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BARRISTER-AT-LAW

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary

Re: Native Title Act Amendment Bill (No. 2) 2009

Thank you for the opportunity to make a submission on the proposed amendment to the future act regime concerning public housing and infrastructure in remote Indigenous communities.

In early September I addressed a submission to the Attorney-General, Robert McClelland, and the Minister for Indigenous Affairs, Jenny Macklin, on the Discussion Paper promulgated on this issue.

The simple point of my submission was that the Discussion Paper was falsely premised. It is not native title which is retarding or preventing the construction of urgently-needed housing and infrastructure. It is a result of neglect over several decades by the States and the Northern Territory, and their continuing ineptitude.

I also made the point that an offer of 'genuine' consultation in exchange for a surrender of valuable procedural rights had to be regarded sceptically when the consultation surrounding the proposal was anything but genuine. A quick milk-run around be capital cities to talk about the rights of traditional owners who live in the remotest parts of Australia is hardly an appropriate or meaningful consultation. It was sub-optimal in the best of light, fraudulent in the worst.

My submission to the Attorney-General is in the process of being adapted to a small publishable paper. It is attached. The broader points I wanted to be made are done therein. I can only add a few miscellaneous points.

1. I note that the Commonwealth and State/Territory governments' need to provide public housing and essential infrastructure in the Discussion Paper has expanded to 'public housing and other facilities by or on behalf of the Crown, a local government body or other

statutory authority'. Conversely, I notice that the 'genuine consultation' in the Discussion Paper has now shrunk to 'an opportunity of comment'. If the Rudd Government was selling a product and engaged in such public deception, ('*Yeah, I know we're taking more than we said and, yeah, I know we're giving you less than we said, but it's OK because it's all for your own good, believe me*') it would be open to being charged with breaches of the fair trading legislation. It brings no honour to the Rudd Government or the Australian people to deceive the most disadvantaged persons in our nation out of what small measure of procedural rights to land they may have.

2. The situating of most of the housing and infrastructure to which this amendment is directed is on communal land, and this is usually held under a statutory title. This means governments will still need to 'negotiate' leases irrespective of this amendment.
3. The failure of the State and Territory governments to negotiate ILUAs for housing and infrastructure reflects their inability to negotiate generally with Indigenous peoples. The obtaining of some present leases by the threat to communities to withhold much-needed housing and infrastructure is shameful and wholly unnecessary, reflecting just how completely the State and Territory governments are out of their depth on this issue.
4. The mere fact that the Indigenous Housing Crisis is as parlous across the nation as it is clearly evinces that the States and Territory are inexperienced with, and are not adequate to, the ever-expanding task of delivering adequate housing and essential infrastructure to hundreds of remote Indigenous communities. You need only read of (and view) the squalor of House 13 at Hoppy's Camp in the Alice in today's *Australian* to comprehend that, two years into SIHIP, the surface of the national Indigenous Housing Crisis has not yet even been scratched. This proposed amendment is a fruitless distraction from the substantive issues.

Yours sincerely

Daniel Lavery
McCawley Chambers
24 November 2009

ATTACHMENT 1

Now that's not a crisis

Daniel Lavery[Ψ]

On 13 August 2009, the Attorney-General's Department and the Families, Housing, Community Services and Indigenous Affairs Department released a discussion paper[i] on possible changes to the future act regime in the *Native Title Act 1993* concerning public housing and infrastructure in remote Indigenous communities.

The discussion paper posits that there is 'uncertainty' under the existing NTA future act processes, that compliance with the present NTA processes 'may result in considerable delay' to the construction of much-needed housing and infrastructure in these communities and 'proposes a new specific process to facilitate these important developments'. The discussion paper states that the Rudd Government is considering 'a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need of an Indigenous Land Use Agreement (ILUA).'

Submissions were invited no later than 4 September 2009, with public forums on the proposal occurring over 10 days in Darwin, Alice Springs, Perth, Broome, Adelaide, Sydney, Brisbane and Cairns.

The premise underpinning the proposal is that the addition of a specific future act process to the NTA can ensure that public housing and infrastructure in remote Indigenous communities are built expeditiously. Is this premise true? Might it be tested by asking whether an ILUA, which is

needed only in circumstances where native title is extant, is the reason or a contributing cause to the fact not a single house has been built in any Indigenous community in the Northern Territory under the $672 million Strategic Indigenous Housing and Infrastructure Program?

For the short answer, one might look at the Cattermole-Davies Review of the 15-month-old SIHIP. Many reasons emerge in the review by Ms Cattermole and Mr Davies but native title isn't one of them. To the contrary, the SIHIP Review states:

> *There have been no delays in any of the SIHIP work currently underway associated with the requirement to obtain long-term land tenure. Leases have been obtained covering houses in the initial packages prior to the date when construction work was due to commence. […]*
>
> *In respect of the next four packages to be progressed at Wadeye, Maningrida, Gunbalanya and Galiwinku, program delivery is currently on schedule including finalisation of lease arrangements between the Northern Land Council, Traditional Owners and government.*

In fact, native title isn't even mentioned in the 40-page review of the staggering SIHIP. Sure, native title *may* cause delays to building houses, as might the weather, but there is no evidence that native title *has* caused *any* delay in the Northern Territory.

The discussion paper's premise eerily echoes the recent claim by WA Treasurer and Housing Minister Troy Buswell that native title was retarding the $496 million Indigenous housing program in Western Australia. Social Justice Commissioner Calma has condemned that claim as patently hollow, pointing out that the WA Government hasn't yet determined where the housing was to be situated. If the housing sites have yet to be determined, so that an assessment of native title has yet to be conducted, it can hardly be to blame!

The Queensland situation

So, if native title is not retarding the provision of Indigenous housing in remote communities in the NT and in WA, why attempt to lay the blame at the native title holders feet? Might these lamentable governmental failures in WA and the NT present a convenient, but vacuous, excuse by the States and the Northern Territory to further erode the future act rights of native title holders? It can be tested by asking what is happening in Queensland where there are nine of the Top 20 most disadvantaged communities in Australia; Yarrabah (3rd), Palm Island (4th), Kowanyama (7th), Napranum (8th), Umagico (11th), Cherbourg (12th), Boigu (13th), Injinoo (15th) and Wujal Wujal (20th), according to the ABS-compiled *Index of Relative Socio-economic Advantage and Disadvantage* (based on 2006 Census data). Unsurprisingly, all nine are Indigenous communities. Is there any evidence to suggest native title is holding up the provision of public housing in these Queensland communities?

Kowanyama

If you travel to Kowanyama, the 3rd most disadvantaged community in the Smart State, you'll quickly learn that the housing crisis in Kowanyama – one of 30 such Deed of Grant in Trust (DOGIT) communities in Queensland - is such that, in a community of about 1300, there are nearly 70 families on the housing waiting list. But it's not native title which is delaying building the urgently-needed houses for these families, there are other clearly identified factors.

Let's start with Queensland Government inaction over recent decades.

Section 29 of the Queensland *Aboriginal Land Act 1991* requires the relevant Minister to transfer the Kowanyama and other DOGITs to traditional owners *'as soon as practicable'*. The Minister is to give all necessary directions and make all necessary appointments to transfer the land to Aboriginal freehold.

In the 18 years since given the statutory mandate, no necessary directions have been given and no necessary appointments have been made to fulfill this legislative duty for the Kowanyama township area. In 2008, Badu Islanders, frustrated with the years of inaction, embarrassed the Queensland Government by issuing legal proceedings to make the Minister fulfil his statutory duty.

In the township area of the Kowanyama DOGIT, there are also about 100 parcels of perpetual lease issued under the *Aboriginal and Torres Strait Islanders (Land Holding) Act 1985*. These are the so-called 'Katter leases' which plague many Indigenous DOGITs throughout Queensland. An embargo was placed on the issuing of such leases soon after the magnitude of the policy and tenure disaster that is the *Land Holding Act* was realised. Over 20 years later, the mess remains unremedied, with DOGIT communities 'swiss-cheesed' because these Katter lease parcels fall out of the DOGIT and so beyond the control of the trustee Council. At a day-long Tenure, Title & Housing Workshop in mid-2008 in Kowanyama, attended by representatives of the Council (including the Mayor and CEO), regional Indigenous Coordination Centre representatives, and the land council Chairperson, it was stated repeatedly that the principal impediment to meeting the community's housing needs was these long-unaddressed tenure issues.

Viewed in this light, it's not compliance with, or uncertainty relating to, native title processes that is contributing to delays in the 'timely delivery of public housing' in Kowanyama. It's a welter of other factors, the common thread being Queensland's unwillingness or inability to tackle these difficult tenure issues, which are largely of its own making. Remarkably, the Queensland Government did not attend the Workshop in Kowanyama to discuss these issues, although it did relay its apologies.

Palm Island

Palm Island, too, has an acute housing shortage for its 3000 residents which was formally recognised by the Palm Island Select Committee, an all-party parliamentary committee, when it reported in August 2005. The Select Committee recommended the urgent 'rationalization' of tenure of not merely Palm Island, but of all discrete Indigenous communities in Queensland. The Response tabled in the Legislative Assembly stated:

> *The Queensland Government supports this recommendation. The Department of Natural Resources and Mines will investigate these options and develop proposals for Government's consideration*.

This proposal promised a targeted, practical reform that would have marshalled real change in some of Australia's most disadvantaged communities. What happened to it? The political will subsided as the embers of the torched Palm Island police station dulled and the issue returned to the bureaucracy where the view was widely held that Palm Islanders should not be rewarded for their insurrection. It can be charted like this:

August 2005	Report from the parliamentary Palm Island Select Committee
November 2005	Beattie Government Response
December 2005	Recommendation on tenure rationalisation endorsed by Cabinet
April 2007	Funding approved for 'pilot' project on Palm Island
Late 2008	The *Improved Future Land Practices (Palm Island*) project (comprising one officer in Brisbane) is behind schedule for the expected finish date of 2010

2009	Focus shifts almost entirely to government land needs on Palm Island with little emphasis on putting the community and Council on a level footing with other similarly-sized non-Indigenous communities
22nd Century	Expected completion for all 32 discrete Indigenous communities in Queensland.

On the native title front, an associated template ILUA, which would have addressed the future act aspects of community development on not merely Palm Island but all DOGIT communities, was commissioned in 2005 from the Queensland Indigenous Working Group, has yet to see the light of day. If there's no urgency attached to producing this ILUA draft, then it can't be future act concerns that are the reason for delay on Palm Island.

But the ringing question remains: how can such a disadvantaged community as Palm Island – once described as the most violent place outside of a war-zone on the planet - be so forsaken when housing has been clearly identified as central to that disadvantage? Ask the relevant Minister. For Robert Schwarten, then Queensland's Minister for Housing, there is no housing crisis on Palm Island. Interviewed in the wake of the watchhouse death of Cameron Doomadgee and the subsequent rioting on the island, Minister Schwarten stated:

> *Palm Island has had 100 houses constructed with $31m, 22-odd of that coming from the state [of Queensland] over the last six years – it has more than got its fair share.*

However, the Palm Island Select Committee had reported the month before this statement that housing was a critical state on Palm Island, and that overcrowding was central to addressing a number of issues including health and child safety. But Schwarten would have none of this. '*The reality*', he said,

> *is that Palm Island really has significant overcrowding problems in some respects because it doesn't have a proper policy of allocation … if you look at the averages on that island and boil it down, the average occupancy would be two to a bedroom. Now, that's not a crisis.*[ii]

The recent Mullighan Inquiry in South Australia found direct causation between overcrowding and child sexual abuse and community dysfunction. And it was succinctly stated, in relation to APY lands, that:

> Overcrowding does not attract the attention of alcohol and drug abuse, nor does the violence it fosters in indigenous communities, but it is increasingly being recognized as central to the dysfunction engulfing them.[iii]

The most recent report from the Australian Institute of Health and Welfare on indigenous housing has found that 6235 Indigenous households in Queensland are overcrowded. Queensland's already dire position in indigenous housing deteriorated even further in the five years from 2001 to 2006 – on Schwarten's watch. Of the nearly 11,000 homes needed to address the shortfall in Indigenous housing, 6000 are in Queensland.[iv] Now, that's not only a crisis, Minister; it's a crying shame.

Minister Schwarten's department had more than $50m of Indigenous housing money unspent in a recent financial year. The everyday tragedy is that these unspent funds could have been front-ended to resolve many of the long-standing issues, such as resolving the Katter lease debacle or engaging the council in some land-use planning, but just haven't been for lack of understanding or desire.

The bigger picture

The bigger picture shows that it is plain that the Northern Territory is not alone in bungling these Indigenous housing issues; Queensland is right up there too in the incompetency stakes. The Bligh Government is now showing some movement on Indigenous housing but only to secure the $500,000,000 dollars on offer from the Rudd Government. But for the increasingly-

swamped Minister Macklin, there is a SIHIP-like disaster-in-the-making in Queensland.

If Minister Macklin takes away any abiding lesson from the on-going SIHIP humiliation, it is that the States and the Territory are wholly ill-equipped to manage these funds in this critically urgent task. The mere fact that the Indigenous Housing Crisis is as parlous as it is across the nation clearly evinces that the States and Territory are inexperienced with, and are not adequate to, the ever-expanding task of delivering adequate housing and infrastructure to remote Indigenous communities.

The bigger picture shows that any 'emergency' in Indigenous communities does not stop at the Northern Territory border. There's an emergency, too, in Western Australia, and in Queensland, and in the South Australian communities. These relevant States and the Territory have demonstrably and disastrously failed in providing adequate housing and essential infrastructure to Indigenous communities.

The offer of 'genuine' consultation

The discussion paper's introduction breathlessly states that 'native title negotiations can provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships'. However, it then goes on to propose that, in lieu of negotiating an ILUA to cover any future act activity concerning housing and infrastructure in remote Indigenous communities, a process of '*genuine*' consultation might replace it. The new, enduring relationships melted in less time than a paddle-pop on Bondi beach in December.

Interestingly, the details of this 'genuine' consultation process are not disclosed in the discussion paper, so one doesn't even get to evaluate this alternative to negotiating an ILUA. If it bears any resemblance to the consultation process surrounding the amendments proposed in the

discussion, one would have to politely decline the offer. Claims of genuineness sound particularly untrue when this consultation on native title rights in remote communities is a quick milk-run around the major cities. The Adelaide Town Hall seems an unlikely place to encounter many of the persons affected by this proposal. Only if the proposal taken to and showcased in Gunbalanya, Mowanjam, Kowanyama and Palm Island could it be called a proper consultation process. This offer of this you-beaut 'genuine' consultation is to be regarded as one would the offer of a 'genuine' Rolex in the alleyways of Hong Kong.

Conclusion

The case for the proposed change to the NTA future act regime concerning public housing and infrastructure in remote Indigenous communities in the discussion paper is not persuasive. The premise underpinning the proposal, that the addition of a specific future act process to the NTA can ensure that public housing and infrastructure in remote Indigenous communities are built expeditiously, is false. Compliance with future act processes may cause delay, but there is no evidence from any relevant source that the present future act processes *has* caused any delay, let alone 'considerable delay'. Assertions made in the discussion paper do not appear to have any hard facts or evidence to buttress them. On the fragile assertions offered in the discussion paper, the Rudd Government should not further dilute the rights of Indigenous peoples across the nation by inserting some form of vague consultation protocol in the NTA future act regime relating to public housing and infrastructure.

[Ψ] Daniel Lavery *specializes in Indigenous land issues. He is a former director of the Indigenous Land Acts Review in Queensland and has worked extensively on Indigenous issues in the Northern Territory. If you have a comment on this paper he can be emailed at* daniel.lavery@alumni.uottawa.ca

[ii] Quoted in Jeff Waters, *Gone for a Song: a death in custody on Palm Island*, ABC Books 2008, 159.
[iii] 'Overcrowding opens door to social tragedy', John Wisemen, *The Australian*, 18 August 2008, 20.
[iv] 'State Housing Shame – indigenous conditions worse in nation', Melanie Christiansen, *Courier Mail*, 8 October 2009, 14.