Submission to the Senate Standing Committee on Legal and Constitution Affairs

Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)

North Queensland Land Council Native Title Representative Body Aboriginal Corporation

January 2010

Contents

- North Queensland Land Council
- Executive Summary
- The bill is discriminatory
- The bill is inconsistent with Rudd Government policy and contrary to long held Australian Labor Party policy on Indigenous Native Title
- The bill will not address State and Federal Government failures in program delivery
- The Future Acts regime is unnecessary and will result in weaker outcomes than the existing Indigenous Land Use Agreements
- The North Queensland Land Council Alternative – A version of the Canadian Model

Executive Summary

The Commonwealth Government's rationale for the bill is that there are unnecessary delays in the provision of public housing and infrastructure that have been caused by a failure to obtain the consent of the Traditional Owners. The desire to remedy these perceived delays to ensure that election commitments are met is admirable, however in the process the remedy will breach a number of other undertakings the government has made to the Australian people.

The North Queensland Land Council supports the government's efforts to invest in and improve public housing and public infrastructure in remote indigenous communities.

However, It is the position of North Queensland Land Council that this bill is a knee-jerk reaction to delays the government is experiencing meeting its promise to build public housing and infrastructure in *some* remote indigenous communities.

North Queensland Land Council believes that this bill sets Native Title progress back over a decade, with minimal result and considerable reduction in the land rights of Indigenous people.

This scenario is not what practitioners of Native Title law, Traditional Owners and Aboriginal Australians believed to be the intention of the incoming Rudd Government based on its public pronouncements on good faith relations with indigenous people and a Native Title system that promotes economic and social development. It is entirely inconsistent with the Indigenous Affairs Minister, Attorney General and the government's long standing argument that Native Title is a vehicle for social and economic development, not an impediment of it

The government has not fully considered all options for the provision of public housing and infrastructure. The North Queensland Land Council supports the principles of the Canadian models outlined in this submission and Appendix as alternatives to the draconian measure of removing consultation and consent of Traditional Owners from the decision making processes in their own lands.

Further, the Commonwealth government has not provided the Queensland government with the promised resourcing to ensure housing and infrastructure construction can commence. It is extraordinarily premature to wind back indigenous land rights when the government has not made all reasonable attempts in both resourcing and engagement to deliver on their own policy objectives.

Fundamentally, it is North Queensland Land Council 's position that:

- Public housing and infrastructure can be constructed under existing legislative and regulatory arrangements.
- The government has not exhausted its options under the existing framework to achieve its objectives.
- The bill is a regressive, discriminatory and unjustly removes the rights of indigenous people.
- The bill is inconsistent with the government's own policy position on Native Title.
- The bill breaks an election promise to Indigenous Australians that the government supports Native Title and would not seek to reduce land rights.
- That there are viable and preferable options to meet the government's policy goals, including the documented Canadian models.

The bill is discriminatory

The future act provisions in the current Native Title Act that relate to public housing, schools, hospitals and other public facilities establish the rights of traditional owners in accordance with the 'freehold test'. Replacing the 'freehold test' with a 'right to comment' where the rights of freeholders are not changed can only be considered as racial discrimination. Clearly this approach offends the principles of the Racial Discrimination Act 1975 ('RDA'). It is also in conflict with international law.

North Queensland Land Council is surprised that the federal government has chosen to take this approach given it's stated commitment to 'reset the relationship'[1]with indigenous people, and in particular Minister Macklin's statements regarding Australia's intention to become a signatory to the United Nations Declaration on the Rights of Indigenous Peoples[2]

The proposed changes reveal an attitude of the government that is inherently discriminatory. It appears that the government takes the view that because a project may be of benefit to a given community it is acceptable to ignore that legitimate interests of Traditional Owners. The government would never countenance such an approach in relation to the property rights of non-aboriginal Australians.

For example it is inconceivable that the government would propose the building of a police station in Mackay on the basis that residents waive property rights on the understanding that they would gain enjoy a safer environment as a result of the increased police presence. This is what Traditional Owners are being asked to agree to.

The removal of these rights that are contemplated in the bill pursuant to subdivision J, K and M are therefore inherently discriminatory and are completely at odds with the stated approach of the government in relation to indigenous issues. If this bill is passed, it will result in replacing the freehold test with a right to comment for Traditional Owners. No similar changes are proposed to the rights of non-indigenous freeholders and as such, the bill stands contrary to the Racial Discrimination Act and Australia's International Law.

[1] Chapter 7, pp6 ALP National Platform and Constitution 2009

[2] Jenny Macklin MP, Statement regarding Australaia's intention to become a signatory to the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House, Canberra 3 April 2009.

In terms of the Racial Discrimination Act, this approach stands in contrast to the Rudd government's stated policy in relation to the Northern territory Intervention[3], where the government has committed to the re-instatement of the Racial Discrimination Act into the Northern Territory Intervention Legislation. This approach of being selective in the application of the Racial Discrimination Act adds further to the uncertainty that indigenous Australians are facing in planning for their social and economic future, without any clear engagement, boundaries or direction from the Commonwealth.

[3]Jenny Macklin MP, House of Representatives Handsard 3 July 2009 , Parliament House, Canberra .

The bill is inconsistent with Rudd Government policy and contrary to long held Australian Labor Party policy on Indigenous Native Title

North Queensland Land Council is disappointed to see this bill being pursued by the Rudd Government. It demonstrates a significant gulf between the statements and commitments of the Government. This gap between the rhetoric and commitments of the Government has generated considerable uncertainty amongst Indigenous Australians as to the future of their rights under all existing legislation. .

North Queensland Land Council negotiates in good faith with all levels of government and regular change of direction and lack of clarity in policy and philosophy make it difficult to continue to engage with any degree of certainty.

The apology made by the Prime Minister in February 2008 expressed a deep commitment to partnership with Indigenous Australians that raised expectations that there could be practical improvements to services and infrastructure without winding back rights. These rights of self determination, consultation and land ownership were won over many decades, and always supported by the Australian Labor Party. North Queensland Land Council is disturbed that in government, unable to reach a partnership in a limited number of locations, that same party has seen fit to propose a legislative sledgehammer to remove these rights and implores the Senate to hold the government to account on its promise of a new deal for Indigenous Australians.

The government has clearly stated that it is committed in government to compliance with the Racial Discrimination Act and to 'facing the world as a united, peaceful and just nation." This bill is contrary to both those commitments.[4] Its actions to restore the Racial Discrimination Act's effect in the Northern Territory support the assurances they gave to the Australian people. To be followed so quickly by this bill which is discriminatory, continues to demonstrate the inconsistent and short sighted approach the government is exhibiting towards all issues in the Indigenous Affairs portfolio.

---

4 http://www.alp.org.au/platform/chapter_07.php#7aboriginal_peoples_and_torres_strait_islanders_resetting_the_relationship, Reference .47

Minister Macklin presumably supports the Australian Labor Party Platform assertion that ." Labor believes that negotiation produces better outcomes than litigation and that land use and ownership issues should be resolved by negotiation wherever possible." However by presenting this bill to the Australian Parliament, it is indicating that it's support for negotiation is limited to expedited outcomes across the board and that where negotiation fails in one community, the land rights of all Indigenous Australians should be limited by legislation.

The bill will not address State and Commonwealth Government failures in program delivery

The premise of the bill is to enable to the Commonwealth Government to improve remote indigenous housing and infrastructure. It has argued that the reason the proposed projects have not been completed is because of the inability of the Commonwealth Government to obtain Traditional Owner consent to proceed with construction. The North Queensland Land Council, without being privy to those negotiations, believes that the inability of the government to meet its housing and infrastructure building objectives is caused by government failure to meet its own commitments..

This amendment will regress three decades of developments in land rights for little or no result.

State Government Resourcing is inadequate

The Rudd Government has failed to meet its promise to the states that the Queensland Government would be resourced to implement their public housing and infrastructure projects. As of January 2010, the Queensland government have been unable to resource the surveying of Yarrabah that would be required to build public houses and infrastructure. Neither the Commonwealth or Queensland Governments have attempted to or provided the resources to resolve existing tenures and interests in Yarrabah. It is entirely incorrect in the communities that fall under the North Queensland Land Council for the Commonwealth Government to assert that inability to gain Traditional Owner consent is the cause of their delays when the preliminary work required by the Queensland Government has not commenced, nor has it been resourced to commence.

Lack Rudd Government Engagement

The Rudd Government's proposing this bill under the guise of expediting the construction of public housing and infrastructure is outrageous given their own lack of engagement in the process. The Commonwealth Government relinquished their responsibilities to the states, who in Queensland have been unable to progress the projects due to lack of resourcing. The Commonwealth Government has not only failed to engage with or make contact with the North Queensland Land Council to discuss what proposals and plans they have for public housing and infrastructure

projects, it has failed to return contact on the issues. The Queensland Government is fully engaged in the process, but maintain they do not have the resources promised by the Commonwealth Government to conduct the preliminary work – for instance land surveying and identification of town boundaries, that is necessary to commence building the actual infrastructure.

The premise that this bill is designed to address lack of engagement and provision of consent by Traditional Owners is insulting to the North Queensland Land Council and its constituents who have been seeking such engagement from the Commonwealth Government. To introduce racially discriminatory legislation and regress Native Title and relationships with Traditional Owners on a false premise should be rejected by the Australian Senate.

The amendment to the Future Acts regime is unnecessary and will result in weaker outcomes than the existing Indigenous Land Use Agreements

North Queensland Land Council vigorously opposes the mechanism that is proposed in relation to future acts. Of particular concern is the mechanism proposed in s 27JAA, which applies to native title land, or land subject to a native title claim. The practical effect of this clause will be that it ensures the inhibition of native title interests on a broad range of facilities identified in s27JAA(3)(b) which includes public heath facilities, public education facilities, police facilities and even sewerage treatment facilities.

The Bill seeks to water down the current the future acts process contained in the Native Title Act, and will give the government the capacity to sidestep the established process. Of particular concern is the effective removal of the "right to negotiate" and Indigenous Land Use Agreements.

S24MD of the Native Title Act establishes a mechanism available for the development of public housing and infrastructure on native title land. The new process would not require consent, whilst under the ordinary future act process it is generally required (in the form of an Indigenous Land Use Agreement). It is important to recognise that the capacity to strike Indigenous Land Use Agreement's currently provides a flexible and responsive process in relation to Future Acts.

The rationale for the removal of these rights, according to the explanatory memorandum that accompanied the bill is in order to establish 'a process for the timely construction of public housing and a limited class of public facilities by or on behalf of the crown'[5] Further, in his second reading speech, the Attorney General claimed that the changes were necessary to respond to 'uncertainty in relation to native title can be a barrier to meeting housing and service delivery of services' [6]

This view misunderstands the reason for delays that have occurred in relation to the delivery of these services. Further, it seeks to blame indigenous people for delays that are the result of inaction by the State and Commonwealth government.

[5] Explanatory Memorandum, Native Title Bill (No. 2) 2009
[6] Robert McClelland MP, House of Repersentatives Hansard, 21 October 2009.

The experience of housing development in Yarrabah, clearly illustrates this point. Yarrabah is the 3rd most disadvantaged community in Australia[7], and residents suffer significant levels of overcrowding. It is also a community where promises from state and commonwealth governments in relation to the provision of housing services have not been delivered. There has been no delay in actioning these projects as a result of objections from Traditional Owners. The delays have resulted from poor state/commonwealth co-ordination, and a failure on the part of the state government to undertake basic tasks associated with the development of housing such as gazetting and surveying the land.

To the people of Yarrabah, the effect of this bill will be to essentially blame them for a lack of progress that has been achieved by government parties involved. A better solution to resolving delays in delivering these projects would be a more transparent system with a higher level of accountability in relation to the action of the state and commonwealth government. It is not acceptable to essentially blame the victim for the failure of government.

The effect of Future Acts Changes on Indigenous Land Use Agreement's

The Attorney-General has stated that the 'Government wants to build new partnerships with the Indigenous community by reaching lasting and equitable agreements'[8] He has also emphasized the potential for native title to 'develop positive and enduring relationships between Indigenous and non- Indigenous Australians' and to be 'a vehicle for the reconciliation we all want to achieve'[9].

.North Queensland Land Council welcomes the Government's commitment to overcoming disadvantage in Aboriginal and Torres Strait Islander communities, including through addressing chronic housing shortages.

It is apparent that these objectives can best be pursued through agreement making and by working in partnership with Aboriginal and Torres Strait Islander peoples,

---

[7] Index of Relative Socio-economic Advantage and Disadavatge, ABS 2006

[8] R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the NativeTitle Consultative Forum, Canberra, 4 December 2008),

[9] Attorney-General's Department & Department of Families, Housing, Community Services and Indigenous Affairs, note 9.

rather than by diminishing the rights of traditional owners through a new future act process.

Advantages of Indigenous Land Use Agreement's

The Government states in the Discussion Paper that it:

recognises that strong relationships between governments, communities and service providers increase the capacity to achieve outcomes, and is determined to make engagement with Indigenous communities central to the design and delivery of programs and services. This includes ensuring that native title holders and claimants are involved in considering how, where and what housing and community infrastructure facilities are built in remote Indigenous communities.[10]

In our view, the best way to create 'strong relationships' and to ensure that traditional owners are 'central to the design and delivery of programs and services' is through agreement-making. The need for a new future act process has not been sufficiently demonstrated.

Governments do not need a new future acts process to build houses or other public infrastructure on native title lands. Indigenous Land Use Agreements are already available to parties to negotiate the building of houses, and other essential services, for Indigenous communities.

An Indigenous Land Use Agreement can provide certainty for all parties, including certainty around future developments and the long term relationship between the parties. Indigenous Land Use Agreements ensure that there is an ongoing and predictable relationship between the parties.

In addition, an Indigenous Land Use Agreement can be holistic, covering a range of issues. It can allow for issues concerning compensation to be dealt with up front, avoiding the need for protracted legal proceedings. An Indigenous Land Use Agreement can also be tailored to the circumstances of the specific community, including traditional laws, customs and cultural considerations.

10

By its very nature, an Indigenous Land Use Agreement requires *consent* and *agreement* between the parties. This is consistent with the standard of free, prior and informed consent and the rights of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. Indigenous Land Use Agreements also allow for the capacity to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions.

The North Queensland Land Council Alternative – A version of the Canadian Model

Whilst a number of criticisms have been raised of the government's proposed bill, we also believe that the Senate Committee provides a positive opportunity to consider alternative approached to the provision of housing services to indigenous people without undermining native title rights of traditional owners.

A review of recent developments in housing policy in Canada[11] demonstrates that there are a range of positive models that could be considered, in particular the following:

- Six Nations of the Grand River Territory
- Tyendinaga Mohawk Territory
- Seabird Island
- M'akola Housing Group of Societies
- Amisk Housing Association
- Wigwamen Inc.
- Manitoba Urban Housing Initiatives
- Wood Buffalo Housing and Development Corp.

North Queensland Land Council does not directly endorse these models, but we believe that they represent examples of positive and creative solutions to the provision of housing to indigenous people. The kind of solutions that do not involve the regressive and discriminatory legislative measures being proposed by the Commonwealth Government in the name of expediency.

We profile two examples of aboriginal ownership one of rental housing, on-reserve. The ownership models are the originals but they are, fortunately, no longer the only ones. At present, 40 First Nations have either implemented home ownership financing arrangements with banks or are in the process of doing so. On-reserve housing is by definition available only to members of a band or First Nation. For off-reserve housing, we summarize the characteristics of four housing organizations that provide off-reserve

[11] The International Housing Coalition, 'Aboriginal Housing in Canada: Building on Promising Practices' presented at the World Urban Forum June 2006, Vancouver, Canada

rental and transitional housing. They are all members of the National Aboriginal Housing Association that represents providers in most provinces and territories. In addition, we report two current non-aboriginal initiatives to provide off-reserve housing for aboriginal people – the experience of the Wood Buffalo Housing and Development Corporation and the Manitoba Real Estate Association's Affordable Aboriginal Home Ownership Program. Off-reserve housing is available to all aboriginals – status and non-status Indians, Métis and Inuit.

• Six Nations of the Grand River Territory (onreserve, aboriginal homeownership in western Ontario);
• Tyendinaga Mohawk Territory (on-reserve, aboriginal homeownership in eastern Ontario);
• Seabird Island (on-reserve rental housing in the lower mainland of British Columbia);
• M'Akola Housing Group of Societies (off-reserve urban rental and social housing on Vancouver Island, B.C.);
• Amisk Housing Association (off-reserve urban rental, high-risk clientele; transitional housing, in Edmonton);
• Wigwamen Inc.,(off-reserve urban housing services in Toronto).
• Manitoba urban projects (off-reserve rental and homeownership in Winnipeg);
• Wood Buffalo (off-reserve urban rental and transition to homeownership in northern Alberta).