SUBMISSION TO

SENATE STANDING COMMITTEE ON LEGAL

AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL (No.2) 2009

Cape York Land Council

10 November 2009

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Background

Cape York Land Council ('CYLC') is an Aboriginal Corporation formed by Cape York traditional owners in 1990 to advance the self determination of Aboriginal people in Cape York Peninsula, and is the Native Title Representative Body pursuant to the *Native Title Act 1993* (Cth) ('NTA') for the Cape York region. We have a proud history of representing Traditional Owners and Native Title Holders in the region.

On 13 August 2009, the Commonwealth Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs issued a Discussion Paper entitled 'Possible housing and infrastructure native title amendments.' This paper made general observations and included a proposed Bill. Submissions on the points raised were accepted until 4 September 2009 (a window of three weeks). Few submissions were received within this very short timeframe. Anecdotally, the Commonwealth took this to mean the general proposals were acceptable.

On 21 October 2009, the Attorney-General, the Hon. Robert McClelland MP, introduced the Native Title Amendment Bill (No. 2) 2009. The Bill seeks to minimize native title holders' future act rights in relation to a long list of government developments in remote indigenous communities. This is achieved by applying a racially discriminatory standard to the treatment of native title in relation to these developments as compared to the treatment of non indigenous title holders in the same circumstances. 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

The Commonwealth's rationale for the Bill is that 'uncertainty' in relation to native title is creating a 'barrier' and 'delays' to the provision of public housing and associated infrastructure in remote communities.

Summary of Submissions

The Bill is opposed by CYLC on the following grounds.

The Bill is Unnecessary to Provide 'Certainty' for Public Developments

- **The NTA covers all forms of future acts**, as is clear from the 'catch all' provision of s24MD. Construction of public housing, education and health facilities and associated infrastructure are either covered by section 24K or 24MD, both of which apply the freehold test. In addition governments can enter into Indigenous Land Use Agreements ('ILUAs) if they wish to 'contract out' of these future act rights. The only reason for this Bill is to repeal non discriminatory native title rights.

- **Native title is not a barrier to rapid roll out of public housing**: The exercise of non-discriminatory native title rights can only be characterised as a 'barrier' and 'delay' if native title is viewed as meaningless and not valid legal rights. This cannot be the intention of the Rudd Government.

- **The exercise of non discriminatory future act rights is not responsible for the lamentable state of public services on remote indigenous communities**. Decades of failed government policies on the sustainable provision of such services, and untenable State land interests such as Katter leases in Queensland, are responsible for this situation. Non discriminatory future act rights should not be a scapegoat for such government failures by characterizing them as 'barriers' to reform.

The Bill is Racially Discriminatory

- Current future act provisions relevant to public housing, schools, hospitals and associated infrastructure maintain the original NTA standard that native title is subject to the freehold test. **Replacing the freehold test with a right to comment where the rights of freeholders are not changed is racial discrimination** and contrary to the *Racial Discrimination Act 1975* ('RDA') and international law.

- **The principle of non racial discrimination in future act dealings was the touchstone of the original NTA both for the then Labor Government and for indigenous leaders.** During negotiations for the original NTA, Indigenous leaders consented to the validation of all government acts potentially invalid under the RDA in exchange for the principle that all future acts would be treated in a non-racially discriminatory manner by granting native title holders rights equivalent to a freehold title holder (or the freehold test). This balance in the NTA was severely wound back in the 1998 *Wik* amendments, amendments which were opposed by the Labor Opposition and by indigenous representatives. During the three Parliamentary inquiries into the *Wik* Bill, the Labor Opposition consistently demanded the return of the non-racially discriminatory treatment of future act rights.

- **The original NTA explicitly maintained the operation of the RDA, except in relation to the discriminatory validation provisions**. This provision was repealed by the *Wik* amendments which suspended the operation of the RDA except for the performance of functions and exercise of powers under the NTA. **Therefore, the only reason that this Bill can be introduced without explicitly requiring that the RDA be suspended is because the RDA has already been suspended by the Howard Government,** a provision again opposed by the then Labor Opposition.

- **The Rudd Government has promised to reinstate the RDA to the Northern Territory intervention legislation in the 2009 Spring Sittings** as part of the new approach to indigenous issues based upon mutual respect and on the basis that the Government takes its responsibilities under United Nations human rights conventions very seriously.

- **Bill relies on a view that s51 (xxvi) of the Constitution (the races power) can make laws which detrimentally affect the right of indigenous peoples**. The Labor Party in Opposition during the *Wik* debates called it 'morally repugnant, socially divisive and would endanger the process of reconciliation' to use the power inserted by the 1967 referendum to pass a racially discriminatory Bill.

The Bill is the Antithesis of the Rudd Government's 'new approach' to indigenous rights and native title

- Attorney-General McClelland and Minister Macklin have consistently acknowledged the crucial role native title can play as the foundation for durable economic and social outcomes for indigenous people, for indigenous governance systems and as a vehicle for reconciliation. This role for native title is backed up by credible national and international research. The Prime Minister Rudd's eloquent apology to indigenous peoples committed his Government to a new future between Indigenous and non Indigenous Australians with an 'absolute premium on respect, cooperation and mutual responsibility' which embraces 'new solutions to enduring problems where old approaches have failed.'

- Inexplicably, this Bill follows the logic of the Howard Government's *Wik* amendments and in fact winds back native title holders' right to speak for their traditional lands even further. Such an approach is not new. Such an approach treats native title holders with racial discrimination, not a 'premium on respect.' Again, this cannot be the intention of the Rudd Government.

- Further Minister Macklin has promised to reinstate the operation of the RDA to the Northern Territory intervention legislation in 2009 Spring Sittings, as noted above. This Bill is dependent upon the suspension of the RDA on native title rights inserted by the Howard Government. **Rather than increasing racial discrimination in the Government's treatment of native title, the Government should take a consistent policy approach and reinstate the RDA to the NTA.**

- **The Bill will result in recognition of native title translating into little more than a symbolic statement and a limited right to negotiate over some mining and some compulsory acquisitions.** Most other non discriminatory future act rights entrenched in the original NTA will have been wound back to the minimalist right to comment through the 1998 *Wik* amendments and this Bill. Therefore, after spending more than a decade fighting for recognition of their native title, native title holders will be left with almost

no ability to exercise their native title rights and manage their traditional lands in response to outside development.

- **The Bill will in effect result in compulsory acquisition of native title in remote communities**, as the nature of the acts will make it almost certain that native title will never 'revive'. To effectively compulsorily acquire native title without going through the non discriminatory NTA procedures is unacceptable, and is an outcome which is politically unthinkable for non indigenous title holders.

Meaningful respect for native title as a valuable property right is part of the solution to effective community housing, not an impediment.

- As has been repeatedly acknowledged by the Rudd Government, **respect for native title can provide a sturdy foundation** for durable economic and social outcomes for indigenous people and for indigenous governance systems.

- These economic, social and political outcomes will usually be sought in the indigenous communities covered by the Bill (communities on indigenous trust lands or indigenous freehold) because it is in those communities where native title remains strong and extinguishment can be disregarded. **It is precisely in these communities where native title must be respected by governments.**

- **Failed policies on indigenous housing do not simplistically relate to levels of funding, but also relate to the process and management of service delivery**. National and international research makes clear respecting Indigenous Peoples' decision making rights in relation to community development empowers a community and creates the best conditions for that community's long term success. Conversely, withdrawing the rights of native title holders to have a meaningful say over service delivery and management of essential community services in their communities will almost inevitably result in further community dysfunction. This is the antithesis of the Commonwealth's intention of strengthening indigenous communities.

Bill creates Political and Legal Uncertainty

- The Bill, and the August 2009 Discussion Paper, have been fast-tracked to the extent that indigenous people have had no meaningful opportunity to negotiate with the Commonwealth. Effective participation and agreement of indigenous peoples to amendments which affect their native title was recognised by the Labor Government as central to the negotiation of the original NTA, was reiterated as central by the Labor Opposition during the debate of the *Wik* amendments, is required by international human rights law and potentially required by common law per *Gerhardy v Brown* (1985) 159 CLR 70.

- **Every international human rights committee has previously condemned the racially discriminatory nature of the 1998 *Wik* amendments**, a view supported and forcefully reiterated by the then Labor Opposition. It could be expected that similar international concerns will be expressed on any further entrenchment of racial discrimination in native title legislation through this Bill.

To paraphrase Attorney General McClelland in his native title speech on at the 'Negotiating Native Title Forum' on 29 February 2008, there is no need for native title to be a point of division in the provision of public housing, education and health facilities. Native title is not in opposition of such future acts. It can provide the foundation for such future acts to be durable and effective. We urge the Rudd Government to retain the Labor Party's historically stated commitment to non-racially discriminatory standards in future act dealings over native title. Two weeks ago at the Kowanyama native title consent determination, Attorney-General McClelland urged native title parties to negotiate over their competing interests. We urge the Rudd Government to apply this approach to its own dealings with native title holders.

Detailed Analysis of the Bill

The Original NTA and the 1998 *Wik* Amendments

Racially Discriminatory Aspects of the *Mabo* decision and the Impact of the Racial Discrimination Act 1975

The *Mabo* decision characterized common law 'native title' as a vulnerable property right, which can be extinguished by government grants, reservations or acquisition without notice, consent or compensation. This is in contrast to the common law's characterisation of non indigenous land titles, which the common law says cannot be interfered with except where *legislation* allows that interference (such as compulsory acquisition legislation). The common law treatment of native title is therefore racially discriminatory.

However, as the RDA prohibits racial discrimination in relation to property rights, it prohibits racially discriminatory treatment of native title. This created a significant difficulty for Commonwealth and State governments as a vast number of government acts done after the RDA were potentially unlawful and invalid on the grounds that they racially discriminated against native title holders.

The Balance between Non-Indigenous and Indigenous Rights in the *Native Title Act 1993 (Cth)*

After the High Court decision in *Mabo*, the Keating Government recognized it as critical that the uncertainty as to invalid acts be dealt with for the benefit of the Government and non indigenous interests, whilst also responding to indigenous aspirations arising from *Mabo*. Consequently, the original NTA is finely balanced between the interests of non-indigenous people and the interests of indigenous peoples.

- The original Act allowed validation of land dealings post-1975 that might have been invalid because of the RDA. These validation provisions were overtly racially discriminatory.

- To balance this discrimination, the original Act provided two key forms of protection for native title in post 1993 land dealings: the freehold test (requiring native title to be treated in the same way as freehold title) and a right to negotiate about certain land uses.

- To underline this negotiated outcome, section 7 of the original Act specifically states that the RDA applies to the Act except in relation to the discriminatory validation provisions.

Significantly, the original Act was the subject of extensive negotiations with indigenous groups, and attracted support from key members of some of those groups. Indigenous leaders (including Professor Mick Dodson, Professor Marcia Langton, Noel Pearson, David Ross and Peter Yu) have made it clear that they would not have supported the racially discriminatory validation provisions had the Act not been balanced by the beneficial provisions of the freehold test and the right to negotiate.

The UN Committee on the Elimination on All Forms of Racial Discrimination (the CERD Committee) considered the compatibility of the original Act with Australia's international obligations in 1993. The Committee described the NTA as 'finely balanced between the interests of indigenous and non indigenous interests', but as this compact had the agreement of indigenous leaders, it was accepted as complying with Australia's obligations to implement non-racially discriminatory legislation.

The 1998 Wik Amendments

The 1998 *Wik* amendments altered this balance between racially discriminatory and discriminatory aspects of the NTA. The *Wik* amendments both repealed the freeholder test for many future acts and extended the racially discriminatory validation provisions.

Under the *Wik* amendments, native title holders' non-racially discriminatory future act rights were wound back to the following.

- **24GB**: Upgrading of pastoral leases to primary production activities, including agriculture, animal breeding, fishing, forestry, horticultural activities, aquaculture activities and farm tourism – *limited right to comment although the act is still valid even if the right to comment not granted.*

- **24 HA**: Management of onshore waters (such as water or irrigation licenses), living aquatic resources (such as inland fishing licenses) and airspace - *limited right to comment although the act is still valid even if the right to comment not granted.*

- **24IA**: Renewals and extensions of pastoral, agricultural and mining leases (including being upgraded to freehold) and licenses relating to rights to take water, timber, gravel and fish – *no procedural rights at all except where the 'right to negotiate' applies and a limited right to comment where a freehold grant will be made (extinguishing native title) the act is still valid even if the right to comment not granted.*

- **24JA:** Where land reserved or leased by the State prior to the *Wik* decision, that land can be used for the reservation/lease purpose or a similar purpose and consequently extinguish native title (for example a public work) – *right to comment only on proposed public works and national parks the act is still valid even if the right to comment not granted.*

- **24KA**: Construction of facilities for services to the public (such as a road, railway, bridge, jetty, electricity or gas transmission facility, sewerage facility) – *freeholder rights (except where the future act takes place on a non exclusive pastoral or agricultural lease in which case the native title holders have the same rights as the lessee). Act still valid even if rights not extended.*

- **24MD:** All other future acts not covered by the above activities grant native title holders the same rights as freehold title holders (including the right to negotiate in the limited circumstances of compulsory acquisition outside of a town and city and exploration and mining tenements in some circumstances).

The *Wik* amendments also provided that ILUAs over *any* future acts could be negotiated between government, developers and native title holders in accordance with a process that was more or less beneficial than the above future act procedures.

Labor Opposition Response to the *Wik* Amendments

The Labor Opposition and minor parties' resistance to the *Wik* amendments resulted in the *Wik* Bill being one of the longest debated in the Parliament's history, going back to the Senate on three occasions. In addition, three separate Parliamentary inquiries were held into aspects of the Bill:

- the Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund: *The Native Title Amendment Bill 1997* (Tenth Report October 1997):
- the Senate Legal and Constitutional Affairs Committee *Inquiry into Constitutional Aspects of the Native Title Amendment Bill 1997* (October 1997); and
- the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: *Consistency of the Native Title Amendment Act 1998 with Australia's international*

obligations under the Convention on the Elimination of all Forms of Racial Discrimination (CERD) (June 2000).

Throughout the extensive Parliamentary debates and three major inquiries, the Labor Opposition consistently advocated for the principal of non racial discrimination in the legal treatment of native title in the terms established in the original Act.

United Nations Human Rights Committee Comments on the *Wik* Amendments

Each major United Nations human rights committee strongly criticized the *Wik* Amendments as racially discriminatory, including the Committee on the Elimination of Racial Discrimination (CERD Committee on at least three occasions), the Human Rights Committee (which has responsibility for ensuring compatibility with the *International Covenant on Civil and Political Rights*)[1], the Committee on Economic, Social and Cultural Rights (which has responsibility for ensuring compatibility with the *International Covenant on Economic, Social and Cultural Rights*).[2]

Most significantly, in August 1999 the CERD Committee exercised the rarely used 'early warning measures and urgent procedures' to request Australia to provide information concerning the compatibility of the *Wik* amendments with the CERD Convention. These powers had never before been used against a Western country. In response to this request, the Australian Government stated that the laws were needed to 'clarify' the operation of the NTA and to provide certainty for development. The CERD Committee found that the amendments had removed the 'delicate balance' in the original Act by creating legal certainty for governments and developers at the expense of native title, including in relation to:

- repealing the non-discriminatory freehold test for all future acts and singling out native title land for non consensual use in circumstances which benefit governments and third parties;
- the lack of effective participation of indigenous peoples in formulating or agreeing to the amendments.

The Committee called upon Australia to address these concerns as a matter of urgency including opening dialogue with indigenous peoples. The Committee's findings raised international media concerns as to Australia's treatment of indigenous people. The Howard Government flatly rejected these findings and instead indicated that they would review Australia's participation in such UN Committees. On the contrary, the Labor Opposition called for members of the CERD Committee to visit Australia to further investigate the impact of the *Wik* Amendments.

[1] Concluding Observations [9-11], 28 July 2000
[2] Concluding Observations [16], 1 June 2000.

Native Title Amendment Bill (No.2) 2009 and Standards of Non Racial Discrimination

The Bill goes even further than Howard's *Wik* amendments in legislating for racially discriminatory treatment of native title.

Current Future Act Rights – s24KA and s24MD

The future act provisions relevant to government developments of public housing, public education facilities, public hospitals and associated infrastructure either fall under **s24KA** (provisions of services to the public) or more likely s**24MD (**acts that pass the freehold test).

Section 24 KA generally applies the freehold test to construction of facilities for services to the public (such as a road, railway, bridge, jetty, electricity or gas transmission facility, sewerage facility).[3] The nature of the public services described in this section suggests that it is not applicable to public housing, education and health services (although ancillary services such as sewerage and electrical transmission would be).

If **s24KA** does not apply, then by virtue of **s24AB (2), s24MD** applies to the future acts which, in accordance with **s24 (MD) (6A)**, grants native title holders the same rights as freeholders. Therefore, in very limited circumstances, it will be of no matter whether a future act is characterised under s24KA or s24MD. Both apply the freehold test to native title holders.

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.

De Facto Compulsory Acquisition of Native Title in a Racially Discriminatory Way

The Bill's provision of the 'non extinguishment principle' does not remedy this racial discrimination. The nature of the future acts covered by the Bill is such that they will remain for a period that will probably make it impossible for native title to ever meaningfully revive. As such, the amendments are a *de facto* form of compulsory acquisition but which avoid the prescribed freehold test and right to negotiate applicable under the NTA to compulsory acquisitions. Notably, it is not legally possible for such developments to occur on non indigenous title without triggering compulsory acquisition legislation.

[3] The exception is where the future act takes place over a non exclusive pastoral or agricultural lease in which circumstances the native title holders have the same rights as the lessees.

Additional but Unlikely Current Future Act Provision – s24JA

It is possible that in limited circumstances s24J **may** apply to the construction of public housing, education and health facilities, although this is extremely doubtful. Section 24JA is a very limited section. It provides that where land is reserved by the State prior to the *Wik* decision or land is leased prior to the *Wik* decision, that land can be used for the reserved purpose or a similar purpose with no reference to native title holders except if the future act is a **public work.** If it is a public work, the native title holders have the right to comment and native title will be extinguished. '**Public works'** are defined at s251 as a building or other structure that is a fixture.

Most remote indigenous communities are on land granted under general legislation on trust or reserved for the benefit of indigenous peoples. However, for this provision to apply, a Court would have to accept that:

- the specific development of particular public works was consistent with this general purpose (despite such works being for the benefit of all members of a community); and

- even if that hurdle was passed, that extinguishing the native title determined for (or claimed by) a significant proportion of the population of the community is for their 'benefit'.

Consequently, the possible application of s24JA should be ignored.

Effects of Bill on Native Title in General

Future Act Rights

The Bill will result in recognition of native title translating into little more than a symbolic statement with very limited future act rights to speak of or input into developments on traditional country.

As noted above, the wide range of future acts which fall under 24G-24J now grant native title holders only the very limited procedural right to comment, and sometimes not even that, in circumstances where ordinary title holders would have substantive rights to negotiate. This is racially discriminatory. The experience of NTRB staff is that comments made pursuant to this right are routinely ignored, resulting in non consensual use of native title on a significant scale.

Native title holders currently only retain non discriminatory substantive rights generally in relation to the future acts subject to s24K (service to the public) and s24MD (broadly compulsory acquisition, exploration and mining). However, the *Wik* amendments also significantly limited the operation of s24MD, so that that section now generally only applies to compulsory acquisitions **outside** of a town or city, to mining exploration licenses not subject to

the expedited procedure (although most licenses are), to mining licenses (excluding approved gold and tin licenses and opal mining) and petroleum exploration licenses.

The Bill seeks to even further narrow these highly circumscribed future act provisions so that the provision of public housing, education and health facilities and associated infrastructure will be denied the freeholder's rights and attract the minimalist right to comment.

If the Bill is passed, then almost the only time where native title holders will be able to exercise a non-discriminatory right to manage their country will be if the State seeks to issue a mining lease, or if the State seeks to compulsorily acquire the land. **In other words, if an area is not prospective (as much is not), native title will have contorted to the irony that traditional owners spend years proving their connection to their country only to have a right to speak for their country in circumstances where the State intends to extinguish their native title.**

Comparison of Non Discriminatory Future Act Rights with Requirements for Proof of Recognition and Administrative Responsibilities of PBCs

The current and potential future act rights are in stark contrast to the onerous task placed on traditional owners to prove native title, a process which can take up to a decade or more. The legal maze imposed on native title claimants has been denounced by many players in the native title system, including Minister Macklin, who in 2008 stated that 'the legal and anthropological process in place [to prove native title] defy comprehension'.[4] This complexity remains even at the consent determination level in most states and territories. Determinations of native title require a demanding commitment from mostly elderly traditional owners and from representative bodies. The cost to the public purse is enormous. But, even where native title holders prove they have retained the exclusive right to speak for their country, this right is worth less and less as non-discriminatory future act rights are legislatively disregarded.

Simultaneously, native title holders are required to establish and manage a prescribed body corporate ('PBCs'), 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. The few PBCs that are currently functioning are doing so through funds negotiated via large scale mining developments or compulsory acquisitions of their native title – developments subject to the freeholder right and the right to negotiate.

By further minimizing non discriminatory future act rights, the Bill will further disempower native title holders in this system creating a situation where the legal symbolic and substantive

[4] Jenny Macklin MP, Minister for Indigenous Affairs, 'Beyond Mabo: Native title and closing the gap', James Cook University, 21 May 2008.

(i.e. future act) benefits of proving native title are increasingly outweighed by the administrative burdens and corporate responsibilities placed on unfunded PBCs.

Impact on Indigenous Land Use Agreements

The Rudd Government has properly focused on the importance of ILUAs as a form og agreement making in settling all forms of native title disputes – both determinations and future acts. This is to be applauded. However, 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 as of legal right. Native title holders will not be guaranteed a right to agreements based on respected legal rights. This appears also to be inconsistent with the outcome of the Commonwealth, State and Territory Native Title Ministers meeting on 28 August 2009 which announced the development of innovative policy approaches to native title agreement-making to deliver broader, more practical outcomes to Indigenous Australians.

Implications of Lack of Effective Indigenous Participation

Effective indigenous participation, decision making processes and general governance issues have been identified by both national and international research as critical to economic and social success of indigenous communities. For example, research by Professor Mick Dodson and Dianne Smith on the political economy of Indigenous communities states that good governance is internationally recognised as a key ingredient for sustainable development, where 'governance' is fundamentally about the legitimacy of decision-making power, processes of representation and accountability.[5] This research reflects the findings of the internationally lauded Harvard Project on American Indian Economic Development. By removing substantive non discriminatory rights to engage with government on the development of public housing, public education and health facilities and associated infrastructure, the Bill undermines native title holders' ability to exercise governance in their remote communities. It is inevitable that such an outcome will create further dysfunction in remote indigenous communities, rather than achieving the government's stated aims of strengthening these communities.

For example, by undermining the status of traditional owners, it will undermine the will of traditional owners to manage their community and will cause further division and confusion between traditional owners and other community members. It will undermine good will in relation to important government developments (such as the significant issue of remote housing) and will confuse the role of important community planning procedures which are also critical to orderly community growth.

[5] Mick Dodson and Dianne E Smith, *Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities*, Discussion Paper No. 250, Centre for Aboriginal Economic Policy Research, Canberra, 2003.

International jurisprudence also requires that indigenous peoples have the right to effective participation on matters of significant relevance to them. Brennan J in the High Court case *Gerhardy v Brown* made similar comments about the consent of indigenous peoples in matters which directly affect their rights.

Rudd Government's Commitment to Indigenous Peoples and Native Title Holders

In 2008, the Rudd Government supported the potential that native title could achieve for indigenous people. Prime Minister Rudd's apology speech honoured Australia's Indigenous peoples as the world's oldest living culture and apologised for past laws and policies that had caused suffering. The Prime Minister urged the forging of a new future between Indigenous and non Indigenous Australians with an 'absolute premium on respect, cooperation and mutual responsibility', where we begin the hard work of finding 'new solutions to enduring problems where old approaches have failed.'

The Commonwealth Attorney General Robert McClelland MP and Indigenous Affairs Minister Jenny Macklin announced that as part of this new future, native title was no longer to be isolated from mainstream Indigenous affairs, languishing as an end in itself after years of litigation. Instead, native title was recognised as 'critical to economic development' and that a 'native title system which delivers real outcomes in a timely and efficient way … is a key priority of the Rudd Labor government'. Native title has a 'crucial role to play' in implementing the commitments made by the Prime Minister by providing the foundation for 'comprehensive settlements' of land related issues. Such comprehensive settlements would be a truly 'whole of government initiative, encompassing housing, economic development, health, law and order and leadership and governance.'

By acknowledging this role for native title, the Commonwealth positions itself as embracing the real opportunities of the *Mabo* decision, which Minister Macklin (quoting Noel Pearson) names as the 'best opportunity for the resolution of colonial grievances between Indigenous and non Indigenous Australians … the cornerstone for reconciliation– legally, politically, historically and morally' and not 'simply a legal doctrine relating to real estate'. The Attorney-General further commented that 'If properly done native title can help deliver positive and enduring relationships between Indigenous and non-Indigenous Australians. There is no need for it to be a point of division.'

This Bill puts at risk these aspirations of the Commonwealth Government. There is no reason for native title to be a point of division on the issue of public housing, education and health facilities. Native title is not in opposition of such future acts. CYLC believes that native title can provide the long term foundation for such future acts to be durable and effective. The Commonwealth must retain its historically stated commitment to non-racially discriminatory standards in future act dealings over native title. This will ensure the development of positive

government-indigenous relationships and strengthen indigenous communities to take responsibility for their future well being.

Rudd Government's Commitment to Re-Instating the RDA as part of 'New relationship with Indigenous People

On 23 October 2008, Minister Macklin promised to repeal the suspension of the RDA in relation to the law enacted for the Northern Territory Emergency Response by the 2009 spring sittings of Parliament, a position confirmed in June 2009.

This promise was in response to the *Northern Territory Emergency Response: Report of the NTER Review Board* ('the Yu Review'). A primary recommendation of the Yu Review was that Government actions affecting Aboriginal communities must respect Australia's human rights obligations and conform with the *RDA.*

> Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and regularity that the Board felt compelled to advise the Minister ... that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern. There is intense hurt and anger at being isolated on the basis of race and subjected to collective measures that would never be applied to other Australians. The Intervention was received with a sense of betrayal and disbelief". (p8).

In its response to the Yu Review[6], released on 21 May 2009, the Government accepted the key recommendations of the Review and made the following comments:

- The Yu Review found that suspending the RDA, combined with a lack of consultation, left Aboriginal people feeling hurt, betrayed and less worthy than other Australians.

- The Australian Government is committed to a more respectful and supportive relationship with Indigenous Australians, as shown by the National Apology. The Australian Government is a party to a number of international treaties, including CERD, **and takes its responsibilities under these United Nations Conventions very seriously**. Without this commitment, the Government believes that the improvements already made in the Northern Territory will not last, and the improvements planned for the future will not happen.

- The Government has committed to introducing legislation into Parliament in the 2009 Spring sittings so that the RDA applies to the Northern Territory Emergency Response.

[6] Commonwealth of Australia, *Future Directions for the Northern Territory Emergency Response: Discussion Paper,* 21 May 2009.

Concluding Comments

There is no need for native title to be a point of division on the issue of public housing, education and health facilities. Native title is not in opposition of such future acts. It can provide the foundation for such future acts to be durable and effective and advance to coherence, strength and viability of indigenous communities. Such future acts also offer an opportunity to develop exactly what the Rudd Government is seeking, innovative approaches to native title agreement-making which deliver broader, more practical outcomes to Indigenous Australians.

The Commonwealth must retain its stated commitment it non-racially discriminatory standards in future act dealings over native title, a commitment which founded the original NTA, formed the basis of the Labor Opposition to the *Wik* amendments and a commitment clearly stated by the Rudd Government in forging its new relationship with indigenous people, including by promising to re-instate the RDA to the operation of the Northern Territory intervention legislation. We urge the Rudd Government to reinstate the RDA to the NTA as well, rather than regressively extending its discriminatory effects.

Committing to non racial discrimination in the operation of all indigenous rights, including native title, will ensure the development of positive government-indigenous relationships and strengthen indigenous communities to take responsibility for their future well being.