ANTaR
Australians for Native Title and Reconciliation
Sea of hands

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Committee
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Australia

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Dear Sir

Native Title Amendment Bill (No. 2) 2009

The Government's commitment to the recognition of native title rights

In his Second Reading Speech for the *Native Title Amendment Bill 2009* on 19 March 2009, the Attorney General said:

> "The *Native Title Amendment Bill 2009* will make amendments to the *Native Title Act 1993* that will contribute to broader, more flexible and quicker negotiated settlements of native title claims. …
>
> The Rudd Labor government is committed to a new partnership with the Indigenous community and closing the gap between Indigenous and non-Indigenous Australians. Native title has an important role to play in this new partnership. A native title system which delivers real outcomes in a timely and efficient way can provide Indigenous people with an important avenue of economic development.
>
> The government's key objective for the native title system is to resolve land use and ownership issues through negotiation, where possible, rather than through litigation.
>
> … recognition of native title rights should occur where possible by agreement and with due regard to the unique character of those rights."

Australians for Native Title and Reconciliation (**ANTaR**) supports this approach to the native title system. However, the proposed housing and infrastructure native title amendments contained in the *Native Title Amendment Bill (No.2) 2009* are not consistent with the Attorney's statements.

In summary, the proposed amendments force Indigenous Australians to give up any capacity to effectively exercise their valuable property rights in exchange for the

provision of housing and public infrastructure. No other Australians are put in that position. Any extension to the ambit of the future act regime contained in the *Native Title Act 1993* (***NTA***) is inconsistent with the *Racial Discrimination Act 1975* and the terms of the Declaration on the Rights of Indigenous Peoples, both of which set standards of behaviour Australian governments should meet.

The need for housing and infrastructure in remote communities

ANTaR agrees that housing and infrastructure are crucial to closing the gap on Indigenous disadvantage. It is good that the Government is committed to ensuring that vital investment in housing and community infrastructure proceeds expeditiously and in a manner consistent with its broader commitment to work in partnership with Indigenous Australians. However, these "citizen rights", to which every Australian is entitled, should not be provided at the expense of valuable property rights held uniquely by Indigenous Australians.

ANTaR is pleased that the Government recognises that strong relationships between governments, communities and service providers increase the capacity to achieve outcomes, and is determined to make engagement with Indigenous communities central to the design and delivery of programs and services, including by ensuring that native title holders and claimants are involved in considering how, where and what housing and community infrastructure facilities are built in remote Indigenous communities.

However, this approach is not in harmony with the Government's approach to the compulsory acquisition of land in the Alice Springs town camps and the failure to provide housing under the SIHIP scheme. It should engage properly with native title holders and claimants to make sure that they have a real say in decisions about the provision of housing and community infrastructure in their communities. The proposed Bill tends unjustifiably to limit their capacity to have input into those processes. Therefore, for this reason, in addition to the inappropriate derogation from native title holders' unique and valuable property rights, the proposed amendments should not be made.

The future act regime under the NTA

The future act regime is already structured to take account of uncertainty as to whether native title exists. It provides that acts that affect native title will only be valid where the future act regime contained in the *NTA* has been complied with. Failure to comply with the requirements of the regime may lead to the consequence that acts done by State and Territory governments are invalid and of no effect in so far as they affect native title. Therefore, such invalid acts cannot confer rights that are inconsistent with native title rights and interests.[1] In these circumstances, it is appropriate for governments to take a precautionary approach to compliance with the future act regime, and to seek to comply with its provisions where there may be uncertainty whether native title exists or not, by notifying registered native title claimants of an intention to do certain acts.

A targeted futures acts process for public housing and infrastructure

Native title holders and claimants should be accorded the same rights in protection of their rights as any other property right holder. Therefore, 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.

The major problem with the future act regime, from a policy point of view, is that it provides for validity for specific types of acts in a piecemeal fashion, depending on arguments put to the Howard Government by special interest holders, such as pastoral lease holders, and State and Territory governments, who wanted to continue to do things on land in the same way they had always done: without regard for the interests of Indigenous Australians. The piecemeal character of the future act regime reflects that piecemeal policy approach. This proposal is merely another example of this special pleading at the expense of Indigenous rights. By these proposed amendments, the Rudd Government seeks to continue this unfair approach.

The amendments add a little more extinguishment to the bucket loads already dumped on Indigenous Australians by the Howard Government through the 1998 amendments

[1] See *Rubibi v Western Australia (No. 7)* [2006] FCA 459, at [19]-[29].

to the *NTA*. Despite all its political commitments to Indigenous peoples and their rights, this new government's proposal would ensure that this process of incremental additions to the future act regime, depending on the politics of the day, 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.

The Government says it is committed to a "specific consultation process" for the provision of vital housing and infrastructure projects. The best consultation process is that which is already provided for under the requirement for there to be an ILUA before construction can begin. That process ensures that sufficient time is provided and pressure put on government to consult properly with native title holders and claimants about the proposed use of their land. Any derogation from such a process should not be considered. ANTaR recommends that the only "genuine" consultation about these matters is that required by the negotiation of an ILUA, which requires free prior and informed consent before any agreement can be reached. The proposed alternative is inadequate in this regard.

Issues for discussion

The addition of a specific native title process for public housing and infrastructure in remote Indigenous communities would not necessarily assist the supply of adequate housing and raise the standard and range of services for these communities, especially given the problems that already face achieving this aim, as illustrated by the recent report on the SIHIP scheme. In any event, this aim should not be achieved at the expense of the native title rights and interests held by people in those communities.

One of the difficulties with the non-extinguishment principle is that native title rights and interests cannot be exercised for the whole of the time the land is subject to public housing and infrastructure, which may be hundreds of years. In such circumstances, while native title is not formally extinguished, its exercise is affected to such an extent that it may as well be.

Lastly, heritage protection legislation in the States and Territories is often inadequate to protect either Indigenous cultural heritage or the exercise of relevant native title rights and interests, especially in so far as there is ministerial override and a lack of any practical capacity to institute criminal proceedings.

Further, ANTaR supports the published submission to this inquiry made on behalf of the Cape York Land Council dated 10 November 2009.

In conclusion, ANTaR does not support the piecemeal addition of elements to the future act regime that have the effect of discriminatorily affecting Indigenous native title rights and interests. In particular, acts that affect native title rights should only be done by agreement and with due regard to the unique character of those rights.

Yours Faithfully

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