

CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

ABN 99 121 997 933 - ICN 268

SUBMISSION IN RELATION TO PROPOSED HOUSING AND INFRASTRUCTURE AMENDMENTS TO THE *NATIVE TITLE ACT 1993 (CTH)*

4 September 2009

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1. **INTRODUCTION**

- 1.1 The Carpentaria Land Council Aboriginal Corporation (“the **CLCAC**”) is the organisation carrying out the functions of a representative Aboriginal/Torres Strait Islander body pursuant to s203FE of the *Native Title Act 1993 (Cth)* (**‘NTA’**) in relation to land and waters in the southern Gulf of Carpentaria.
- 1.2 The CLCAC representative body area includes land and waters the subject of Federal Court Orders recognising the existence of native title.¹ It also includes areas which are the subject of native title claims and areas where native title is asserted notwithstanding that a formal claim is yet to be lodged. The CLCAC area includes determinations or claims adjacent to or in the vicinity of town areas.
- 1.3 The CLCAC supports the Commonwealth’s project for the provision of housing and infrastructure in the Aboriginal communities in its representative body area, but believes it is essential for its long term viability that the project be delivered in an agreed way that implements the wishes and needs of those communities.
- 1.4 FaHCSIA has circulated a document titled *Discussion Paper: Possible Housing and Infrastructure Native Title Amendments* dated August 2009 (**‘the Discussion Paper’**) suggesting an amendment to the NTA which would include a new subdivision in the NTA for infrastructure and housing on Aboriginal land (**‘the proposed amendment’**).
- 1.5 The CLCAC has a number of concerns in relation to the proposed amendment. They are as follows:

2. **SUMMARY**

- 2.1 In summary, the CLCAC does not see the necessity for the proposed amendment. In most cases it will serve no function other than to provide a means to further erode the rights of Aboriginal People, reward bureaucratic failures and incompetence and serve to highlight the present failure of State agencies to adequately engage and consult with Aboriginal communities.
- 2.2 Native title should be viewed as an opportunity for those delivering services to engage with Aboriginal communities to ensure that housing and infrastructure is developed in not only the most efficient and cost effective way, but also in a way that is premised on equality and mutual respect.

¹ See *Lardil Peoples v State of Queensland* [2004] FCA 298 (‘the Wellesley Sea Claim’) and *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* [2008] FCA 1855.

- 2.3 Processes already exist in the NTA that allow housing and infrastructure to be delivered to Aboriginal communities in a timely fashion, if they were properly utilised. The existing bureaucratic failure to provide adequate housing and infrastructure in Aboriginal communities has nothing to do with procedural rights under the NTA. Australian governments failed to provide adequate housing and infrastructure long before native title was recognised.
- 2.4 In the absence of viewing an exposure draft it is difficult to identify all the issues which may arise in relation to the proposed amendment. Further, it must be said that the Discussion Paper is unhelpfully vague.
- 2.5 The CLCAC wishes to make clear that our opposition to the proposed amendment is not an abstract rights based objection. Our opposition is based on a view derived from experience and understanding of the communities in which we operate which leads us to believe that the proposed amendment will only encourage inappropriate conduct from State Governments and will ultimately be counter-productive.
- 2.6 The CLCAC believes that FaHCSIA should abandon the idea of a special additional Future Act process for public housing and infrastructure. It should instead encourage State Governments to negotiate with Aboriginal communities and seek their informed support for housing and infrastructure projects by agreement.

3. THE CURRENT SCHEME UNDER THE NATIVE TITLE ACT

- 3.1 There is simply no reason to suggest that the operation or implementation of the NTA is the cause of any difficulties in delivering housing and infrastructure to Aboriginal communities.
- 3.2 Under the NTA as it currently stands, proponents can develop projects on Aboriginal land and authorise any future act by way of an agreement. This includes the provision of public housing and infrastructure. The NTA provides for alternative procedure agreements in a number of forms, and in doing so caters for situations where native title exists and where it does not.²
- 3.3 The CLCAC does not believe that Governments have seriously tried to avail themselves of the benefits available to them under the existing agreement provisions in the NTA. A clear advantage of the use of agreement under the NTA is that it is the only mechanism available whereby native title rights can be affected without creating future liabilities for the Government in relation to compensation. The terms of any compensation can be clarified upfront thus enabling the costs of the project to be developed with more certainty. A further advantage of creating agreed frameworks through agreement, is that it creates the

² See for example, ss.24BB, 24CB and 24DB, NTA.

flexibility for a range of projects to be developed and approved, rather than having them dealt with individually under a range of subdivisions of the NTA.

- 3.4 While it is necessary for any agreements with Aboriginal people to be registered under the NTA in order to bind third parties, even before they are so registered they constitute contracts that can be enforced under the general law. Agreements regarding native title would therefore not create any further impediment to housing and infrastructure projects than would any other agreement.
- 3.5 Even where an agreement is not pursued, the NTA already provides other mechanisms which enable the public housing or infrastructure to be built. In some instances Subdivision J will apply and, in others, Subdivision K will apply. In other instances it is open to a relevant body to compulsorily acquire land under Subdivision M. An important feature of both Subdivision K and Subdivision M is that they provide an element of equality by requiring native title holders to be provided the same rights as other landowners.³ Accordingly, diminution of the procedural rights under these subdivisions is necessarily discriminatory and should form no part of Government policy.
- 3.6 The Discussion Paper refers to a need to overcome uncertainty and delay in the provision of public housing and infrastructure in Aboriginal communities. It is unfortunate that this language is used as it has long been used in the rhetoric of some stakeholders as part of an attack on native title rights. As long as the procedures of the NTA are followed there is no uncertainty. Indeed, the NTA deems those activities as valid. Nor is there any reason for delay if the requirements in the NTA are approached sensibly, in good time and in good faith.
- 3.7 The CLCAC finds it incredulous that the Discussion Paper complains that “*there is uncertainty about the application of the existing specific future act processes*”. For the reasons outlined above, any confusion as to what subdivision applies is irrelevant if it is the subject of an agreement. In any event, the future act regime of the NTA has now been in operation for over a decade. All State governments have sections in the respective Crown Solicitor’s offices dedicated to native title. It would be expected that government departments who have, as their core business, the provision of services to Aboriginal communities, would have some familiarity with the future act regime. Other stakeholders that need to deal with areas where native title exists have managed to come to terms with their obligations under the NTA. Native title representative bodies too manage to advise native title holders and claimants of which division applies and what procedural rights are to be afforded.

³ The NTA refers to native title holders as having the same rights as the holders of “ordinary title”. See reference to the definition of “ordinary title” at s253 of the NTA.

- 3.8 Furthermore, the CLCAC is not aware of any instance whatsoever where native title rights have impeded the provision of public housing or infrastructure in those Aboriginal communities in which we operate. In such circumstances, it is difficult to see the necessity of the proposed amendment.⁴
- 3.9 In the Discussion Paper, which is premised on a statement that there will be \$5.5 billion dollars of funding over 10 years, it is simply disingenuous to suggest that Governments are incapable of properly implementing the program because they do not understand the operation of the NTA. The assertion is complete folly. The Commonwealth could write to each of the States and advise that unless they can confirm in writing that they have the capacity and expertise to lawfully implement the program in compliance with the NTA, they should return the funding to the Commonwealth so it can implement the program. The CLCAC believes that no State government would advise that they do not have the capacity or the expertise to comply with the NTA.
- 3.10 The Discussion Paper fails to provide any convincing reason as to why existing mechanisms under the NTA are inadequate. In the CLCAC's view, the existing mechanisms are sufficient to enable housing and infrastructure to be provided.

4. GENERAL CONCERNS

- 4.1 The CLCAC has a number of general concerns in relation to the proposed amendment.
- 4.2 First, the proposed amendment pays no regard to the social and political realities of some of the communities in which the housing and infrastructure is to be provided. In many areas in CLCAC's region, such as on Mornington Island, the traditional laws and customs of the residents provide that every bit of the land is owned by some person or family. Regardless of what native title legal process is employed, building public housing and infrastructure in Aboriginal communities will raise practical problems concerning whose land should bear the burden of public housing and infrastructure for the benefit of the whole of the community.
- 4.3 Public housing and infrastructure projects in Aboriginal communities require the support of those communities to succeed. Adequate housing is a fundamental human right that Aboriginal People are entitled to

⁴ As the Aboriginal & Torres Strait Islander Social Justice Commissioner remarked with regard to the intervention in his Native Title Report 2007 (at 207):

"This approach to native title treats native title as a hindrance rather than a necessity. Something to be legislated away where it looks like it may block a desired course of action. This is of deep concern."

enjoy.⁵ There is no doubt that the Aboriginal communities the CLCAC represents want and need better housing and infrastructure, but they also want that housing to be built in a way that addresses their specific needs with outcomes that respect their culture and property. Approached the wrong way, attempts to build housing and infrastructure in Aboriginal communities will lead to social disruption and animosity. If approached the right way, whole of community support for such projects will not be extremely difficult to obtain.

- 4.4 Empowering bureaucracies to force particular proposals on Aboriginal communities by legislation without proper negotiation will lead to great social disruption. The issue of how to manage public housing and infrastructure projects in such communities is a significant community issue. Questions relating to the recognition and application of Aboriginal laws and customs to such projects are not answered by simply providing a new mechanism in the NTA, particularly here such a mechanism simply operates to override the rights and interests of traditional owners.⁶ The appropriate way for such projects to progress is for them to be designed in conjunction with communities and delivered by agreement.
- 4.5 A second concern in relation to the proposed amendment is that it appears to be premised on the assumption that if a project is for the benefit of Aboriginal people generally, there is justification in overriding the interests of native title holders. This is of particular concern. Aboriginal People in the CLCAC's region want housing and infrastructure, but that there are important social and cultural reasons why they must be involved in the process.
- 4.6 Such an attitude is also fundamentally discriminatory. It would be unacceptable for the property rights of non-Aboriginal people in Australia to be diminished for the provision of benefits such as public housing or infrastructure. Any attempts by government to sweep away the property rights of individual non-Indigenous Australians in such circumstances on the basis that a public benefit would be provided would rightly lead to outrage and resistance. This will also be the case in Aboriginal communities.

⁵ International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3, entered into force 3 January 1976, entered into force for Australia, 10 March 1976. See also CESCR General Comment No 4 on the Right to Adequate Housing (13/12/1991).

⁶ As Maureen Tehan has remarked with regard to proposed mining projects:

"The seeds of ongoing dispute are to be found in regimes which fail to recognise Aboriginal interests in land and fail to allow adequate time and resources for decisionmaking about developments and protection of country. Where those interests are recognised there is increasing knowledge and understanding of the processes and effects of exploration and mining and an increasing willingness to participate in such ventures although not at the rate the mining industry would prefer."

Cited in Mick Dodson "The Mining Industry and Indigenous Land Owners – a Post-Native Title Act Analysis" Proceedings of the National Agricultural and Resources Outlook Conference, Canberra, 7-9 February 1995 p371 at 383.

- 4.7 A third concern is that the likely effect of the proposal would be to create an incentive for Governments to avoid trying to reach an agreement with Aboriginal people in favour of the simpler option of overriding their legal rights and interests. The policy underlying the provisions of the NTA dealing with agreement making is that discussion and agreement between Aboriginal and non-Aboriginal Australians is better than conflict and litigation. This policy applies as much to the interface of public housing and native title in Aboriginal communities as it does to other native title issues. The proposal in the Discussion Paper goes against this policy.
- 4.8 The proposed amendment is a return to policies of the past that ignored the wishes and rights of Aboriginal people. Like those past policies it is destined to fail. The mechanisms to allow State government departments and Aboriginal communities to engage in negotiations that would deliver successful public housing and infrastructure projects in Aboriginal communities already exist in the NTA. Government agencies should use them.
- 4.9 In the CLCAC's experience, government agencies often seem to view native title issues as simply a box to tick in the development process. Unfortunately, it is also often left as the last box to tick. Rather than go to native title holders and their representatives to develop proposals upfront, the project is developed, consultants retained, contracts entered to, and then, when the project is about to commence the native title process commences. This has the inevitable consequence that the native title holders are only provided with input into a proposal at a point where it is essentially concluded. This makes any consultation a farce and makes consultations subject to strict timeframes coupled with the pressure of cost blow-outs.
- 4.10 This problem is often made worse as a consequence of the fact that different bureaucracies have different responsibilities for different components of the project, with some of those agencies happy to ignore native title and leave it to another department to deal with. The proposed amendment only encourages this conduct. It creates no incentive to deal with Aboriginal people up front.
- 4.11 Finally, the proposed amendment is unhelpfully vague, particularly in relation to the subjective concept of "benefit".
- 4.12 In some parts of the Discussion Paper it is suggested that the proposed amendment would be used "for *projects benefiting remote Indigenous communities*".⁷ That begs the question of who decides what is for the

⁷ With regard to the vagueness of the concept of "public interest" or benefit Dickson CJ and La Forest J in the Supreme Court of Canada in *R v Sparrow* (1990) 7 DLR 4th remarked that:

"We find the public interest justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation of constitutional rights"

“*benefit*” of Aboriginal People. It is unclear as to whether this term means that something is of “*benefit*” when Aboriginal communities see a public housing or infrastructure project as being to their benefit, or whether it is of “*benefit*” when a government Department decides that something was for the benefit of the Aboriginal community.

- 4.13 To rely on this nebulous concept of “benefit” is also misleading in circumstances where it is effectively being used to justify a particular process at a given point in time. The traditional owners rights are immediately affected, and to the extent that s.24KA or 24M would otherwise operate, their procedural rights will be truncated in a discriminatory way. There is no guarantee that the land will continue to be used for the benefit of Aboriginal people. Housing and infrastructure can be sold off. There would be no reaffording of procedural rights once the purpose of the infrastructure and housing is changed. We note that the Discussion Paper suggests that it will only relate to “*public infrastructure*” and “*public housing*”, but in the absence of an agreement, the NTA provides no mechanism to review a sale of infrastructure once it is created. This is particularly so where the only requirement is that it be for the benefit of Aboriginal people generally, rather than “*native title holders*”. Furthermore, unless any change in status was itself a “*future act*”, then there would be no mechanism to ensure that native title holders had any input into the privatisation of public infrastructure.
- 4.14 Elsewhere the Discussion Paper uses a different descriptor to describe when the proposed amendment will apply. Accordingly, it is said to apply “*for public housing and infrastructure projects on Indigenous land*”.⁸ Here it is described in more open ended terms without any reference for the need for there to be any “*benefit*”. A further description which appears in the Discussion Paper is that the “new process would cover such facilities only where “*they are being established to service the relevant Indigenous community*”.
- 4.15 The CLCAC believes that the best people to determine what is of benefit to Aboriginal People are Aboriginal People themselves. Furthermore, if a project is truly beneficial, then Aboriginal People will support it and agreements should be relatively straight forward. In order to facilitate meaningful input, it would have also been helpful if there was some greater clarity as to precisely when the proposed amendment would operate, on what land it could be used and precisely what other restrictions will be placed on the infrastructure provided under the subdivision.

⁸ The page references to these quotes are not provided because the Discussion Paper contains neither paragraph or pages numbering to assist with referencing.

5. REWARDING BUREAUCRATIC FAILURES

- 5.1 In the CLCAC's view the true impediment to public housing and infrastructure in Aboriginal communities is not the native title rights of Aboriginal people. It is the failure and incompetence of the State and Territory bureaucracies that the Commonwealth funds to deliver such programs.
- 5.2 The whole focus of the Discussion Paper is based on a false premise that further overriding native title rights will make these bureaucracies more competent. The focus should be on how the Commonwealth can insist that State government bureaucracies that deliver these programs deliver them competently and successfully.
- 5.3 Annexure "A" to this submission is an example of the failure for infrastructure to be implemented in a timely manner on Mornington Island. It is clear from that example that the delay that occurred had nothing to do with native title but everything to do with the failure of the bureaucracy implementing the project and a flawed approach of trying to get traditional owners to enter into agreements without legal advice. The example is useful because even if the proposed amendment to the NTA was made, the delay would still have occurred because the approach by the Government was in contravention of its own legislation.
- 5.4 State governments are invariably eager to receive Commonwealth money to provide services in Aboriginal communities. When they receive this funding, however, they almost always fail to have proper regard to whether they can actually deliver such programs in an acceptable and successful way. Then, when the Commonwealth imposes deadlines on State bureaucracies, those bureaucracies will often attempt to override and steamroll traditional owners in Aboriginal communities in order to comply with those Commonwealth deadlines. The proposed amendment will give State government bureaucracies further legal powers to steamroll traditional owners in such circumstances. It will reward them for failure and incompetence by codifying in law an ability on their part to override the wishes of Aboriginal communities.
- 5.5 In CLCAC's view, what is required is an insistence on the part of the Commonwealth that there be reform of State bureaucracies so they are competent and successful. This should be the focus of any reform proposals regarding public housing and infrastructure in Aboriginal communities.

6. INADEQUACY OF CONSULTATION IN RELATION TO THE PROPOSED AMENDMENT

- 6.1 Throughout the Discussion Paper there is an assumption that further overriding of the future act regime is acceptable because adequate consultation will occur. The Discussion Paper states there will be
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“genuine consultation”. This of course begs the question as to what other type of consultation there is or whether there is ever a statutory requirement of *“non-genuine consultation”*. Elsewhere the Discussion Paper refers to projects proceedings *“with a specific consultation process”*, but no indication is given as to what that would be.

- 6.2 Despite the rhetoric in the Discussion Paper, that the Government recognizes *“strong relationships between governments, communities and service providers increase the capacity to achieve outcomes”*, it has not done anything to encourage the development of those relationships. Nor has the Commonwealth taken any step to ensure *“native title holders and claimants are involved in considering how, where and what housing and community infrastructure facilities are built in remote Indigenous communities.”*
- 6.3 Native title holders in the CLCAC’s region are currently feeling the effects of decisions made in relation to the provision of housing without any consultation with people on Mornington Island. There is currently an existing legislative requirement for the whole of Mornington Island to be transferred to a land trust under the *Aboriginal Land Act 1991* (Qld). That is a remedial measure which native title holders ought to be enjoying. In the interim the land remains the subject of a lease which still has 20 years to run. Housing is managed by the Mornington Shire Council and the land is held in trust under the lease. Without any consultation with Aboriginal people to deal with the matter, the Commonwealth is requiring that the Mornington Shire Lease to be extended by 40 years. People on Mornington Island have been told by the Queensland government that a decision has been made to extend the lease and to issue a 40 years sublease. They have been told that this will occur despite any objection they might have and that the Government will not consult with them. No one has yet been able to explain to the CLCAC why the extension is required so urgently that consultation is not possible. Nor have they explained why the lease extension is a beneficial measure, other than to say that the Commonwealth requires it. No consultation has been undertaken by the Commonwealth with the native title holders and claimants in relation to the proposal.
- 6.4 If that is the current approach of the Commonwealth, then it is hard to have any confidence that the Commonwealth will ensure that native title holders or claimants will be consulted in relation to infrastructure. Even the process of consultation in relation to this Discussion Paper is telling. It is a Discussion Paper about amendments to the NTA directly aimed at remote communities. The only information sessions being provided are in capital cities or large regional centres. There was no information session held in the CLCAC’s region, with the nearest session held over approximately 1000 kilometres away in Cairns.
- 6.5 More fundamentally, if the Commonwealth was truly committed to working with native title holders and claimants as the Discussion Paper

asserts, it would have already have made it a requirement of Commonwealth funding that State Governments enter into agreements with native title holders and claimants in relation to the provision of housing and infrastructure to ensure that a cooperative approach is implemented.

7. QUESTIONS ASKED IN DISCUSSION PAPER

7.1 The Discussion Paper asks three specific questions in relation to the proposed amendment. CLCAC would like to respond to those questions in detail:

Would the addition of a specific native title process for public housing and infrastructure in remote Indigenous communities assist the supply of adequate housing and raise the standard and range of services delivered to Indigenous families in remote communities?

7.2 In the CLCAC's view it would not. The key determinant of the provision of public housing and infrastructure is the will of the Government to provide it. For the reasons set out above, the NTA procedures do not alter this basic proposition. Encouraging bureaucracy to steam roll its view into Aboriginal communities is likely to be simply counterproductive and add to costs and delays.

7.3 If FaHCSIA is concerned to ensure more efficient provision of services in Aboriginal communities more effective measures might include the following:

- (a) making it a condition of receiving Commonwealth funding to deliver services in Aboriginal communities that the relevant State or Territory Department include Aboriginal communities early in the process of the design of such programs through a comprehensive program of consultation with native title holders at the outset of the project;
- (b) making it a condition of funding that any subcontractors engaged to manage the implementation of a project have some understanding of native title and cultural heritage laws and that they agree to abide by the same; and
- (c) requiring State or Territory agencies that seek Commonwealth funding to deliver services in Aboriginal communities to demonstrate that they have the will and sufficient expertise to consult with the relevant Aboriginal communities and deliver the relevant programs before they receive such funding, including that they have the capacity to comply with the NTA.

7.4 The CLCAC believes that one of the most obvious problems associated with the delivery of housing and infrastructure to Aboriginal communities

is the multiplicity of bureaucracies involved, all of which appear to extract part of the budget for administration. Indeed, there appears to be significant Commonwealth bureaucracy which provides funding to the States, who then divide the delivery of the program among multiple agencies who each have administrative expenses, but in any event then sub-contract the management of the program to a project manager who obviously needs to be paid, who in turn contracts the people who will actually carry out the works.

- 7.5 The CLCAC's experience in relation to the example at Annexure A, is that despite attempts by the CLCAC to facilitate the project, there was no responsibility for dealing with native title and indeed, the Department responsible for the project was content to proceed notwithstanding that native title and cultural heritage issues had not been resolved.

What particular requirements about consulting with native title holders would ensure native title is taken into account in engagements between governments, service providers and Indigenous communities about the design and delivery of housing and infrastructure services?

- 7.6 The Discussion Paper remarks that consultation within the proposed Future Act process would reflect "*the Government's commitment to make engagement with Indigenous communities, including any native title holders, central to the delivery of programs and services*". Given that the whole focus of the proposed amendment is to move away from the use of the agreement making provisions of the NTA in favour of other subdivisions, it is hard to see how the stated commitment is reflected in the government's proposal.
- 7.7 Consultation with Indigenous people that obtains their free, prior and informed consent,⁹ focuses on the rights of the Indigenous people concerned¹⁰ and takes account of their traditional laws and customs of Indigenous people regarding decision making¹¹ is an internationally recognised human right.¹² Native title rights concern property rights and

⁹ See Article 19 of the United Nations Declaration of the Rights of Indigenous Peoples A/RES/61/295 (2 October 2007) reads: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representation institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

¹⁰ Article 27 of the International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 has been interpreted to require consultation that has such a focus. See *Mahuika et al v New Zealand* (547/1993), ICCPR, A/56/40 vol II (27 October 2000) 11 at paras 9.5 and 9.8 and *Länsman v Finland* (511/1992), ICCPR, A/50/40, vol II (26 October 1994) 66 (CCPR/C/52/D/511/1992) at para 9.6.

¹¹ See the judgments of the Inter-American Court of Human Rights with regard to providing alternative land to Indigenous people when their traditional lands are taken in *The Case of the Sawhoyamaya Indigenous Community v Paraguay* (Judgment of March 29, 2006) at paras. 135 and 212 and *The Case of the Yakye Axa Indigenous Community v Paraguay* (Judgement of June 17, 2005) at paras.151 and 217.

¹² Such consultation is also required by ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries (June 27, 1989) Art. 6(2). An ILO committee established to examine alleged non-observance of this provision remarked:

human rights such as the right of Aboriginal people to be consulted. Aboriginal communities want their rights in that regard to be upheld.

- 7.8 At present, there is a fundamental failure across all levels of government to adequately consult Aboriginal communities.
- 7.9 The so-called consultation that occurs is often merely a cloak to conceal that decisions have already been made by Government agencies without taking any Aboriginal input into account. It is not unusual for Government departments to hold meetings, relied upon as “consultation”, which are in effect only information sessions with Aboriginal people. Alternatively, opportunity is provided for Aboriginal People to engage with the issue, but no resources are provided to them to check the information or seek independent advice. In other instances notices are sent to Aboriginal organisations with an extremely tight short time frame in which make submissions.
- 7.10 The problem is even more acute for Prescribed Bodies Corporate (PBCs). There is little or no funding available for those corporations notwithstanding that they are required to be the statutory interface between the proponents of future acts and the native title holders. Often notices are provided with little information, accompanied by requests for comments to be provided within 28 days. No resources are provided to enable PBCs to canvas issues with native title holders. A process such as this serves only to give the impression that consultation is occurring.
- 7.11 In CLCAC’s view, consultation requires effective and genuine engagement with Aboriginal people. Consultation does not occur:
- a) by meeting with Aboriginal people to tell them what has been already decided;
 - b) by meeting with Aboriginal people to discuss a stated issue but then raising a completely different issue with that Aboriginal community which they did not have notice of, or time to consider;

“ .. the concept of consulting with indigenous peoples that could be affected by the exploration or exploitation of natural resources includes establishing a general dialogue between both parties characterised by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention. In addition, Article 6 requires that consultation should occur beforehand, which implied that communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies...[I]f an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention.”

See Report of the Committee Set Up to Examine the Representation Alleging Non-Observance of the Indigenous and Tribal Peoples’ Convention, 1989 (No.169) by Ecuador, Made by CEOSL CB 282/14/2(Nov 2001), paras. 38 & 44.

- c) where Aboriginal people are pressured to decide an issue a particular way under threat of a negative impact or sanctions;¹³
- d) where discussion papers and other proposals are issued with very short time frames in circumstances where many Aboriginal organisations do not have the resources to respond to such short time frames; or
- e) where consultation sessions are held in capital cities hundreds or thousands of kilometers away from the relevant Aboriginal community making it impossible for members of that community to attend.

It should also be noted that a right to comment is not consultation.

7.12 In the CLCAC's view consultation involves the provision of accurate information to Aboriginal communities, notice that a matter is being considered, the early involvement of the community in the process, the community being given time to consider a proposal, the relevant Departments not having preconceived ideas about how projects should occur and Departments considering Aboriginal input in their approach to issues. It is unfortunate that consultation of this nature is so rare.

Are there any concerns raised by the Government's proposed positions, that:

- i. The 'non-extinguishment principle' should apply to acts covered by the new process*
- ii. Compensation should be available for any impact on native title of acts validated by the new process, and*
- iii. Heritage protection through other legislation should be a precondition to the new process being available.*

(i) The non-Extinguishment Principle

7.13 In the CLCAC's view whether the non-extinguishment principle should apply needs to be determined on a case by case basis. That is why agreements under the NTA are the most appropriate means to deal with infrastructure and housing. In our view the requirement of extinguishment in s.24JA can be a disincentive for Aboriginal People to approve certain agreements.

7.14 In other instances the non-extinguishment principle can be meaningless. Because there are no defined time limits for the existence of infrastructure, they can in many instances be permanent. In those circumstances the non-extinguishment principle has little effect other

¹³ Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs [2009] FCA 844,

than to be used by Governments to reduce the amount of compensation provided.

(ii) Compensation

7.15 It is the CLCAC's opinion that compensation should be paid in all circumstances unless it is otherwise waived by consent in an agreement. Indeed it would be fundamentally discriminatory for compensation not to be available in such circumstances. No other group in the Australian community would be denied compensation for the taking of its land even where the land was taken for the public benefit. In any event, compensation is required by virtue of s.51(xxxi) of the Constitution.

(iii) Heritage Protection

7.16 If the proposed special Future Act process were to proceed CLCAC believes that heritage protection should be precondition to it being available. However, such a precondition may not be enough. In Queensland there are limitations in heritage protection scheme such that Aboriginal cultural heritage is not always protected.

8. FAILURE TO PROPERLY FUND ABORIGINAL ORGANISATIONS SO THEY CAN RESPOND TO HOUSING AND INFRASTRUCTURE PROPOSALS

8.1 Critical to the ability of native title holders and claimants being consulted, is that they be resourced to actively participate in the decision-making process.

8.2 PBCs are established under the NTA to be the agents or trustees of the traditional owners'. Their purpose under the *Native Title (Prescribed Bodies Corporate) Regulation 1999* is to respond to any proposals to affect the native title rights in regard to which they have responsibilities. Aboriginal representative bodies also have obligations to act on instructions. Native title holders and claimants are entitled to be informed of the proposal and make informed decisions.

8.3 In the absence of native title holders and claimants being in a position to make informed decisions and provide instructions, the ability for them to approve projects or to provide informed comment and the ability for them to avail themselves of the procedural rights they are entitled to becomes non-existent.

8.4 It is remarkable that in an Aboriginal housing program of 5.5 billion dollars the Commonwealth is saying that it has no money available to give to PBCs to resource them to be able to carry out their statutory functions of responding to, and facilitating, projects such as those having to do with public housing and infrastructure in Aboriginal communities.

8.5 The State which receives the funding is also saying it has no funding to facilitate the process. Yet both the Commonwealth and the State can provide resources to consulting firms to manage the project and facilitate the program for the Government. This failure to properly resource Aboriginal People is unacceptable.

9. CONCLUSION

9.1 The CLCAC wants public housing and infrastructure to be provided in remote Aboriginal communities. It therefore submits that:

- (a) the proposed amendments be abandoned;
- (b) the focus in improving performance in this areas should be on the State and Territory bureaucracies administering these programs; and
- (c) the Commonwealth should adhere to its own policy statements on consultation with Aboriginal communities more consistently.

4 September 2009

Annexure “A”

Example: - Mornington Island Sewerage Facility and Land Fill

Background

The Lardil, Yangkaal, Gangalidda and Kaiadilt People have been the native title holders for the seas around the Wellesley Islands since 2004. Prior to that determination the claim had been a registered claim since 1997. At all times the State had been a party to those proceedings. The Wellesley Islands land claim resulted in a determination in favour of the Lardil, Yangkaal, Gangalidda and Kaiadilt People in November 2008. Prior to that determination it was the subject of a registered claim since 2005. The State was, at all times, a party to those proceedings as well.

The Department of Local Government wanted to build an ocean sewerage outfall system and land fill site. Both activities occurred in areas where specific people had particular interests under traditional law and customs. Both have potentially significant environmental effects. How infrastructure of this kind occurs on a small island also creates some additional considerations.

As is apparent from the Chronology below, despite being a department whose core business includes dealing with Aboriginal People, including for the purposes of providing infrastructure and housing, no attempt was made to communicate with the people with statutory responsibilities for cultural heritage and native title upfront. When contact with native title holders was attempted, and flaws in the Department’s procedures identified, it was the representatives of the native title holders who tried to fix the problem. Rather than work with native title holders to do so, the Department responded by silence and inaction.

Chronology

1. The CLCAC and native title holders first became aware of the Mornington Island Sewerage Facility and Landfill with the receipt of a future act notice issued pursuant to s.24JA of the *NTA* on 2 September 2008.
2. The notice itself advised that the duration of the act would be 9 months, but did not disclose that the intention was to extinguish any native title affected by the works. Clearly the intention was for the works to be permanent.
3. At no stage prior to that Notice was either the CLCAC or the Gulf Region Aboriginal Corporation (**“GRAC”**) (the relevant PBC) advised of the project or advised that negotiations were occurring with native title holders. Instead the Department approached Aboriginal people directly.

4. On 26 September 2008 the legal representative of the native title holders made a request for further information. It was noted that s.24KA was the relevant subdivision under the NTA for the area below low water mark. The letter noted that the provision of the information will enable the matter to be dealt with as “*expeditiously as possible*”.
5. On 5 November 2008 (5 weeks later), the contracted manager of the project sent an email in reply providing information at the request of an officer of the Department of Local Government. That email provided some basic information in relation to the project, and also included a Cultural Heritage Agreement.
6. The difficulty with the agreement was that:
 - a. it referred legislation which no longer existed, and hadn't been in existence for 5 years, and also referred to Apudthama Land Trust which is at Injinoo on Cape York;
 - b. it failed to comply with the *Aboriginal Cultural Heritage Act 2003* (Qld) ('ACH Act'); and
 - c. the native title holders were clearly promised a cultural heritage management plan, but none of the procedures to enable it to be a cultural heritage management plan were followed.
7. These failures were not just technicalities. Activities carried out pursuant to a cultural heritage agreement or a cultural heritage management plan provide a complete defense to any destruction of cultural heritage. The failure to follow the scheme of the ACH Act meant that no party was protected by the Agreement. This had significant consequences for the contractors as much as anyone else.
8. As far as the CLCAC is aware, none of the Aboriginal people who signed the cultural heritage agreement received any legal advice in relation to the content of the agreement, notwithstanding that it required them to give indemnities to the Government. Representatives of the Government witnessed the signatures. The fact that the agreement contained references to legislation which had not existed obviously raises concerns of the understanding of any Aboriginal people of its contents.
9. In early November 2008 a number of telephone calls were made and an email sent by the legal representatives of the native title holders to the proponent and the Department of Local Government outlining a number of concerns with the proposal, the approach that had been taken and requesting further information from the Department. The email sent to the Department of Local Government set out in detail the inconsistency of the agreement with the ACH Act. The email also requested a copy of any environmental study.

10. No substantive response was received from the Department of Local Government
11. Some six months later, in May 2009, Crown Law (Qld) provided a draft cultural heritage agreement for consideration in relation to the proposal.
12. On 11 May 2009 the CLCAC held a meeting of GRAC and the native title holders on Mornington Island. This was the first opportunity to discuss the sewerage facility in any meaningful way with native title holders. Despite expecting a level of general understanding of the project, the native title holders present at the meeting advised that they had not been properly consulted in relation to the project. The CLCAC was instructed to negotiate the terms of a Cultural Heritage Agreement for the sewerage outfall system and landfill site, but were instructed that the Agreement was not to be finalised until:
 - a. The environmental study for both proposals is provided and considered; and
 - b. A satisfactory explanation is given as to why options, including a recycling system, other than an outfall system is provided.
13. On 29 May 2009, the CLCAC forwarded a draft cultural heritage agreement to Crown Law and requested the information which was requested in the meeting by native title holders. The draft agreement provided reflected the standard cultural heritage agreement which has been adopted in the region. It was hoped that the use of the standard agreement would ensure a quick resolution to the matter.
14. On 11 June 2009 the CLCAC forwarded a further draft cultural heritage agreement to Crown Law.
15. On 2 July 2009 Crown Law wrote to the CLCAC advising that it was assisting the Department of Infrastructure and Planning in this matter and provided a response to the CLCAC draft cultural heritage agreement.
16. On 7 July 2009 Crown Law provided to the CLCAC background environmental reports for the project.
17. On 13 July 2009, the CLCAC participated in a teleconference with Crown Law and a representative of the Department of Local Government. It was agreed at that meeting that:
 - a. The Department would provide a response to a proposal to present the environmental information; and

- b. Crown Law indicated it would start looking at the issue of the future act notices and in the meantime would give further consideration to the cultural heritage agreement.
18. On 23 July 2009, Crown Law provided an email which answered questions in relation environmental issues.
19. On 12 August 2009 Crown Law advised the CLCAC that the Mornington Shire Council had advised that it was willing to host the presentation on environmental issues and that they wanted to try and organise for this to occur at the end of August.
20. On 13 August 2009, Mornington Shire Council sent an email to Crown Law and others that stated:
- “ I am simply astounded that, having been advised by [name withheld] (DLGSPR) on 24 April 2009 that the project was proceeding with Native Title and Cultural Heritage issues still outstanding and that this was ostensibly confirmed in late June and more recently by [name withheld] email of 5 August, the penny has suddenly dropped that these outstanding matters are quite important to resolve! It is unacceptable that Council is now being pressured to convene a meeting because the Queensland Govt has not done the necessary legal clearances and the project is at risk of non-completion and cost over-runs. Council is not the project manager, we are the client.*
- Council, through the Deputy CEO, [name withheld] and the Deputy Mayor[name withheld], informed [name withheld] of Qld Govt in March 2008 that consultation had been inadequate and not considered NT. Our advice was ignored. We are happy to meet with the CLAC and the project manager to discuss the technical issues of the project but this is not going to happen before 1 September.*
21. On 13 August 2009 Crown Law forwarded an email to the CLCAC and others advising that it was necessary for the project to commence by 25 August 2009 (ie. in 12 days time) otherwise it is not able to commence until next year. At no time prior to that email was any timeframe of that nature raised with the CLCAC.
22. At the time the 12 day deadline was raised:
- a. no explanation had been provided as to the circumstances surrounding the signing of the original documents by some Aboriginal People in relation to Aboriginal cultural heritage in the absence of legal advice;
- b. the CLCAC was awaiting the further draft of the cultural heritage agreement with the State having been considering the further draft since 11 July 2009; and
- c. no notice has been issued under the *Native Title Act 1993* (Cth) in relation to the area the subject of the Wellesley Sea Claim as the State indicated it would.
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23. The position remains the status as at the date of this submission.

Summary

The above chronology is telling of the inappropriateness of the proposal in the Discussion Paper. At every stage the CLCAC and native title holders have sought to deal with the matter expeditiously to avoid delay. Rather than deal with native title issues upfront and engage with Aboriginal people upfront, it was left as the last box to tick and only then would seem, after relevant contracts being entered into. Notwithstanding that there was clearly contractual obligations that needed to be complied with, the Department took no steps to address legitimate issues that had been raised, and, it would seem, deliberately avoided taking steps to deal with the native title issues.

There can be no complaint that the relevant officers did not understand the relevant NTA procedures. The CLCAC advised them of the relevant subdivision from the outset. A year later they still had not acted on that advice.

To highlight the inappropriateness of the proposed amendment set out in the Discussion Paper, on the day the Crown Law advised that the project was to start in 12 days, they forwarded a copy of the Discussion Paper to the CLCAC. From the CLCAC's perspective that action was a statement that somehow the delays were the fault of native title holders and that the Commonwealth would be legislating the problem away.

The above project has clearly incurred costs as a result of failure to comply with legislation. These costs could have been avoided if the native title holders had been approached at the outset with their legal representatives.

Furthermore, the process would have been quicker if their representatives were properly resourced to deal with the problem. The resources required to enable them to do so would have been insignificant compared with the funds which have been wasted on the process that was adopted.