Dissenting report by Senator Rachel Siewert

The deplorable state of remote housing

1.1 The inadequate provision and deplorable state of public housing on remote Aboriginal and Torres Strait Islander communities has been an issue of serious concern in Australia for decades. The Australian Greens welcome the commitment of the Commonwealth Government to invest significant resources to begin to address overcrowding and unmet need, and improve the condition of existing housing stock to advance the health and safety of remote communities. I am keen to support legitimate efforts by the Commonwealth to ensure that this housing is constructed quickly, is appropriate for the communities it serves, and meets Australian health and safety standards. To this end I support the stated objective of the Native Title Amendment Bill (No. 2) 2009. However, having spoken with Aboriginal communities and organisations, and having seen and heard the evidence presented to the committee, I am not convinced that this legislation is supported by, or in the best interests of, the communities it is meant to serve.

1.2 My main point of concern and contention is the manner in which the legislation proposes to suspend and diminish native title rights, purportedly to achieve the objective of expeditiously delivering this much-needed housing. I do not believe that this suspension and diminution is necessary; I am not convinced it will make much difference to how quickly this new housing could be provided by governments using existing provisions (particularly Indigenous Land Use Agreements – ILUAs) to negotiate in good faith with native title holders or representative bodies; and I remain concerned that the extent of derogation of these rights is significantly out of proportion to the supposed benefits of the expedited delivery of this housing.

1.3 The problems with the provision of housing on remote Aboriginal communities predate the introduction of native title, and the lack of investment by state governments, plus their recalcitrance in entering into consultations and negotiations with Aboriginal communities in good faith, provides a much better explanation for the delays in and failure to deliver adequate and appropriate housing in a timely manner than any issues with legal complexities involving native title and state land rights acts, or difficulties reaching agreements with Aboriginal communities desperate to get new housing. The federal government has failed to demonstrate any causal link between the two, in circumstances where, if such a causal link existed, it would be relatively easy to compile comparative data with other states and territories.[1]

1 Given that these provisions are acknowledged to only apply to particular areas within Queensland and Western Australia, as discussed further below.

1.4 The most compelling point for us is the simple fact that this is a bill that purports to speed the delivery of benefits to Aboriginal communities, and yet all of the evidence to the committee from Aboriginal organisations clearly stated they did not want it and did not believe it necessary. Surely, if there is a choice between suspending or diluting their rights or receiving the benefits of housing a few months sooner, it should ultimately be down to those rights-holders to decide if the alleged benefits outweigh the perceived costs? As Australians for Native Title and Reconciliation and others[2] argued to the committee, on the basis of the principle of equitable treatment, native title holders should have the same rights and abilities to protect their interests as other property right holders, and these rights '…should only be affected with their consent.'[3]

1.5 I do not support the recommendations of the majority report, and dissent from most of the assertions presented at the end of the report as the 'committee's view'. That said, I found the arguments and evidence from the vast majority of submissions received and evidence presented to the committee (which makes up most of Chapter 3 and represents the bulk of the report) to be compelling. I remain concerned however that the ultimate conclusions of the report neither reflect nor adequately address this evidence and these arguments. In fact, there appears to be a major disconnect between the evidence presented, the concerns discussed and arguments evaluated within the report on the one hand, and its final conclusions on the other.

1.6 This brief minority report will not seek to repeat or provide further examples of this evidence, but will simply address the main issues and arguments. It comprises three main sections:

- The failure of the Federal, WA and Queensland Governments to make a compelling case or provide evidence of the need for these reforms;
- Consideration of existing options for reaching agreements on future acts, shortcomings in the current approach to consultation and agreement making with native title holders and representative bodies, and the likely impact of the reforms on future use of ILUAs; and
- The diminution of native title, procedural and human rights that would result, in particular its impact on the principle of non-extinguishment and its compatibility with the *Racial Discrimination Act 1975*.

1.7 In total, these considerations lead us to conclude that the proposed changes to the Native Title Act are not necessary to expedite the delivery of new housing for Aboriginal communities experiencing extreme overcrowding; would have a serious impact on the rights of native title holders that is out of proportion to any alleged or

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2 Australians for Native Title and Reconciliation, *Submission 6*, Cape York Land Council, *Submission 2*; Carpentaria Land Council Aboriginal Corporation, *Submission 3*; NTSCorp *Submission 10*; and Torres Strait Regional Authority, *Submission 13*.

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

perceived gain; there is little or no evidence that these changes are supported or desired by the communities they are meant to benefit; and ultimately they are likely to prove counterproductive in the wider task of addressing Indigenous disadvantage and improving life outcomes.

No case for the need for reform

1.8 It is interesting to note that the committee report ultimately agrees with the Law Council of Australia and the Northern Land Council that the practical application of the proposed reforms will be limited to future acts on a group of Indigenous communities within Queensland and Western Australia - where land is held by (or for the benefit of) Aboriginal or Torres Strait Islander people under particular state-based land rights legislation and the federal native title regime also applies.[4] That is, where a non-exclusive native title right coexists with and is subject to a state-based statutory scheme.[5]

1.9 I am concerned that this information was not contained in the Explanatory Memorandum, or in the Attorney-General's second reading speech. A satisfactory account for this important oversight was not given by the federal government. As a consequence of confirmation of this limited application only emerging relatively late in the inquiry (in evidence given by the Attorney-General's Department to the hearing in Sydney) this crucial fact did not inform the committee's terms of reference nor its hearing program (hearings were not held in Queensland or WA). As a consequence, while there were three submissions from land councils in Queensland,[6] there was no engagement with native title representative bodies, land councils or Aboriginal organisations in WA. I remain concerned that the views of those affected in Western Australia could not be ascertained. The short turn-around for the inquiry over the Christmas – January 'downtime' period may also have been a contributing factor.

1.10 Given the limited application of these provisions to large discrete communities in Queensland and WA where native title has already been suppressed,[7] it is then incumbent on the federal and state governments to make the case that the expeditious delivery of new housing within these communities is being significantly hampered by the interaction of the existing provisions of the native title and the relevant state land rights regimes. However, there was no evidence presented that lack of sufficient appropriate housing in remote Indigenous communities in these states

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4 The Law Council of Australia reasserted this point in a late supplementary submission, raising concern that the responses of FaHCSIA and Attorney-General's Department to the inquiry had failed to properly address this issue: see Law Council of Australia, *Supplementary Submission 14B*, pp 1-2.

5 Paraphrasing Ron Levy, Northern Land Council, *Committee Hansard*, p.16.

6 Cape York Land Council, *Submission 2*; Carpentaria Land Council Aboriginal Corporation, *Submission 3*; North Queensland Land Council, *Submission 17*; and Torres Strait Regional Authority, *Submission 13*.

7 Law Council of Australia, *Supplementary Submission 14B*, p. 1.

was due to procedural delays or an inability to reach agreement on an ILUA, nor was there comparative data presented on the time taken to negotiate the provision of remote housing in comparable remote communities in other states and territories where different regimes apply.

1.11 When it comes down to it, there simply appears to be no evidence that the time taken to not deliver remote housing in these states was any worse than the time taken to not deliver it elsewhere in Australia. There are numerous examples of remote communities in both these states who have been crying out for new housing for decades, so it makes little sense to suggest that communities will not seek to reach agreements as quickly as possible where governments are negotiating in good faith to deliver much-wanted essential services.

Usefulness of existing mechanisms, including ILUAs

1.12 The Australian Greens believe that community negotiation, as the best way to ensure the delivery and repair of housing and infrastructure, is both timely and just. I believe that communities have a fundamental right to be fully consulted on issues which directly impact upon their lives, and see full informed prior consent as a crucial consideration where the rights and interests of communities are affected. I am disturbed by the continuing trend within the Federal Government to discount the importance of working in partnership with affected communities to develop policies, implement initiatives, and to develop community capacity and self-governance in the process. I am increasingly distressed by the prevalence of an attitude and culture within government departments that communities and community leaders do not understand or act in their own best interests, and that their concerns and aspirations must be over-ridden, and punitive measures that reduce their rights must be imposed for their own good.

1.13 I believe the most appropriate manner to resolve native title and housing issues is through negotiated outcomes, and that existing mechanisms such as ILUAs are both sufficient and more appropriate than the proposed new mechanism. I am not convinced that the federal and state governments have either made a compelling argument, or provided any evidence that the use of ILUAs necessarily results in either significant delays in reaching agreements, or in uncertainty regarding outcomes or tenure.

1.14 It is interesting to note the evidence provided by NTSCorp, Cape York Institute and the Northern Land Council that, in practice, ILUA processes work quite effectively on the ground in negotiations between Indigenous right holders, mining companies, developers and other private sector interests, and other communities. They suggest that complex and drawn out negotiations only seem to occur either '…where people are not willing to sit down with Indigenous groups and have these conversations…', or where state and territory governments are involved. This also raises the question of whether the problem is either that state and territory governments are not sitting down to negotiate in good faith, or whether the standards and level of legal detail or certainty being pursued by state and territory governments

are disproportionate to what is required to get things done on the ground (it is of course possible that both of these factors are coming into play).

1.15 NLC also argued that, contrary to the assertions made by state governments, there is in fact no apparent legal uncertainty with the negotiated outcomes of ILUAs.[8] The state governments failed to make the case for this uncertainty, and no evidence was presented of ILUAs being challenged on these grounds.

The diminution of native title and human rights

1.16 I am extremely concerned that the manner in which the Bill proposes to suspend and diminish native title rights could amount to the practical extinguishment of native title and is tantamount to compulsory acquisition by other means. This view was strongly expressed in submissions and evidence by the Cape York Land Council (CYLC),[9] the National Native Title Council (NNTC),[10] and the Law Council of Australia.[11] The Law Council of Australia also asserted the claim by governments that the only means by which they could improve old houses and build new ones is to compulsorily acquire the land or require the signing of 40 year leases is '…an extraordinary proposition.'[12]

1.17 Given the woefully short life expectancy of Aboriginal people living on many remote communities, the NNTC asserts that 40 year leases effectively equate to suppression of native title rights 'for a generation'[13] – which they consider to be practical extinguishment and hence de facto compulsory acquisition. They argue that, on this basis, native title holders should have exactly the same rights that they would have elsewhere under section 24MD of the *Native Title Act 1993* (NTA) if their lands were compulsorily acquired – that is, a full and undiminished right to negotiate. However, under the proposed new provisions this important procedural right to negotiate has been downgraded to a mere right to comment and consult. Given the recent history of such consultation processes,[14] the lack of provisions that require governments to ensure such consultation is comprehensive, and the lack of any obligation for them to take into account the views and concerns expressed – there is a very real reason to expect these consultations could end up being superficial and insincere.

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8 Northern Land Council, *Committee Hansard*, pp 16-18.

9 Cape York Land Council, *Submission 2*, pp 6 & 11; and *Committee Hansard*, p. 22.

10 National Native Title Council, *Submission 5*, p. 2; National Native Title Council, *Supplementary Submission 5B*, p. 1; and *Committee Hansard*, 28 January 2010, p. 10.

11 Law Council of Australia, *Submission 14*, p. 2.

12 Law Council of Australia, *Submission 14*, p. 3.

13 National Native Title Council, *Submission 5*, pp 2-3.

14 For instance, *'Will they be heard?'* report, Melbourne Law School, 2009.

1.18 Perhaps the most concerning aspect of the manner in which these provisions comprise de-facto compulsory acquisition is that they do so in a racially discriminatory manner which is only possible because of the suspension of the application of the *Racial Discrimination Act 1975* (RDA) to the NTA by the Howard Government's 1998 'Wik' amendments. In fact, as the CYLC compellingly argues, '…this is an extension of the 1998 Wik amendments which significantly reduced the non discriminatory freeholder test applied to all future acts by the original NTA.'[15] The Rudd Government, despite its stated intention of its 'new approach' to ensure native title plays a foundational role in delivering durable social and economic outcomes for Indigenous people, is in fact embracing and extending the logic of the Wik amendments to significantly wind back the rights of native title holders to speak for their lands, resulting in '…recognition of native title translating into little more than a symbolic statement and a limited right to negotiate over some mining and compulsory acquisitions.'[16]

1.19 In effect, after spending decades negotiating complex processes to have their native title rights recognised, their ability to exercise those rights is diminished to the point of irrelevance, as '…by withdrawing native title holders' legal power to leverage an agreement, such negotiated outcomes will only occur at the behest of government good will, and not of legal right.'[17] The NNTC also described the net result of these proposals as '…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',[18] and the Law Council of Australia also reached a similar conclusion.[19]

1.20 The reason why this outcome is particularly tragic is that it overlooks and undermines the strong role that effective application of native title rights could play in addressing the underlying causes of disadvantage and delivering effective community housing solutions. As Prime Minister Kevin Rudd has acknowledged, respect for native title can provide a sturdy foundation for durable economic and social outcomes.[20]

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15 Cape York Land Council, *Submission 2*, p. 3.

16 Cape York Land Council, *Submission 2*, p. 5.

17 Cape York Land Council, *Submission 2*, p. 14.

18 National Native Title Council, *Submission 5*, p. 10.

19 Law Council of Australia, *Submission 14*, p. 8.

20 Prime Minister Kevin Rudd, Apology Speech.

1.21 Good governance has a crucial role to play in sustainable community development. International experience clearly demonstrates that the key elements of good governance are its cultural legitimacy, the validity of its representative processes and its accountability.[21] The effective exercise of native title rights provides a strong foundation for cultural legitimacy,[22] and by undermining the ability of native title holders to exercise their role in good governance of their communities the ultimate impact of these changes is to undermine and weaken the government's stated aims of strengthening these communities.

1.22 This issue is of particular concern to the extent that analysis of the failure of previous Indigenous housing policies in Australia and overseas[23] clearly indicate that it is not only an issue of the provision of sufficient resources, but also of the manner in which housing stock and essential services are managed. Given the limited application of these provisions to communities on land covered by state land rights regimes, the fact that native title remains strong in these places is precisely why it is important to recognise and respect native title to support good community governance. As the CYLC put it '…meaningful respect for native title as a valuable property right is part of the solution to effective community housing, not an impediment.'[24]

1.23 This application and extension of the discriminatory logic of Howard's Wik amendments is occurring at the same time that the Rudd government is also struggling to deliver on its commitment to restore the application of the RDA to the discriminatory aspects of the NT Emergency Response Act. All of the relevant United Nations human rights committees (including the Convention of the Elimination of all forms of Racial Discrimination (CERD), CESCR and the Human Rights Committee) have universally condemned the Wik amendments as incompatible with Australia's international commitments to human rights.

1.24 It is interesting to note that after many of the subsections of Chapter 3 of the majority report – which deal in turn with the need for the new process, possible contradictions with the RDA, the non-extinguishment principle, and procedural rights – there is a section in which the Department response is effectively presented almost as a 'right of reply'. I must admit some concern with the manner in which these responses (which are predominantly assertions that fail to substantively address the questions and issues raised in evidence rather than compelling arguments) are presented uncritically in light of the seriousness of the issues under consideration.

1.25 It is of particular concern that on a number of occasions these departmental responses appear to include some new assertions which are contestable, but there is

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21 Mick Dodson and Dianne Smith, *Governance for Sustainable Development 2003*, CAEPR, ANU.

22 Cape York Land Council, *Submission 2*, p. 14.

23 Land rights and development reform in remote Australia, 2005, Altman et al, CAEPR, ANU.

24 Cape York Land Council, *Submission* 2, p. 6.

neither critical discussion by the majority report nor is any opportunity given for others to respond. A case in point is the assertion that the Australian Government believes the amendments within the Bill (and the Act itself) to be 'special measures' for the purposes of the RDA. This assertion is particularly problematic, because CERD, which the RDA enacts, is very clear about the criteria for special measures. Special measures require full informed consent and must be perceived to be beneficial and desired by those affected, and that they must also be both necessary and proportionate. It is arguable that these measures fail on all three counts, and it is clear from the submissions from Aboriginal organisations that they do not support these measures or consider them to be necessary, beneficial or proportionate.

Conclusions

- The proposed changes are unnecessary to provide 'certainty'.
- Native title is not a barrier to the rapid provision of housing.
- Delays caused by the exercise of native title rights are not responsible for the state of public housing and services on remote Indigenous communities in WA and Queensland.
- The Bill is racially discriminatory and contradicts the Rudd Government's commitments to a 'new partnership' with Indigenous communities and to restoring the RDA.
- The impacts of the Bill are disproportionate to the alleged benefits, and it is not supported by the communities it purports to benefit.
- The Bill reduces the rights of some native title holders to little more than a symbolic right to be consulted and potentially ignored.
- The Bill will result in de-facto compulsory acquisition of native title in some remote communities.
- Rather than reducing uncertainty the Bill makes things more uncertain.

Recommendations

1.26 That the Bill be opposed.

1.27 That template ILUAs be developed.

1.28 That the registration test be removed where an ILUA has been certified by the responsible NTRB.[25]

1.29 That section 47A be amended to explicitly state that the non-extinguishment principle applies for the provision of public housing and services.[26]

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25 Northern Land Council, *Supplementary Submission 16B*

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1.30 Should the bill proceed (against recommendation 1), that the government introduces the amendments proposed by the NNTC[27] to protect the rights of native title holders and ensure the right to negotiate.

Senator Rachel Siewert

Australian Greens

27 National Native Title Council, *Supplementary Submission 16B*