Law Council
OF AUSTRALIA

Native Title Amendment Bill (No.2) 2009

Senate Legal and Constitutional Affairs Committee

23 December 2009

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Introduction

1. The Law Council is pleased to provide the following comments on the *Native Title Amendment Bill (No.2) 2009* (Cth) (the Bill).

2. This submission is made in the context of comments provided to the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Attorney-General's Department (AGD) in September 2009.

3. The submission also considers background issues including the Federal Government's push for land tenure changes and Individual home ownership in Aboriginal communities.

4. The Law Council's key submissions in relation to the Bill are, as follows:

   (a) The consultation provisions under the Bill should be tightened to require real and effective consultation,;

   (b) The proposed new future act procedure should provide a mechanism for lapse of the operation of the non-extinguishment principle and a return of native title lands to the community and/or through individual acquisition after a period of say 40 years;

   (c) Fair compensation should be provided for the suppression of native title rights and interests.

Housing and Aboriginal land tenure systems

5. Efforts by the Federal Government in recent years to invest in housing and infrastructure in Indigenous communities have been accompanied by insistence on agreements to long term leases over Aboriginal freehold land. This approach has generated significant opposition by 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.

6. 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 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.

7. The Law Council notes that it may be unconscionable for the government to negotiate long-term leases with Aboriginal title-holding bodies, while withholding much-needed investment in housing and amenities until a lease is agreed to. Reports surrounding the negotiations with some communities on Aboriginal land have demonstrated that such bodies do not wish to agree to leases over their lands, but feel strongly pressured to do so to address the poor state of their communities, following years of Federal and State/Territory government neglect. This may be interpreted as a form of physical duress, under which Aboriginal title-holding bodies have the choice of handing over hard-won legal title to their lands or forgoing investment in their communities and housing.

8. It is further noted that, to date, the Federal Government has relied heavily on funds drawn from the Aboriginal Benefits Account (ABA) to support the leasing scheme being rolled out in the Northern Territory. The Law Council is advised that this is an unsustainable source of funding and submits that, in any event, it is inappropriate to use funds, comprised of royalty payments to Aboriginal communities from commercial activities on Aboriginal land, to fund a leasing scheme which Aboriginal communities have not designed, do not control and did not consent to before its introduction.[1]

9. The Law Council has raised these matters on several previous occasions, in the context of inquiries such as this, and raises them again on this occasion to highlight the significant challenges surrounding the long-term Aboriginal township leasing policy. At the commencement of the Northern Territory Emergency Response "Intervention" (the Intervention), the then Minister for Indigenous Affairs, Mal Brough MP, stated: "The acquisition of leases is crucial to removing barriers so that living conditions can be changed for the better in these communities in the shortest possible time frame... The leases will give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure."[2]

10. During those Parliamentary debates, it was never made clear that vital investment in *new* housing and infrastructure would not occur in any community that had not entered into a long-term lease. This is of critical importance to the way in which this aspect of Indigenous disadvantage is being addressed. Negotiations attempted since the introduction of the *Aboriginal Land Rights Amendment (Township Leasing) Act 2006* (Cth) have demonstrated that very few communities understand the proposed scheme sufficiently to be comfortable agreeing to leasing of their lands to the Commonwealth on behalf of their communities – and for future generations.

11. The Law Council submits that the necessity for long-term leases is questionable and the protracted nature of subsequent negotiations over leases in some communities does not demonstrate a logical approach to what has been appropriately labelled a "national emergency". Overcrowding and poor living conditions have been highlighted as contributing to violence and abuse perpetrated against women and children in the Northern Territory. The Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse in 2007 noted:

> *"The present estimate of unmet housing need in the Northern Territory is $1.2 billion – up from $800 million six years ago. This represents 4000 dwellings and even this would only achieve an average occupancy rate of seven people per dwelling.*
>
> *"To exacerbate this situation, the population in these communities is expected to double over the next 25 years. At the present rate of construction, it will take some 33 years to meet the existing unmet need; and by that stage, the increase in population will mean we are still 33 years behind demand."*[3]

[1] None of the Indigenous bodies which provided submissions to the Senate Community Affairs Committee inquiry into the *Aboriginal Land Rights Amendment (Township Leasing) Act 2006* (Cth) expressed support for 99-year township leases and there was no further consultation carried out in respect of the relatively shorter 40-year leasing scheme.

[2] Mal Brough MP, Second Reading speech, *Northern Territory National Emergency Response Bill 2007*, House Hansard, 7 August 2007.

[3] *Ampe Akelyernemane Meke Mekarle* "Little Children are Sacred", Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007, Northern Territory Government, page 195-6

12. The Law Council submits that priority must be given to immediate and unconditional construction of new dwellings and other community infrastructure to resolve critical housing shortages in some Indigenous communities. The question of township leasing and land tenure must be dealt with separately to negotiations for investment in housing and necessary services, to ensure any duress is removed in relation to the reassignment land rights.

The amending Bill

13. The Bill will amend the *Native Title Act 1993* (Cth) to provide for:

    (a) the notification and opportunity to comment for Native Title Representative Bodies (NTRBs) and registered native title claimants whenever a 'future act' is declared under the Native Title Act;

    (b) the application of the non-extinguishment principle where any interest is declared which affects native title interests, the intention of which is to ensure native title interests can be revived once the future act ceases to have effect; and

    (c) the provision for appropriate compensation for any interests that are affected.

14. The Law Council regards the central purpose of the Bill to be positive and supports, in particular, the application of the non-extinguishment principle (for a period of up to say, 40 years) to any acts carried out in furtherance of the government's proposed investment in housing and infrastructure in Aboriginal and Torres Strait Islander communities.

Consultation

General comments

15. The Law Council submits that it is important that there be effective consultation with native title holders in respect of acts done on native title land and consent, where possible. This focus must not be removed simply because the future act is one which increases the availability of public housing and infrastructure in remote Indigenous communities and to that extent provides a "benefit".

16. It is also noted that many of the future act provisions in the *Native Title Act 1993* require 'consent', although 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'.[4] 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.

17. In the context of the present Bill, the government is merely required to "notify" native title holders, native title bodies corporate, registered claimants and NTRBs (as appropriate) and afford an opportunity for those parties to comment on acts which

[4] As provided for, for example, in Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

could affect native title. It is noted that the 'acts' in question will often affect communities and other groups consisting of both native title holders/claimants and others who are not part of the native title claim group. Accordingly, it is accepted that, in these circumstances, it may be inappropriate to place undue emphasis on actual 'consent' by native title holders/claimants, as their interests in the 'acts' proposed by the government, which could affect native title, may differ from the interests of other members of the community for whose benefit the investment is proposed.

18. However, it must be emphasised that the government should engage in *effective* consultation and take all reasonable steps to obtain consent, if possible, in order to apply this policy in a way that is consistent with Australia's obligations under international law.

19. Effective consultation with, and consent of (where possible) , native title holders and claimants is particularly important, given the potential long-term (or indefinite) suppression of native title interests that could occur due to construction of public housing and other permanent or semi-permanent structures, including police stations, emergency facilities, schools and public health facilities.

20. Consideration must also be given to other government policies, including in respect of Aboriginal land tenure and home ownership. For example, if at some point in the future public housing and other buildings in Aboriginal townships (owned by the Commonwealth) are offered for private sale to individuals (e.g. in the context of a Federal government home ownership initiative), it seems unlikely that the unextinguished native title interests underlying the dominant Crown title would continue to be preserved. This may result in significant tensions within communities, particularly between home owners and disenfranchised native title groups.

<u>Specific comments and recommendations</u>

21. The Bill provides, under ss 27JAA(10)-(15) that:

    (a) The 'action body' (being the entity performing the act which may affect native title) must notify the registered native title claimant, representative body or native title body corporate and 'give them an opportunity to comment'.

    (b) Any registered native title claimant or native title body corporate may request to be consulted about the doing of the act, insofar as it affects their native title interests.

    (c) If such a request is received within the specified timeframe, the action body must consult with the party about ways of minimising the impact on registered native title interests.

22. There is also a further requirement that the action body must provide a report to the Minister about things done to notify and consult, where appropriate, and that the report may be published at the Minister's discretion.

23. In the Law Council's view, this places a weak consultation requirement on entities engaged in activities which will have potentially long-term impacts on native title rights and interests. 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.

24. It is further noted that the adequacy of the form of notification required cannot be ascertained until the required form of notice is published by the Minister. If, for example, the required notice is mere publication in a regionally or nationally distributed news publication or gazette, or online, there is a reasonable prospect that a native title claim group or body, particularly in remote areas, may not receive the notification, or realise that they are required to actually request that they be consulted, until the notice period has expired. The consequences of missing that opportunity may be significant and are certainly avoidable if a more stringent consultation requirement is imposed.

25. The Law Council submits that 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 consultation requirement would be more effective if a more stringent notification requirement were set out within the Bill itself, specifying a number of different forms of notice. 'Action bodies' should also be required to take reasonable steps to identify and notify relevant native title bodies and report those steps to the Minister. Further, 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.

Compliance with the future acts regime

26. The Bill inserts a new subdivision, s 27JAA, into the future acts regime, which effectively creates an expedited process for suppression of native title interests to enable public development on native title land (or land subject to a native title claim).

27. It is noted that this establishes an alternate process under the future acts regime, which enables the Commonwealth to side-step the ordinary process, including the "right to negotiate" and Indigenous Land Use Agreements (ILUAs) which is the present mechanism available for the development of public housing and infrastructure on native title land. The new process would not require consent, whilst under the ordinary future act process it is generally required (in the form of an ILUA).

Non-extinguishment principle

28. Whilst the application of the non-extinguishment principle is supported, it is submitted that long-term suppression of native title would have the same practical effect as extinguishment.

29. There is a particular anomaly arising from the fact that Indigenous persons are potentially being required to forego their native title rights for an extended, perhaps indefinite, period in return for the provision of public housing and infrastructure on their traditional lands. In return for agreeing to a lease, Aboriginal communities will be required to pay rent and be subject to public housing policies which may not be appropriate to their particular circumstances. Moreover, there does not appear to be an associated plan for the return of native title lands on which housing or infrastructure has been built under this new process.

30. The proposed new future act process should provide for the non-extinguishment principle to operate for a limited period; see, for example, the expected lifecycle of public housing in remote communities of up to 30 years, as indicated in the National Partnership Agreement on Remote Indigenous Housing at clause 13(c). There should be potential for the return of ownership of housing and infrastructure to the community, or to individual ownership, after the lifecycle of those assets or through private acquisition under an appropriate arrangement.

Compensation

31. Given the potential long-term or indefinite suppression of native title interests which might occur under these amendments, it is submitted that the Federal Government should make appropriate arrangements to compensate native title holders and claimants whose interests are affected, in the same way that any other future act would invoke the right to negotiate.

Headings

32. The headings 'Subdivision JA – Public housing etc.' and '24JAA Public housing etc.' do not convey anything like the full range of facilities and infrastructure that may be subject to the procedures introduced by the proposed amendments. In each heading, in lieu of the words 'Public housing etc.', the Law Council suggests: 'Public housing and other public facilities and infrastructure'. The same applies in relation to the heading above ss 24JAA(3).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.