Parliament of Australia

Senate

Legal and Constitutional Affairs Committee

Inquiry into Native Title Amendment Bill (No 2) 2009

Northern Land Council Submission

28 January 2010

NORTHERN LAND COUNCIL SUBMISSION:
NATIVE TITLE AMENDMENT BILL (NO 2) 2009 – 28 JANUARY 2010

The Northern Land Council (NLC) welcomes the opportunity to make a submission regarding the *Native Title Amendment Bill (No 2) 2009*.

In practice the Bill will have little application in the Northern Territory, since by definition the grant of leases (or development) on Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is not a "future act", and thus is not subject to the negotiation and consultation requirements in the *Native Title Act 1993* (NTA).

The NLC supported this position when the Act was enacted, so as to ensure that there would not be spurious litigation to prevent the grant of leases by Aboriginal Land Trusts, or the grant of mineral tenements on Aboriginal land by the Northern Territory Government (with the consent of the relevant traditional owners and responsible land council). As indicated below, this statutory position is consistent with subsequent judgements as to the relationship between coexisting native title and a statutory land rights scheme.

Accordingly the only land in the Northern Territory where the Bill may presently apply is community living areas established under NT law on which significant Aboriginal communities or towns have been established (eg Yarralin).

The Bill is said to be appropriate as a precautionary measure, given "some state governments have indicated that uncertainty in relation to native title can be a barrier to meeting housing and service delivery targets [which] is creating delays."

However the material associated with the Bill does not explain as to the legal or other basis whereby it is said that uncertainty exists or may arise.

Relevant law derives from the High Court's judgement in *Ward*, and the subsequent judgements of Full Courts of the Federal Court in *de Rose v South Australia* and *Erubam Le v Queensland*. In relation to grants of land under a statutory scheme for the benefit of Aboriginal/Islander people, the High Court applied provisions in the NTA whereby native title is not extinguished but has no effect in relation to the grants. In relation to Crown land which has been reserved for a purpose, the High Court held that native title was partially extinguished and had no effect in relation to the reservation (in the same way that native title is partially extinguished by the grant of a pastoral lease, with the pastoralist's interests prevailing).

In *de Rose* the Federal Court held that native title may be permanently extinguished regarding those parts of a pastoral lease used in an exclusive way (eg the homestead). The legal analysis to justify this outcome involved extinguishment being rendered as a legal consequence of the grant of the pastoral lease, not as a result of the pastoralist's actions. *Erubam Le* concerned the extinguishment of native title by a public work which is a "previous exclusive possession act" in accordance with amendments made in 1998.

These judgements are authority for the view that coexisting native title (including native title which legally exists but is suppressed) on land subject to a statutory scheme for the benefit of Aboriginal/Islander people, or Crown land reserved for their benefit, is not affected by the grant of leases or use of land for public housing (or otherwise). Thus no legal uncertainty arises. That is,

the grant of leases or use of reserved land for housing does not give rise to a “future act” so as to require consultations with native title holders or claimants.

There is some tension in the respective courts' approach and analysis in *de Rose* and *Erubam Le*, and in both cases consideration was given by the native title claimants as to an appeal to the High Court. This may engender concern as to uncertainty such that the Bill is considered appropriate as a precautionary measure.

However these judgements also reveal a significant deficiency in the benefit said to flow to native title holders from the Bill. It is intended that, if the new procedures are used, native title will not be extinguished because the non-extinguishment principle will apply in relation to the public housing scheme. However the procedures only apply to a “future act” - being an act which affects native title interests, and under current law there will be no “future act”.

Accordingly solicitors representing native title holders or claimants will need to advise that, although it is intended that native title is not extinguished by, for example, the grant of a lease for public housing in Queensland on DOGIT (deed of grant in trust) land, legally extinguishment will occur. This legal outcome will hardly encourage native title holders or claimants to be supportive of public housing proposals such as the grant of leases by the entity owning the DOGIT land.

By contrast, in relation to the housing leases recently negotiated and executed in relation to Aboriginal land in the Northern Territory, native title is not extinguished. This is because, as stated above, the “future act” provisions do not apply.

It is submitted that consideration should be given to adapting or utilising this legal mechanism to ensure that native title is not extinguished, rather than that in the Bill (which will not under current law achieve that outcome).

It is further submitted that consideration should be given to amending s 47A so as to reverse an aspect of the outcome in *Erubam Le*, which held that a public work (being a “previous exclusive possession act”, as defined in the 1998 amendments) extinguishes native title and that s 47A does not apply to reverse that outcome. Section 47A is a beneficial provision which provides that past extinguishment (except in relation to minerals) must be ignored where a native title application is made over land subject to statutory schemes for the benefit of Aboriginal/Islander people. However *Erubam Le* held that s 47A does not apply in relation to extinguishment which has been caused by the establishment of a public work.

The practical outcome is that, using a community established in Arnhem Land as an example, native title will have been extinguished regarding public works (ie almost all development involving a government) which occurred prior to 1978 (when Aboriginal land was granted) and likely prior to 1996, but native title will not have been extinguished in relation to subsequent development authorised by a Land Trust after that date. This is because s 47A applies to the latter, but not to the former. This differential outcome gives rise to what might be described as a “patchwork quilt” regarding the existence or non-existence of native title, which appears to be an unintended consequence. The outcome is also impractical, since determining whether or not native title exists requires a factual examination of historical circumstances pertaining to the timing of development in a community. This revival of the concept of operational inconsistency, appears inconsistent with the High Court's approach in *Ward* - which held that ascertaining whether or not native title has been extinguished is a legal exercise involving consideration of whether the grant of interests by governments is inconsistent with native title rights.

Finally, as currently drafted the Bill leaves open the possibility of governments subsequently reserving Crown land for the benefit of Aboriginal/Islander people during the 10 year period (in which the procedures apply given a sunset clause). It is submitted that the drafting should be amended to clarify that the measure applies only to land which was reserved at the time it was foreshadowed in the discussion paper in 2009, but not to land reserved after that date.