The Senate

Legal and Constitutional Affairs Legislation Committee

Native Title Amendment Bill (No.2) 2009 [Provisions]

February 2010

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Ms Julie Dennett	Secretary
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Ms Jane McArthur	Executive Assistant

Suite S1. 61	Telephone:	(02) 6277 3560
Parliament House	Fax:	(02) 6277 5794
CANBERRA ACT 2600	Email:	legcon.sen@aph.gov.au

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ABBREVIATIONS

Act	*Native Title Act 1993*
AHRC	Australian Human Rights Commission
ANTaR	Australians for Native Title and Reconciliation
Bill	Native Title Amendment (No. 2) Bill 2009
CLCAC	Carpentaria Land Council Aboriginal Corporation
CYI	Cape York Institute
CYLC	Cape York Land Council
Department	Attorney-General's Department
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
ILUAs	Indigenous Land Use Agreements
Law Council	Law Council of Australia
NLC	Northern Land Council
NNTC	National Native Title Council
RDA	*Racial Discrimination Act 1975*

RECOMMENDATIONS

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.

CHAPTER 1

Introduction

1.1 On 29 October 2009, the Senate referred the provisions of the Native Title Amendment Bill (No. 2) 2009 (Bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 2 February 2010.[1] On 2 February 2010, the Senate agreed to extend the reporting date to 23 February 2010.

1.2 The Bill was introduced in the House of Representatives on 21 October 2009 by the Attorney-General, the Hon. Robert McClelland MP. It would amend Division 3 of Part 2 (the future acts regime) and Divisions 1 and 4 of Part 15 (definitions) of the *Native Title Act 1993* (Act).

Summary of key amendments

1.3 The key amendments provide a new 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 any other statutory authority of the Crown in any of its capacities, for Indigenous communities on Indigenous-held land.[2]

1.4 According to the Explanatory Memorandum, an important feature of the new process is its notification and consultation procedures:

> The new process ensures that the representative Aboriginal or Torres Strait Islander body and any registered native title claimants and registered native title bodies corporate in relation to the area of land or waters are notified and afforded an opportunity to comment on acts which could affect native title ('future acts'). In addition, a registered native title claimant or registered native title body corporate may request to be consulted regarding the doing of the proposed future act so far as it affects their registered native title rights and interests.[3]

1.5 The key amendments will ensure that: the non-extinguishment principle would apply to future acts covered by the new process, native title could revive if the future act ceases to have effect; compensation would be payable for any impact on native title rights and interests; and the new process would operate for 10 years only, matching the 10-year funding period under the current National Partnership

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1 Journals of the Senate, No. 96 – 29 October 2009, p. 2691.

2 Explanatory Memorandum, p. 2.

3 Explanatory Memorandum, p. 2.

Agreements between the federal, state and territory governments on remote Indigenous housing and remote service delivery.[4]

Conduct of the inquiry

1.6 The committee advertised the inquiry in *The Australian* newspaper on 18 November 2009, 2 December 2009, 9 December 2009 and 27 January 2010. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 53 organisations and individuals inviting submissions.

1.7 The committee received 17 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.8 The committee held a public hearing in Sydney on 28 January 2010. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the Hansard transcript are available through the internet at http://www.aph.gov.au/hansard.

Acknowledgement

1.9 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Scope of the report

1.10 Chapter 2 provides a brief background to the Bill, and outlines its purpose and key provisions. Chapter 3 discusses the key issues raised in submissions and evidence.

Note on references

1.11 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

4 Explanatory Memorandum, p. 2.

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.

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

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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]

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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]

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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

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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

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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]

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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.

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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

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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

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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]

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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

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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

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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.

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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:

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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

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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]

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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]

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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:

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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.

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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

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal senators agree with the majority report's recommendations. However, Liberal senators wish to make some additional comments and recommendations in relation to template ILUAs and the 10-year sunset provision (proposed paragraph 24JAA(1)(d)).

Template ILUAs

1.2 Liberal senators support ILUAs as the preferred method for agreement-making with native title holders and claimants. The committee heard that ILUAs would not assist with the expeditious delivery of public housing and infrastructure in Indigenous communities, on the bases that negotiation and registration of such instruments is not timely and can take in excess of 12 months to complete.

1.3 Liberal senators note that template ILUAs would assist in overcoming the identified difficulties, and consider that it would be prudent for all governments concerned to develop template ILUAs as a means for expedited agreement-making in the future. Such agreements should be inclusive in nature and encompass a range of necessary services, not simply those related to public housing and infrastructure.

Recommendation 1

1.4 Liberal senators recommend that the Australian, state and territory governments take such measures as are necessary to develop template Indigenous Land Use Agreements for future service delivery.

Sunset clause

1.5 Liberal senators also express concern with the 10-year sunset clause contained in the Bill. Liberal senators strongly support the objectives of the Bill, and the substantial investment therein, and suggest that the Australian Government should aim to 'Close the Gap' within five years rather than 10 years. The effectiveness of the program could be reviewed after the first five years of operation, and if necessary, then be extended for a further five years to take advantage of the 10-year funding provided for in the National Partnership Agreements.

Recommendation 2

1.6 Liberal senators recommend that proposed paragraph 24JAA(1)(d) be amended to require the delivery of urgent public housing and infrastructure to Indigenous communities within five years.

Recommendation 3

1.7 Subject to the above recommendations, and the majority report Recommendation 1, Liberal senators recommend that the Senate pass the Bill.

Senator Guy Barnett
Deputy Chair

Senator Mary Jo Fisher

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*

26 Northern Land Council, *Supplementary Submission 16B*

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*

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Jon Altman
2	Cape York Land Council
3	Carpentaria Land Council Aboriginal Corporation
4	Ausrtalian Petroleum Production and Exploration Association Ltd (APPEA)
5	National Native Title Council
5a	National Native Title Council
6	Australians for Native Title and Reconciliation
7	Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs
7a	Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs
7b	Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs
8	Daniel Lavery
9	Graeme Taylor
9a	Graeme Taylor
10	NTSCORP
11	Australian Human Rights Commission
12	The Hon. Stephen Robertson MP and The Hon. Desley Boyle MP
13	Torres Strait Regional Authority
14	Law Council of Australia
14a	Law Council of Australia
15	Western Australian Government

16 Northern Land Council

16a Northern Land Council

17 North Queensland Land Council

17a North Queensland Land Council

ADDITIONAL INFORMATION RECEIVED

1 Answer to Question on Notice supplied by National Native Title Council on 15 February 2010

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

AHMAT, Mr Richie, Chairman
Cape York Land Council

CATTERMOLE, Ms Amanda, Group Manager, Office of Remote Indigenous Housing
Department of Families, Housing, Community Services and Indigenous Affairs

GUEST, Ms Krysti, Senior Legal Officer
Cape York Institute

HARVEY, Ms Tamsyn, Assistant Secretary, Native Title Unit
Attorney-General's Department

HILL, Mr Kim, Chief Executive Officer
Northern Land Council

HILL, Mr Kim, Executive Member, National Native Title Council

LEVY, Mr Ron, Principal Legal Officer
Northern Land Council

LITCHFIELD, Mr John, Acting Branch Manager, Land Reform Branch
Department of Families, Housing, Community Services and Indigenous Affairs

MUNDINE, Mr Warren, Chief Executive Officer
NTSCorp

NELSON, Ms Sally, Principal Legal Officer, Native Title Unit
Attorney-General's Department

PARMETER, Mr Nicholas, Senior Policy Lawyer
Law Council of Australia

SMITH, Mr Kevin James, Deputy Chair, National Native Title Council and Chief Executive Officer
Queensland South Native Title Services

WEBB, Ms Raelene, QC, Member, Indigenous Legal Issues Committee
Law Council of Australia

WYATT, Mr Brian John, Chairman
National Native Title Council