Submission to Legal and Constitutional Affairs Committee Inquiry into Native Title Amendment Bill (No.2) 2009

Attorney-General's Department

Department of Families, Housing, Community Services and Indigenous Affairs

Introduction

This submission is made jointly by the Attorney-General's Department (AGD) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). Under the Administrative Arrangements Order, AGD is responsible for the relevant provisions of the *Native Title Act 1993*. FaHCSIA has worked closely with AGD on the development of the proposal due to its significance for the Government's 'closing the gap' strategy.

Context

Indigenous Australians living in remote communities remain the most disadvantaged group in the country. In many communities houses are overcrowded and in poor condition, and public infrastructure is severely lacking.

In 2008, the Council of Australian Governments (COAG) recognised the pressing need to improve public housing and infrastructure in remote communities. It agreed to the National Partnership on Remote Indigenous Housing which sets out a new and comprehensive framework for providing more and better houses. Unprecedented funding of $5.5 billion over 10 years will be directed to raise the standard of housing and infrastructure in remote communities. This investment will fund approximately 4200 new houses and upgrades to 4800 existing houses.

COAG has also agreed to the Remote Service Delivery National Partnership to improve the standard and range of services delivered to Indigenous families to be broadly comparable with those provided to other Australians in similar sized and located communities.

The Government intends that these and other closing the gap initiatives be developed and delivered in partnership with Indigenous Australians. A fundamental principle underpinning the National Partnerships is that engagement with Indigenous men, women and children and communities should be central to the design and delivery of programs and services. The Government is committed to ensuring that vital investment in housing and community infrastructure proceeds expeditiously and in a manner consistent with its commitment to work in partnership with Indigenous Australians.

The proposed amendment

The Native Title Amendment Bill (No.2) 2009 provides a process to assist the timely construction of public housing and a limited class of public facilities by or on behalf of the Crown, a local government body or other statutory authority of the Crown, for Indigenous people in communities on Indigenous held land.

Where a future act is covered by the new process and certain procedural requirements are met the future act will validly affect native title. However compliance with native title requirements is not of itself sufficient to allow housing and infrastructure projects to go ahead. It is still necessary to obtain permission for the project in accordance with the particular land rights legislation and other arrangements governing the use of the particular area of Indigenous held or managed land. This process typically involves extensive consultation and negotiation with the Indigenous organisation and/or people who hold the land rights interest.

The new process is confined in its application to future acts (such as the grant of a legal interest in land or the physical construction of buildings) that have all of the following features:

- The future act must relate to an area of Indigenous held land. This is because the Indigenous communities intended to benefit from facilities provided under the new process are situated on such lands.

- The future act must be done or commenced within 10 years of the commencement of the new process.

- The future act must relate to the establishment or use of specific types of facilities (see below) by or on behalf of the Crown or a local government body or other statutory authority of the Crown. This is intended to cover the public provision of those types of facilities.

- There must be a law protecting Indigenous heritage areas or sites in the area to be affected by the future act.

- The future act must not be the compulsory acquisition of native title. This is already dealt with by an existing future acts process.

The types of facilities that may be covered by the new process are:

- Public housing for Indigenous people living in the area. This does not include housing for community service staff or for private ownership.

- Public education and health facilities and police and emergency facilities that benefit Indigenous people living in the area.

- Certain facilities such as power and electricity facilities provided in connection with the housing and infrastructure facilities.

Where a future act is covered by the new process it will validly affect native title if certain procedural requirements are met (see below). The non-extinguishment principle applies to any acts done under the new process. This protects native title in the long term. Where an act does in fact have an impact on native title the new process requires that compensation be paid to native title holders whose rights are affected. This accords with existing provisions and processes under the Native Title Act.

Procedural requirements

The Native Title Act already has a number of different processes applying to different types of future acts. The procedural requirements in the existing processes vary depending on the type of future act. For many future acts the obligation is simply to notify native title parties and to give them an opportunity to comment. In other cases there is an obligation to negotiate in good faith with the native title party with a view to obtaining their consent to the act, with recourse to arbitration if agreement cannot be reached.

The procedural requirements of the new process are unique and have been developed in light of public consultation on the proposal (see below) and with the aim of improving housing and facilities for residents of Indigenous communities. The main elements are:

- Native title holders, registered claimants and representative bodies must be notified about the proposal in the way determined by the Attorney-General by legislative instrument.

- All notified parties have two months to comment on the act. This gives native title parties the option to provide feedback about a proposal while allowing it to proceed quickly should they consider further consultation is unnecessary.

- Any native title holder or registered claimant may, within the two months, request to be consulted. If they do, the project proponent (called 'action body' in the Bill) must consult about ways of minimising the impact of the act on native title and, about issues in relation to relevant access to the land or waters and the way anything authorised by the future act might be done.

Where consultation is requested the future act cannot validly be done until the native title party agrees in writing they have been consulted or a period of four months has expired since the notice was given. The four month period is intended to enable genuine engagement while ensuring urgently needed services can be provided quickly. This time-frame compares favourably with the existing 'right to negotiate', which allows a minimum of six months for parties to negotiate *and* reach agreement on a broad range of matters including royalty-like payments, and with the time periods under which extensive housing related community engagement has been conducted under the Strategic Indigenous Housing and Infrastructure Program.

The concept of 'consulting' has an established meaning. It is insufficient to simply 'go through the motions', and a proponent who failed to seriously engage or to consider information and arguments put forward would not in fact be 'consulting.' The Bill contains several original measures to ensure proponents do not simply wait for the four month period to expire but instead consult meaningfully where required under the new process:

- The Attorney-General could make regulations specifying the ways in which consultation must be conducted and proponents are required to comply with those requirements. The requirements may, for example, require face to face meetings with native title parties, that the proponents provide translators, or that issues of design, location and nature of proposed facilities are dealt with.

- Proponents must provide a compliance report to the Attorney-General on the operation of the procedural requirements in each case. The report must comply with any specific requirements which may be determined by the Attorney-General by legislative instrument. To promote transparency the Attorney-General may publish the compliance reports.

- A future act covered by the process will be invalid to the extent it affects native title if the proponent fails to give notice, to give an opportunity to comment, to provide a consultation report, or does the act before the end of the relevant consultation period.

These measures are supported by the requirements of the National Partnership Agreements under which housing and other facilities potentially covered by the new process will be provided. The implementation plans agreed between the Commonwealth and participating jurisdictions oblige State and Territory governments to ensure native title processes are complied with. The Commonwealth thus has an additional mechanism by which to ensure genuine engagement and consultation as required by the new process.

Further, native title compliance is merely one aspect of providing facilities to communities on Indigenous held land – proponents must also obtain permission under land rights legislation etc, which involves extensive consultation and negotiation with the Indigenous owners or community which holds the land rights interest.

The need for the new process

In some States native title has been identified as a barrier to meeting targets under the National Partnership. The existing specific future act processes are either uncertain in their application or do not have appropriate policy settings:

- Subdivision M – the 'freehold test' – could be used involving the compulsory acquisition of native title rights and any other rights including Indigenous land ownership or interest. This generally results in native title being extinguished, and the procedural rights of native title holders would be limited to whatever was available under the applicable compulsory acquisition law. Compulsory acquisition processes can also be protracted. The Australian Government takes the view that compulsory acquisition would rarely if ever be preferred on Indigenous held land.

- Subdivision J – public works etc on existing reserves: The extent to which the process applies to houses and facilities on Indigenous held land is unclear. Where it does and the works are 'public works', the act will extinguish native title, and the procedural rights would be limited to the right to be notified and to comment.

- Subdivision K – facilities for the public: This covers a limited category of acts which may include ancillary works and infrastructure for housing development although perhaps not the housing and substantive education facilities etc themselves.

The existing Indigenous Land Use Agreements (ILUA) provisions would remain as an option for future acts otherwise covered by the new process. However, the new process would be available in circumstances where the timely negotiation and registration of an ILUA is not possible or timely.

Consultations on the Bill

On 13 August 2009, the Commonwealth Attorney-General, the Hon Robert McClelland MP, and the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, released a discussion paper about the proposal for a new future act process for public housing and infrastructure.

Public consultation sessions to discuss the proposal were held in Adelaide, Alice Springs, Brisbane, Cairns, Darwin, Perth and Sydney. A further session was planned for Broome but was cancelled due to lack of interest. The sessions were well attended by native title representative bodies and state government agencies. Representatives from the Australian Human Rights Commission, the Law Council of Australia and the National Native Title Tribunal also attended the sessions.

Written submissions were also invited. The Government received 27 written submissions from a range of stakeholders including native title representative bodies, State governments and interested members of the public. These submissions are available at www.ag.gov.au.

There was agreement that public housing and infrastructure is urgently needed in remote communities but divergent views on whether a new native title process would assist to deliver this. Many argued existing native title processes are sufficient if used appropriately. There was discussion of whether the new process would be inconsistent with the *Racial Discrimination Act 1975* (Cth) or otherwise discriminatory. There was also considerable discussion of the specific procedural rights that should be accorded to native title holders and claimants under a new process. There was strong support for the proposition that any amendment should not be confined to remote areas.

State governments pressed the point that native title issues need to be resolved to progress the delivery of housing under the National Partnership. Native title representative bodies, and other organisations including the Australian Human Rights Commission emphasised the importance of genuine engagement between governments and native title holders and the need to protect native title rights and interests.

The Bill was developed having regard to the views put forward by stakeholders in relation to the proposal. As a result of stakeholder feedback additional consultation mechanisms have been included in the provision. This includes the requirement to

provide a consultation report before projects are commenced as proposed by the National Native Title Tribunal.

The new process will now apply to all Indigenous held and managed land, rather than being limited to remote areas as was originally proposed in the discussion paper. This change reflects strong views expressed by stakeholders during consultation.

Conclusion

The Bill will create a new native title future act process for vital public housing and infrastructure in discrete Indigenous communities, while ensuring native title rights and interests are protected. The new native process is not the sole mechanism by which improved housing and facilities will be delivered. It is but one of a multitude of initiatives the government is pursuing over a broad front to ensure the ambitious closing the gap targets are achieved and that the residents of communities on Indigenous held land can benefit quickly from the very substantial investment set aside for housing and facilities for these communities.