivalent to those held by freehold title holders.[37] According to submitters and witnesses, these rights are eroded by the Bill.

3.37 The Cape York Land Council (CYLC) stated that the Bill creates a future acts process independent of the freehold standard. It argued that the proposed process essentially replaces existing and relevant future acts processes (Subdivisions K and M), which incorporate a non-racially discriminatory standard, with a process that is racially discriminatory:

> The Bill will repeal the non-discriminatory standard currently legislated in s24KA and s24MD and replace it with the limited right to comment in circumstances where ordinary title holders rights are not also amended. This Bill will authorize the non-consensual use of native title land by governments and potentially other parties. Whilst the proposals include a right (where relevant) to compensation and apply the non extinguishment provision, this does not remedy native title holders' racially discriminatory treatment. It would be unthinkable for Governments to pass legislation that treated holders of ordinary title in this way, and probably unconstitutional.[38]

3.38 ANTaR's submission targeted what it claimed was an incremental and discriminatory reduction in native title property rights. It argued that continued

---

35 Mr John Litchfield, Acting Branch Manager, Land Reform Branch, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 38. See also Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 40; and Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 2.

36 Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 41; and Ms Amanda Cattermole, Group Manager, Office of Remote Indigenous Housing, FaHCSIA, *Committee Hansard*, 28 January 2010, p. 40.

37 Part 2, Division 3, Subdivisions K and M of the *Native Title Act 1993*.

38 Cape York Land Council, *Submission 2*, p. 11. See also Australians for Native Title and Reconciliation, *Submission 6*, pp 1-2; NTSCORP, *Submission 10*, p. 4; Torres Strait Regional Authority, *Submission 13*, p. 4; and North Queensland Land Council, *Submission 17*, p. 5.

expansion of the future acts regime may ultimately extinguish native title rights and interests:

> …[The Bill] would ensure that this process of incremental additions to the future act regime…will continue indefinitely. It should call a halt to this discriminatory method of affecting Indigenous property rights, and decline to expand the scope of the future act regime in this way. It should note that all such expansions to the regime end up limiting the capacity of Indigenous Australian to exercise native title rights and interests and may end up extinguishing them. [39]

3.39 In its submission, the Carpentaria Land Council Aboriginal Corporation (CLCAC) identified, as a fundamental discrimination, the apparent premise that if a project is of general benefit then there is justification in overriding the interests of native title holders:

> It would be unacceptable for the property rights of non-Aboriginal people in Australia to be diminished for the provision of benefits such as public housing and infrastructure. Any attempts by government to sweep away the property rights of individual non-Indigenous Australians in such circumstances on the basis that a public benefit would be provided would rightly lead to outrage and resistance. This will also be the case in Aboriginal communities.[40]

3.40 While some submissions and evidence condemned the Bill as racially discriminatory and contrary to international law (such as the Convention on the Elimination of All Forms of Racial Discrimination),[41] the AHRC did not commit to a view on this issue. Instead, the AHRC encouraged the Australian Government to fully explore any potentially discriminatory impacts of the Bill, and ensure that Australia's international human rights obligations are explicitly made a key consideration in the development of any future amendments.[42]

3.41 When asked whether the Bill is inconsistent with the RDA, officers of the Department told the committee that the Australian Government considers the Act to be a special measure under which the RDA is suspended, and that the Bill is also viewed in this context:

> This is a very small and targeted amendment that does readjust some rights, but overall the government sees it as a special measure.[43]

---

39 Australians for Native Title and Reconciliation, *Submission 6*, p. 4.

40 Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 11.

41 For example, Cape York Land Council, *Submission 2*, pp 7, 11 & 13; Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 3; National Native Title Council, *Submission 5*, p. 2; and Australians for Native Title and Reconciliation, *Submission 6*, pp 1-2.

42 Australian Human Rights Commission, *Submission 11*, pp 3-4.

43 Ms Tamsyn Harvey, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 42.

The application of the non-extinguishment principle

3.42 The Bill provides for the non-extinguishment principle to apply to the new future acts process. Some evidence to the committee discounted the government's emphasis on this provision, arguing that the future acts encompassed by the new process render the proposed provision meaningless.

3.43 Some submissions observed that, in recent years, the Australian Government's commitment to and investment in public housing and public infrastructure in Indigenous communities has been accompanied by an insistence on long-term leases over Indigenous land.[44]

3.44 The Law Council commented that this approach has generated significant opposition in a number of targeted communities 'which are naturally reluctant to agree to long term leases simply to secure access to services enjoyed by the broader community'. It expressed concern with the notion that there is no other way for governments to provide public housing and public infrastructure other than as proposed by the Bill:

> Aboriginal land tenure under Aboriginal land rights statutes is similar to tenure enjoyed by private land owners across the country. Those rights exist either in fee simple or freehold. They are not interests in land which are, as is native title, subordinate to any subsequently declared legal interest. Accordingly, the Law Council considers it to be an extraordinary proposition that the only means available to the government of improving old, and building new, housing and infrastructure on Aboriginal land is to compulsorily acquire the land or to negotiate leases to the Commonwealth of over 40-years duration.[45]

3.45 In evidence, the NNTC stated that 40-year leases constitute an effective extinguishment of native title, and that such extinguishment should be recognised and compensated, as is the case under Subdivision M of the Act:

> We can say as much as we like in amendments that the non-extinguishment principle applies, but when you build a fixture on a piece of land and have land that is held on lease for a generation—and a generation here, in Aboriginal and Torres Strait Islander terms, could very well be 40 years; that is a generation—in real terms that is the suppression of native title rights for a generation. So you actually have practical extinguishment. When you have practical extinguishment, you have de facto compulsory acquisition. Talking about this provision not being compulsory acquisition is a complete furphy. It is de facto compulsory acquisition. Under the current native title regime, compulsory acquisition outside towns and cities attracts the right to negotiate—section 24MD. The net result of these

---

44 For example, National Native Title Council, *Submission* 5 and Law Council of Australia, *Submission 14*.

45 Law Council of Australia, *Submission 14*, p. 3. See also Mr Daniel Lavery, *Submission 8*, p. 2 and Attachment 1, pp 10-11.

> proposals is a downgrading of a very important procedural right, the right to negotiate, to a mere right, which is the right to comment and the right to consult.[46]

3.46 Other contributors to the inquiry agreed with this assessment. The CYLC submitted that the nature of the acts will make it almost certain that native title will never 'revive';[47] and ANTaR and the AHRC commented on the potential duration of a long-term lease (hundreds of years and generations, respectively), with the former submitter commenting that native title might as well be extinguished from the outset.[48] NTSCORP submitted:

> …the Bill reduces native title to a merely symbolic right, rather than a property right *in rem*, and will effectively result in the extinguishment of native title and the compulsory acquisition of native title in Indigenous communities, given the permanency of acts such as public infrastructure. The proposed 'non extinguishment provision' does not remedy this.[49]

3.47 In an attempt to address these concerns, the Law Council suggested that the Australian Government separate the issues of leasing and land tenure from the provision of public housing and public infrastructure.[50]

3.48 The NLC appeared to endorse the Law Council's views, telling the committee that the Northern Territory's advanced progress in finalising leases under the Strategic Indigenous Housing and Infrastructure Program is due to a separation of service delivery and native title rights issues:

> Knowing and understanding the position of people in the Territory, Aboriginal people and traditional owners, if we had touched upon the rights agenda, we would not have had any agreements whatsoever. So what we did do through an agreed process was to talk about the service delivery. That is, what the government was merely providing—services in regard to housing and public infrastructure. If you had started talking about the rights, you would not have got an agreement.[51]

3.49 In response, the Departmental and FaHCSIA acknowledged the perception that 'you cannot have access for a long time', but indicated that native title will be

---

46 Mr Kevin Smith, Deputy Chair, National Native Title Council, *Committee* Hansard, 28 January 2010, p. 10. See also National Native Title Council, *Submission 5*, p. 2; and Law Council of Australia, *Submission 14*, p. 8.

47 Cape York Land Council, *Submission 2*, p. 6; and Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 11.

48 Australians for Native Title and Reconciliation, *Submission 6*, p. 4; and Australian Human Rights Commission, *Submission 11*, p. 3.

49 NTSCORP, *Submission 10*, p. 5.

50 Law Council of Australia, *Submission 14*, p. 5.

51 Mr Kim Hill, CEO, Northern Land Council, *Committee Hansard*, 28 January 2010, p. 18.

minimally affected by the Bill. Where rights are affected, departmental officers reiterated that native title holders will be compensated in accordance with the Act.[52]

The procedural rights of native title parties

3.50 Provisions of the Bill generating the most emotion among submitters and witnesses were those dealing with the procedural rights of native title holders and claimants. In particular, submitters and witnesses took issue with the proposed level of engagement with Indigenous peoples under the new future acts regime.

3.51 The CLCAC cautioned that public housing and public infrastructure must be developed in an effective way, as well as in a way premised on equality, informed consent and mutual respect:

> There is no doubt that the Aboriginal communities the CLCAC represents want and need better housing and infrastructure, but they also want that housing to be built in a way that addresses their specific needs with outcomes that respect their culture and property…Empowering bureaucracies to force particular proposals on Aboriginal communities by legislation without proper negotiation will lead to great social disruption.[53]

3.52 Much evidence identified examples of state and territory projects, the failure of which was attributed to a lack of engagement with Indigenous communities.[54] Some organisations expressed the view that the provisions of the Bill itself were also evidence of a lack of engagement.[55]

Timeframes

3.53 Before introducing the Bill, the Australian Government released a discussion paper titled *Possible Housing and Infrastructure Native Title Amendments*.[56] This discussion paper foreshadowed the Bill, and submissions in respect of it were subject to strict timeframes.

---

52 Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 41; and Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 2.

53 Carpentaria Land Council Aboriginal Corporation, *Submission 3*, p. 6.

54 For example, Carpentaria Land Council Aboriginal Corporation, *Submission 3*, pp 6 & 8-9; and Australians for Native Title and Reconciliation, *Submission 6*, p. 2.

55 For example, NTSCORP, *Submission 10*; and Australian Human Rights Commission, *Submission 11*.

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

3.54 A number of submitters expressed considerable concern with the discussion paper timeframes, describing them as 'unrealistic', 'unacceptable' and preventative of meaningful engagement with the Australian Government.[57]

3.55 In evidence, the committee also heard of dissatisfaction with the manner in which the Attorney-General has responded to those consultations. NTSCORP, for example, stated that a superficial approach was adopted, which did not address the substance of Indigenous peoples' concerns:

> We have had a number of consultations with the Attorney-General about things that should be done. We feel that the skin of that has been taken up, but the body of it has not...An example would be looking at this stuff in regard to housing. Yes, the skin of it is that we need housing, it needs to be done. The body of it, how we should do that, is the debate we are having here today. We believe that the amendments are not dealing with the true issues of the body of it.[58]

3.56 Representatives from the NNTC noted that there have been no formal discussions regarding a better co-ordinated strategic approach to achieving the objectives of the Bill:

> We are yet to have that dialogue. If we have that dialogue, there are sufficient tools to actually achieve that objective.[59]

3.57 Some submissions argued that the Australian Government's approach was contrary to current policy, as well as Australia's international human rights obligations, specifically Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, to which Australia is a signatory. That treaty provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[60]

3.58 The AHRC stated that a key element of 'free, prior and informed consent' is ensuring that sufficient time, funding and information are available to enable Indigenous peoples to effectively participate in a consent process. In its view, this did not occur:

---

57 Cape York Land Council, *Submission 2*, p. 6; Carpentaria Land Council Aboriginal Corporation, *Submission 3*, pp 3-4; NSTCORP, *Submission 10*, p. 3; and Australian Human Rights Commission, *Submission 11*, p. 2.

58 Mr Warren Mundine, CEO, NTSCORP, *Committee Hansard*, 28 January 2009, pp 4 & 7.

59 Mr Kevin Smith, Deputy Chair, National Native Title Council, *Committee Hansard*, 28 January 2010, p. 11.

60 United Nations, Declaration on the Rights of Indigenous Peoples (adopted by General Assembly Resolution 61/295 on 13 September 2007), Article 19; and Committee on the Elimination of Racial Discrimination, General Recommendation 23: Indigenous Peoples: 18/08/97.

> The timeframe for consultations was brief. There was a lack of consultation with communities that are likely to be directly affected by the proposed amendments. Further, the resource constraints faced by Native Title Representative Bodies and Prescribed Bodies Corporate present a significant barrier to participating in such consultations.[61]

3.59 The AHRC considered the potential far-reaching impact of the Bill and identified the fact that traditional owners might not be the beneficiaries of proposed public housing and public infrastructure as particular concerns, making it imperative for:

> …governments [to] engage in genuine consultation with Aboriginal and Torres Strait Island peoples in order to obtain their free, prior and informed consent to the introduction of such measures.[62]

3.60 At the public hearing, NTSCORP emphasised not only that informed consent is fundamental to achieving public housing and public infrastructure, but that Indigenous peoples are willing to work with government toward achieving that objective:

> …we are very happy to work with people and work with governments. We feel this process is coming over the top of us and hitting us with a big stick.[63]

3.61 Other submitters, such as the NNTC, reiterated such sentiments:

> Clearly we want housing, and we have said that ourselves. However, we can help get it done, and that is the point we are making. If we are engaged at the level that we have been through the current processes as to other areas we can deliver.[64]

3.62 Consent was a fundamental issue throughout the inquiry, with submitters and witnesses highlighting provisions in the Bill which they considered undermine and derogate from the rights and interests of native title holders and claimants.[65]

Requirement for registration

3.63 Proposed paragraph 24JAA(10)(b) provides an opportunity to comment on a proposed future act for registered native title claimants, registered native title bodies

---

61 Australian Human Rights Commission, *Submission 11*, p. 3. See also Torres Strait Regional Authority, *Submission 13*, p. 4.

62 Australian Human Rights Commission, *Submission 11*, p. 3; and NTSCORP Limited, *Submission 10*, p. 7.

63 Mr Warren Mundine, CEO, NTSCORP, *Committee Hansard*, 28 January 2009, pp 3 & 5.

64 Mr Brian Wyatt, Chair, National Native Title Council, *Committee Hansard*, 28 January 2010, p. 13.

65 For example, see Cape York Land Council, *Submission 2*, and National Native Title Council, *Submission 5*.

corporate, and representative Aboriginal or Torres Strait Islander bodies in relation to land or waters in the affected area. A similar provision is proposed in subsection 24JAA(13) in respect of written requests for consultation regarding a future act.

3.64 The NNTC indicated that the requirement for registration in these provisions restricts the number of persons and organisations eligible to exercise the statutory right. According to its evidence, the registration process is difficult for Indigenous peoples to undertake, especially in view of the procedural timeframes outlined in the Bill:

> If you did not have a claim over the Indigenous lands—and I can name a couple of places where I come from where there is not a claim on foot—to avail yourself of the mere right to comment you would have to lodge a claim in the Federal Court and go through the process of the registration test under sections 190A to 190D…The cost associated with that is deplorable…It would be around $50,000 to $60,000. The time frame to bring a group of people together to authorise a claim is not going to be two months as foreshadowed by this amendment; it is going to be longer than that. Also, in the area that I am coming from, there is judicial comment to the effect that when you lodge a claim for the purpose of, for want of a better expression, an ulterior motive—it may very well be to invoke the right to comment—that could be considered an abuse of process. So this particular procedure that has been highlighted involves cost, time frames that are unrealistic and a potential abuse of process.[66]

3.65 The committee also heard that a right to comment or request consultation is not genuine consultation, with some witnesses arguing that, unlike a right to negotiate, a right to comment is a significantly weaker position in which to engage with governments. Further, there is no guarantee that Indigenous concerns will be taken into account or safeguarded.[67]

Onus for requesting consultation

3.66 Another issue raised in evidence concerned the onus for requesting consultation. According to the Law Council:

> Under the Bill the default position is that there will be no consultations (i.e. consultations will only take place if there is a written request to be consulted that is made within a particular timeframe). Clearly, consent will not be required and, as with some other future acts under the *Native Title Act 1993*, there is no power for native title holders/claimants to prevent the act. Accordingly, native title bodies will be in a poor position to bargain for undertakings to ameliorate adverse consequences for native title interests.[68]

---

66 Mr Kevin Smith, Deputy Chair, National Native Title Council, *Committee Hansard*, 28 January 2010, p. 10. See also NTSCORP, *Submission 10*, p. 7.

67 For example, Torres Strait Regional Authority, *Submission 13*, p. 2.

68 Law Council of Australia, *Submission 14*, pp 6-7.

3.67 The AHRC stated that placing this onus on native title claimants or bodies corporate is a concern given their limited resources.[69] This was also an argument supported in the submissions from bodies corporate. The CYLC, for example, advised the committee that:

> …native title holders are required to establish and manage a prescribed body corporate ('PBC's), to respond to all future act notices in accordance with the complex process required by the *Native Title (Prescribed Body Corporate) Regulations 1999*, and to comply with the administrative requirements of the *Corporations (Aboriginal & Torres Strait Islander) Act 2006*. Neither the Commonwealth nor States have committed funds to enable PBCs to be established and operate in a manner appropriate to these onerous obligations.[70]

3.68 To address some of the concerns, the Law Council suggested:

- the default position should be that there will be consultations, save where the registered native title claimant or registered native title body corporate decides that they are not necessary in the circumstances;
- the Bill set out a more stringent consultation requirement, for example, specifying a number of different forms of notice;
- action bodies should be required to take reasonable steps to identify and notify relevant native title bodies and report those steps to the Commonwealth minister; and
- the *notification day* for the purposes of s 24JAA(11) should be defined as the day on which notification was received by, or communicated to, the relevant native title body or bodies.[71]

Absence of consensual provisions

3.69 As indicated above, submitters and witnesses expressed concern with the discussion paper's consultation process. This dissatisfaction manifested in comments regarding the need for more genuine consultation and stronger procedural safeguards within the Bill itself.

3.70 NTSCORP submitted that, without the need for consent, governments would be able to meet consultation requirements by engaging in superficial consultative processes. It suggested that the Bill be amended to include qualitative measures for consultation.[72]

---

69 Australian Human Rights Commission, *Submission 11*, pp 4-5;

70 Cape York Land Council, *Submission 2*, p. 13. See also Carpentaria Land Council Aboriginal Corporation, *Submission 3*, pp 7 and 11.

71 Law Council of Australia, *Submission 14*, p. 7. See also NTSCORP, *Submission 10*, p. 7.

72 NTSCORP, *Submission 10*, pp 7-8. See also Mr Daniel Lavery, *Submission 8*, pp 1-2.

3.71 Likewise, the AHRC endorsed the inclusion of safeguards within the Bill. However, it proposed that the new future acts process be used as a measure of last resort only:

> At the very least, governments should be required to negotiate in good faith in an attempt to reach an ILUA before the future act processes are available to them.
>
> The availability of a 'fast track' future act process may in fact discourage governments from seeking to negotiate and enter into agreements with Aboriginal and Torres Strait Islander communities regarding the provision of public housing. The new process may even jeopardise ILUA negotiations currently under way, and reduce goodwill among the parties to negotiate broader settlements.[73]

3.72 The Law Council also emphasised the importance of effective consultation in respect of proposed future acts, and the undertaking of all reasonable steps to obtain consent, where possible. However, the Law Council appeared to view the Bill as an exception to that rule:

> …there is apparently an increasing trend in amending legislation toward mere 'consultation' without a positive requirement for the internationally accepted norm of 'free, prior and informed consent'. Generally, it is submitted that the Government should always endeavour to obtain consent of communities affected by government actions, particularly in respect of native title interests. The present amendments should be seen as an exception to that ideal and should not be used in the future as a precedent for "watering down" the requirement for consent.[74]

Department and FaHCSIA response

3.73 The departments were aware of submitters' and witnesses' concerns regarding the extent and effect of consultations with native title holders and claimants. However, they advised the committee that nearly 30 per cent of submissions in relation to the discussion paper thought a new future acts process would or might assist in the urgent provision of public housing and public infrastructure. Further, the department told the committee that some feedback from consultations was incorporated in the Bill.[75]

3.74 In addition, the departments rejected that FaHCSIA's discussion paper consultations, or any other future consultations, were, or would be, superficial:

---

73 Australian Human Rights Commission, *Submission 11*, p. 6; National Native Title Council, *Submission 5*, pp 1-2; Queensland Government, *Submission 12*, pp 1-2; and Torres Strait Regional Authority, *Submission 13*, pp 3-4.

74 Law Council of Australia, *Submission 14*, pp 5-6.

75 Ms Sally Nelson, Principal Legal Officer, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, pp 34-35; and Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 5.

> The concept of 'consulting' has an established meaning. It is insufficient to simply 'go through the motions', and a proponent who failed to seriously engage or to consider information and arguments put forward would not in fact be 'consulting'. The Bill contains several original measures to ensure proponents do not simply wait for the four month period to expire but instead consult meaningfully where required under the new process.[76]

3.75 The departments submitted that the procedural measures within the Bill are supported by the requirements of the Remote Service Delivery National Partnership, and the National Partnership on Remote Indigenous Housing. The national partnerships require state and territory governments to ensure compliance with native title processes, thereby providing the Australian Government with 'an additional mechanism by which to ensure genuine engagement and consultation as required by the new process'.[77]

3.76 The Department and FaHCSIA confirmed that, under the National Partnership on Remote Indigenous Housing, the Australian Government is investing $5.5 billion over 10 years to fund approximately 4,200 new houses and upgrades to 4,800 existing houses in remote communities. According to their evidence, over 150 houses are currently under construction (13 completed) and over 230 refurbishments are underway (118 completed) throughout various states and the Northern Territory.[78]

3.77 When questioned by the committee, departmental officers agreed that the Bill does not require the consent of native title holders to a proposed future act,[79] but officers noted:

> To put it in context, there is no right to veto any act under the Native Title Act. There is a range of different procedural rights that can be gone through, but at the end of the day even the right to negotiate can be overruled by the Native Title Tribunal or a minister.[80]

3.78 Submitters and witnesses argued their cases coherently, but on an overall assessment, the committee is persuaded that, subject to one minor amendment, the Bill should be passed by the Senate.

---

76 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, p. 3; and Ms Sally Nelson, Principal Legal Officer, Native Title Unit, AGD, *Committee Hansard*, 28 January 2010, p. 35.

77 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission 7*, pp 1 & 4.

78 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary Submission 7a*, p. 5.

79 Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, *Committee Hansard*, 28 January 2010, p. 37.

80 Ms Tamsyn Harvey, Assistant Secretary, Native Title Unit, *Committee Hansard*, 28 January 2010, p. 37.

Committee view

3.79 The committee notes that the purpose of the Bill is to create a new process in the future acts regime contained in Division 3 of Part 2 of the *Native Title Act 1993*, and that the Australian Government, supported by the Queensland and Western Australian Governments, considers that the new process is necessary for the timely construction of public housing and associated infrastructure.

3.80 According to government evidence, the existence of two land tenure regimes in Queensland and Western Australia creates legal uncertainty, leaving these governments with two options: to either compulsorily acquire native title land (thereby extinguishing native title); or engage in negotiations for an ILUA, a process potentially taking more than 12 months to complete.

3.81 Through COAG, the Australian Government is committed to, and supports its state and territory counterparts in, implementing the targets of the Closing the Gap strategy. A fundamental component of this strategy is providing urgently needed housing and infrastructure for the benefit of disadvantaged Indigenous peoples, many of whom have been living in substandard conditions for far too long. The committee agrees that this measure is both necessary and urgent, and commends the objectives of the Bill.

3.82 Some evidence to the committee questioned the need for a new future acts process, and argued that the existing statutory processes function adequately when governments are willing to meaningfully engage with native title holders and claimants. Overwhelmingly, the committee heard that ILUAs are the preferred method of consultation and agreement-making, and should readily facilitate the urgent delivery of much needed housing and infrastructure in Indigenous communities in Queensland and Western Australia.

3.83 The committee does not doubt the willingness of Indigenous peoples to negotiate with governments and, consistent with the governments' evidence, agrees that ILUAs are the preferred method for negotiating outcomes with Indigenous peoples. However, the critical feature of the Closing the Gap strategy is for housing and infrastructure to be delivered on an urgent basis and in the most timely manner possible.

3.84 On the evidence before it, the committee is not persuaded that the ILUA process on its own would ensure the urgent and expedited delivery of necessary housing and infrastructure in every case. The committee accepts that template ILUAs might go some way toward resolving this difficulty. However, there was insufficient evidence put to the committee to convince it that template ILUAs are beyond developmental stage and would, in the short-term, overcome the committee's reservations.

3.85 The committee acknowledges and supports the Australian Government's approach to working in partnership with Indigenous peoples, and considers that such an approach will be beneficial to all concerned. The committee suggests that, in this

spirit, the Australian Government and its state and territory counterparts further examine the development of template ILUAs as a means of expeditiously providing services in the future.

3.86 Much of the evidence argued that the Bill intentionally diminishes native title rights and interests. The committee does not accept this interpretation on the bases that: first, the Bill is a special measure undertaken for the sole purpose of securing adequate advancement of Indigenous peoples and in promotion of their human rights and fundamental freedoms; and, second, that the time limited 10-year future acts process proposed would supplement existing statutory processes for the limited purpose of providing an additional future acts mechanism where circumstances render ILUAs untimely or unlikely to achieve necessary housing and infrastructure outcomes.

3.87 The committee notes that the intended application of the proposed new process is effectively limited in its application to communities on Aboriginal Land in WA and Queensland. Further, it will be applied only in relation to the provision of houses and infrastructure in places where Aboriginal people are already resident.

3.88 The proposed process will provide certainty as to the validity of the tenure underpinning construction and intended use of facilities and will not extinguish native title. Indeed, in many cases, it may be applied in locations where native title is likely to have already been extinguished.

3.89 The committee is reassured that the Bill is targeted legislation intended to benefit Indigenous communities with urgent housing and infrastructure needs. Further, the committee notes that, within a decade, the provisions of the Bill will sunset thereby restoring the future acts regime to its current form (future amendments excepted).

3.90 On a final note, the committee considers that it would be prudent for the Bill to encompass housing for those persons whose presence in the community is necessary to provide the services envisaged by this Bill.

Recommendation 1

3.91 The committee recommends that Subdivision JA of the Bill be amended to include the provision of staff housing as part of the new future acts process.

Recommendation 2

3.92 Subject to the above recommendation, the committee recommends that the Bill be passed.

Senator Trish Crossin

Chair