NTSCORP LIMITED
ACN No. 098 971 209 ABN No. 71 098 971 209

SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL (No. 2) 2009

27 November 2009

Executive Summary

NTSCORP makes the following key points in its submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Native Title Amendment Bill (No.2) 2009* ("**the Bill**").

a) The Bill is an attempt to downgrade the level of procedural rights and compensation which the activities specified in the Bill would otherwise attract under the *Native Title Act 1993* (Cth) ("**the Act**").

b) NTSCORP criticizes the Bill as being unjustified, unnecessary and racially discriminatory. Furthermore, we submit it contradicts the approach taken by the Federal Government to Close the Gap, diminishes the significance of native title recognition and undermines the autonomy of Indigenous communities.

c) NTSCORP identifies alternative actions that the Government should take in order to adequately safeguard native title rights and interests whilst allowing for the implementation of public services and infrastructure. These include:

(i) utilising the current future act regime;
(ii) requiring informed consent of Indigenous communities;
(iii) utilising Indigenous Land Use Agreements ("ILUAs") in order to provide for genuine consultation amongst all parties;
(iv) streamlining bureaucratic processes in order to reduce delays and improve efficiency; and
(v) developing alternative benefits for Indigenous communities to expedite negotiations for implementing public services and infrastructure.

Introduction

1. NTSCORP Limited ("**NTSCORP**") has statutory responsibilities under the Act to protect the rights and interests of Aboriginal communities in New South Wales. NTSCORP is funded under Section 203FE of the Act to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Indigenous peoples who assert traditional rights and interests in NSW and the ACT specifically to assist them exercise their rights under the Act. In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:

- Facilitation and assistance;
- Dispute resolution;
- Notification;
- Agreement making;
- Internal review; and
- Other functions (see s203BJ in particular).

The facilitation and assistance function includes representation in native title matters.

2. NTSCORP welcomes the opportunity to provide submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Bill.

3. NTSCORP commends the Federal Government's commitment to strengthening Indigenous communities. NTSCORP strongly supports the objective of providing public housing and infrastructure to Indigenous communities. However, such an objective should not be achieved at the expense of weakening native title rights and interests. Therefore, whilst NTSCORP supports the Federal Government's endeavour to improve Indigenous housing, we do not support the Bill.

4. NTSCORP is concerned with the limited amount of time made available to respond to this inquiry. We accept that the Minister for Families, Housing, Community Services and Indigenous Affairs is under significant political pressure to address the dire state of housing in Indigenous communities, however, the timeframes provided for stakeholders to comment on the Bill are unrealistic and have prevented adequate consultation amongst key stakeholders.

Communities Affected by the Bill

5. The Indigenous communities of Walgett and Wilcannia have been identified by the Federal Government as 'priority areas' in the implementation of its Remote Service Delivery Strategy. NTSCORP supports the Government funding these Indigenous communities, however we expect the Bill will impact on the native title rights and interests of the communities of Walgett and Wilcannia.

6. Further, it appears that the Bill will also apply to freehold or leased land, where the grant or vesting was pursuant to legislation that makes provision for the grant or vesting only to, in or for the benefit of Indigenous peoples[1] or where the land is held on trust or for the benefit of Indigenous peoples.[2] We understand this to mean that it will affect land in NSW held by Local Aboriginal Land Councils, the New South Wales Aboriginal Land Council and land held and divested by the Indigenous Land Corporation. As native title may exist on these lands pursuant to s47A of the Act, the rights and interests of future native title claimants and/or holders may also be impacted by these proposed amendments.

7. The *Aboriginal Land Rights Act 1983* (NSW) ("**ALRA**") currently preserves and protects native title rights and interests on land granted in freehold for the benefit of Aboriginal people under the ALRA. The ALRA prohibits dealings on land held by Aboriginal Land Councils unless there has been a determination that native title does not exist, and in doing so creates the possibility of claiming native title on those lands. NTSCORP submits that the Federal Government's proposed amendments run contrary to the protections provided for in the NSW ALRA.

NTSCORP's criticisms of the Bill

The Bill is Unjustified

8. NTSCORP submits that the Bill is unjustified. NTSCORP is concerned that the Bill has not been developed with due regard to evidence-based policy making. The

[1] Proposed s24JAA(1)(b)(i) in clause 3, Native Title Amendment Bill 2009 (No. 2) 2009 (Cth).
[2] Proposed s24JAA(1)(b)(ii) in clause 3, Native Title Amendment Bill 2009 (No. 2) 2009 (Cth).

Discussion Paper 'Possible housing and infrastructure native title amendments' suggested that native title processes create uncertainty and delay in relation to the expeditious implementation of public infrastructure. However, no empirical evidence was provided to validate this claim. On the contrary, evidence suggests that native claimants and holders have been cooperative in negotiations and native title rights are not an impediment to the provision of public infrastructure. NTSCORP submits that evidence must be provided before legislative reform of this nature is contemplated.

The Bill is Unnecessary

9. NTSCORP submits that the Bill is unnecessary. As outlined above, ILUAs already provide a process by which native title agreements can be negotiated in good faith. NTSCORP commends the Federal Government's approach in recognising the importance of ILUAs as a form of agreement making in addressing the interests of Indigenous people, government and proponents. However, the Bill undermines the process of negotiating an ILUA by legislating for an alternative process which shortcuts important safeguards and diminishes Indigenous communities' opportunity to reach an agreement which recognises their interests.

The Bill is Racially Discriminatory

10. NTSCORP strongly supports the submissions made by the Cape York Land Council ("**CYLC**") that the Bill is racially discriminatory. We agree that the Bill diminishes native title rights and interests by applying a racially discriminatory standard to the treatment of native title. Specifically, by replacing the freehold test with a right to comment, where the rights of freeholders are not affected, is contrary to the *Racial Discrimination Act 1975* (Cth) ("**RDA"**).

11. The 1998 *Wik* amendments introduced by the Howard Government weakened the original intentions of the Act substantially. We submit that the current amendments further weaken the Act, by providing for an alternative process to circumvent the existing future act processes. Given the criticism directed towards the *Wik* Amendments by the United Nations Human Rights Committee, we agree with CYLC that similar concerns may be expressed over the current Bill.

The Bill contradicts the Federal Government's Approach to Indigenous Affairs

12. We further concur with CYLC that the Bill contradicts the approach adopted by the Federal Government in relation to Indigenous affairs and native title. The Bill significantly undermines the acknowledgment by Attorney-General McClelland and Minister Macklin of the importance of native title in providing a strong community foundation.

13. NTSCORP submits that the Bill illustrates a failure by the Federal Government to utilise an opportunity to build positive relationships with Indigenous communities. We consider the Bill a lost opportunity to build respect between Indigenous communities and governments and to develop employment opportunities that have been directly

negotiated with Indigenous peoples. Instead, the Bill circumvents processes designed to engage and empower Indigenous communities.

14. NTSCORP submits that native title law reform must give practical effect to well-publicised commitments already made by the Federal Government. These include:

    a. the Federal Government's support for the United Nations' *Declaration on the Rights of Indigenous Peoples*,[3] which provides *inter alia* that free, prior and informed consent of Indigenous people is required for any activity that is geared towards commercial gains on their traditional territories; and

    b. the Federal Government's commitment to Indigenous self-determination and increasing Indigenous decision-making in the *Closing the Gap* strategy, which are also identified as 'things that work' in the Productivity Commission's *Overcoming Indigenous Disadvantage – Key Indicators Report 2009*.

The Bill Diminishes the Significance of Native Title

15. NTSCORP submits that 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. We note that this provision is more appropriately directed towards future acts of a temporary or impermanent nature. Public housing and infrastructure is not generally considered temporary.

16. In addition, if native title rights are suppressed or suspended for the duration of a lease, and that lease is renewed for an indeterminate period, then the practical effect of this is no different than permanent extinguishment.

The Bill Undermines Indigenous Communities

17. Finally, we concur with CYLC's submissions that respect for the validity of native title is crucial to the functioning of Indigenous communities. The Bill fundamentally undermines Indigenous Peoples' ability to exercise governance in their communities, which will serve to further entrench community dysfunction.

18. We emphasise that the limited timeframe for submissions have denied Indigenous communities across Australia an opportunity to effectively participate in the decision-making process.

The Bill does not Adequately Address Compensation Issues

19. The Bill only provides compensation for native title holders. Given the fact that only two native title determinations have occurred in New South Wales, the vast majority

[3] Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples - Parliament House, Canberra, 03/04/2009 http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm

of the State's Indigenous population will have no right to compensation for activities contemplated by the Bill.

20. The Bill classifies the implementation of public infrastructure, housing and services as a past act for the purposes of compensation. NTSCORP submits that this classification is inappropriate and that acts such as public infrastructure should instead be treated as falling within Division 3 future acts and provide the corresponding compensation provisions.

21. In addition, we submit that governments could provide non-pecuniary forms of compensation to Indigenous communities, such as construction of community centres, job creation and training where a community agrees, as part of a process.

22. We further refer you to our comments with regard to the *Land Acquisition on* (*Just Terms Compensation*) *Act 1991* (NSW) ("**LA (JTC) Act**") below. Furthermore, we note that in the current Bill compensation is only available to native title holders, not registered claimants or future native title holders.

NTSCORP's Proposed Alternatives to the Bill

Utilise the Current Future Act Regime under the Native Title Act

23. NTSCORP submits that the Bill is unnecessary as the Act currently provides future act procedures for compulsory acquisition and public infrastructure under s24MD and s24KA.

24. Section 24KA generally applies the freehold test in relation to the construction of public facilities. We recognise that this section is applicable to a wide range of public infrastructure.

25. Where s24KA does not apply, by virtue of s24AB(2), s24MD will apply. Section 24MD grants native title holders and any registered native title claimants the same rights as freeholders[4]. In NSW, this may include procedural rights provided by the LA(JTC) Act.

26. If parties utilise s24MD, and the NSW LA (JTC) Act applies, this provides for compensation on the basis of 'market value'. In contrast, the proposed Bill provides for 'reasonable compensation'. We note with concern that the Federal Government has provided no definition for 'reasonable compensation'.

27. NTSCORP recognises that utilising s24MD of the Act for constructing public housing, health and education facilities is an undesirable option for the Federal Government and one the Bill presumably has been introduced to avoid. It is widely acknowledged that compulsory acquisition of native title and freehold land held by Indigenous People is not in the best interests of Indigenous People and NTSCORP shares this

[4] Section 24MD(6A) *Native Title Act 1993* (Cth).

position. Introducing legislation which has the same effect, but is different only in name, provides no solution.

The Need for Informed Consent

28. NTSCORP submits that the failure of the Bill to require informed consent is highly problematic. We submit that it is imperative that informed consent is given by Indigenous communities when making decisions which affect native title rights and interests. 'Suppression' or suspension of native title rights and interests is an extreme interference with native title rights, especially when Indigenous people asserting native title rights and interests may not be the only beneficiaries of the proposed public housing or infrastructure. It is vital that Indigenous People are actively involved and engaged in determining what public housing and infrastructure is best for their Country and community, if at all.

29. NTSCORP notes that both the Discussion Paper and the Attorney-General's Second Reading Speech emphasised the need for consultation with native title parties to be 'genuine'. However, we note that this term has not been included in the Bill. Instead, the Bill provides for consultation but provides no qualitative measure for that consultation.

30. We submit that 'genuine consultation' implies that native title parties will be given an opportunity to meaningfully engage with the process of delivering public infrastructure, services and housing. We contend that providing native title parties with an 'opportunity to comment' does not amount to 'genuine consultation.' Similarly, providing an opportunity to registered claimants to 'request to be consulted' is insufficient. In particular, we note that the process of obtaining registration can be lengthy and resource-intensive, and that parties may not have capacity to file a claim and obtain registration within the two month time frame, thus excluding them from this process. We submit that the onus to request to be consulted should not be placed on native title holders. The Bill lacks a clear framework providing procedural rights, even at the lowest level of consultation.

31. NTSCORP submits that in the absence of requiring informed consent from Indigenous communities, state and territory governments will potentially be able to meet legislative requirements of consultation by engaging in superficial consultative processes. In the absence of providing a qualitative measure, requiring the negotiation of ILUAs, or providing measures such as those contained in the recently endorsed Guidelines for Best Practice in Flexible and Sustainable Agreement Making, 'genuine consultation' amounts to mere rhetoric.

32. NTSCORP further submits that the Bill provides no incentive for governments to genuinely negotiate with Indigenous communities with a view to reaching an agreement. Under the proposed Bill, governments must merely provide parties with an opportunity to comment, or where the party is registered, an opportunity to be consulted, before they are allowed to proceed with the acts. Whilst NTSCORP does not support the current Bill, if implemented there are a number of measures which should be introduced. These include:

a) NTSCORP submits that the Bill should impose a penalty to act as a disincentive in circumstances where parties do not act in a manner conducive to reaching a meaningful agreement.

b) We submit that in order for consultation to be 'genuine', adequate resources must be allocated to all parties. This is particularly important where communities are geographically dispersed or face other impediments in relation to accessing resources.

c) Similarly, a minimum timeframe for engagement must be implemented in order to ensure genuine discussion. NTSCORP submits that a minimum timeframe of 6 months would be appropriate, as is provided in the right to negotiate under Subdivision P of the Act.

d) Further, NTSCORP submits that guidelines for consultation should be developed to provide appropriate direction to the parties. For example, the recently endorsed Guidelines for Best Practice in Flexible and Sustainable Agreement Making may be of use in developing guidelines specific to the consultation process.

Preferential Options – Utilising the ILUA Process

33. NTSCORP submits that the purpose and process of negotiating ILUAs is to provide an opportunity for genuine consultation with Indigenous communities. A credible notion of 'genuine consultation' is therefore fundamentally inconsistent with bypassing the ILUA process. NTSCORP therefore submits that as ILUAs already provide a genuine process for consultation, the proposed Bill is unnecessary.

34. ILUAs provide the most effective opportunity for government and other parties to obtain, and for Indigenous communities to give, informed consent to activities on their traditional country. An ILUA binds all persons who hold or may hold native title and are required to be notified providing suitable notice that an ILUA will have effect in relation to a particular area or issue. In addition, ILUAs are required to be registered and have the enforceability of a contract. This is of particular utility for intergenerational projects such as housing and infrastructure, which will have long-term implementation measures.

35. 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. It is disappointing to see that the Federal Government is using legislative reform as a means of circumventing obligations which other proponents must perform. This is highly inconsistent with the Federal Government's "new approach" to Indigenous affairs.

36. The Federal Government has not provided any clear policy reasons to the Indigenous community as to why public infrastructure, housing and services should not require an ILUA. If there is an unwillingness for the Government to utilise the current future act provisions for these future acts, then ILUAs provide the best alternative to undertake those future acts.

37. NTSCORP submits that 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. For example, local governments in Queensland and Western Australia have already produced template ILUAs for specific activities. 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.

Other Alternatives

38. The Federal Government could also consider legislating to make public housing services and infrastructure subject to Subdivision P of the Act, the right to negotiate. This scheme already provides a six month period of good faith negotiations between governments, proponents, and registered native title claimants or native title holders and results in a section 31 agreement which validates future acts. If an agreement cannot be reached, it provides for an arbitral determination on the activity. It is routinely used in mining and compulsory acquisitions and provides a viable alternative to the current Bill.

The Need to Address Bureaucratic Inefficiencies

39. Native title compliance is only one aspect of a significant range of statutory compliance requirements when planning public infrastructure. NTSCORP submits that other bureaucratic processes provide greater obstacles to the implementation of public infrastructure, housing and services, than native title rights and interests. As such, reform should be directed towards overcoming bottlenecks within bureaucracy, rather than attempting to erode native title rights. Indigenous communities should not be forced to bear the consequences of bureaucratic inefficiency.

40. We submit that all levels of government should make commitments to expediting the implementation of public infrastructure by addressing the actual causes of delay. For example, governments should provide easier, quicker access to tenure information, expedite environmental approvals and undertake whatever actions are necessary to speed up existing processes, before turning to legislative reform of native title to short cut the perceived problems.

41. Further, NTSCORP submits that governments should make early contact with Native Title Representative Bodies to ensure a more expeditious process. In particular, we submit that the formation of a specific group within state and territory governments to

address native title issues would significantly streamline the process. At present, there exists substantial variation in the knowledge base of government officials in dealing with native title processes, which can considerably delay the process. Introduction of a specific group of government officials to work on native title engagement would greatly improve and expedite the process by allowing retention of tacit knowledge.

42. NTSCORP notes that there is currently no consistency in the way state government departments notify future acts and we therefore express concern about governments' capacity to follow new notification processes to provide for consultation in such a short turnaround. There is no indication in the Discussion Paper or the Bill that the Federal Government will take steps to address the existing problems with notifications under the future act regime.