

Attorney-General Robert McClelland
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Attorney

Re: Proposed change to the future act regime concerning public housing and infrastructure in remote Indigenous communities

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

Introduction

In August sometime, the Attorney-General's Department and the Families, Housing, Community Services and Indigenous Affairs Department released a discussion paper 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 are 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 the need for an ILUA, which is needed only in the 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 just-published Cattermole-Davies Review of the 15-month-old Strategic Indigenous Housing and Infrastructure Program. Many reasons emerge in the review by Ms Cattermole and Mr Davies but native title isn't one of them. To the contrary, the 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 mentioned in their 40-page review of the disastrous SIHIP program.

Sure, native title *may* cause delays, just like any number of factors – including the weather, but there is no evidence that native title *has* caused *any* delay in the NT.

The discussion paper's premise eerily echoes the recent claim by WA Treasurer and Housing Minister Troy Buswell that native title is holding up the \$496 million Indigenous housing program in WA. 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 an assessment of native title has yet to be conducted, it can hardly be to blame!

The Queensland situation

So, native title is not retarding the provision of Indigenous housing in Gunbalanya in the NT or Mowanjam in WA. Might these lamentable failures in WA and the NT present a convenient, but lame, 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 the nation; Yarrabah (3rd), Palm Island (4th), Kowanyama (7th), Napranum (8th), Umagico (11th), Cherbourg (12th), Boigu (13th), Injinoo (15th) and Wujal Wujal (20th). Predictably, all nine are Indigenous communities. Is there any evidence to suggest native title holding up critical housing in these communities?

If you travel to Kowanyama, the 3rd most disadvantaged community in Queensland according to the ABS-compiled *Index of Relative Socio-economic Advantage and Disadvantage* (based on 2006 Census data), you'll quickly learn that it is not native title that is contributing to the housing crisis there. The crisis in Kowanyama – one of 30 such Deed of Grant in Trust communities in Queensland - is such that, in a community of about 1300, there are nearly 70 families on the waiting list. But if it's not native title which is delaying building urgently-needed houses for these families, are there other identified factors?

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

Section 29 of the Queensland *Aboriginal Land Act 1991* mandates the relevant Minister to transfer the Kowanyama DOGIT 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, no necessary directions have yet been given and no necessary appointments have yet been made to fulfill this legislative duty for the Kowanyama township area. In 2008, Badu Islanders, frustrated with the decades of delay, embarrassed the Minister for Natural Resources by issuing legal proceedings to make him fulfill his statutory duty.

In the township area of 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 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), Indigenous Coordination Center 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, NTA 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 issues. Remarkably, the Queensland Government did not attend the Workshop in Kowanyama to discuss these issues, although it did relay its apologies.

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 marshaled real change in some of Australia's most disadvantaged communities. What happened to it? There was a departure of political will as the embers of the Palm Island Police Station dulled and the issue returned to the bureaucracy. It can be charted like this:

August 2005	Report from Palm Island Select Committee
November 2005	Beattie Government Response

December 2005	Recommendation on tenure rationalization endorsed by Cabinet
April 2007	Funding approved for 'pilot' project on Palm Island
Late 2008	The <i>Improved Future Land Practices (Palm Island)</i> 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
22 nd 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.

But the ringing question remains: how can such a disadvantaged community as Palm Island – once described as the most violent place on the planet outside of a war-zone - be so forsaken when the housing issue has been clearly identified as critical 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 Mr 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 issue on Palm Island, and that overcrowding was central to addressing a number of issues including health and

child safety. But Minister Swarten 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.*¹

It doesn't seem to matter to Mr Swarten who's sharing the bedroom. The recent Mullighan Inquiry in South Australia found direct causation between overcrowding and child sexual abuse and community dysfunction. It was succinctly stated in relation to APY lands:

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.²

Minister Swarten's department had more than \$50m of Indigenous housing money unspent in a recent financial year. The mundane tragedy is that these unspent funds could have been front-ended to resolve many of the long-standing issues, such as the Katter leases, but just haven't been.

The bigger picture

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 movement on Indigenous housing but only to secure the half billion dollars on offer from the Rudd Government. If Minister Jenny Macklin takes away any abiding lesson from the SIHIP humiliation, it should be that the States and the Territory are wholly ill-equipped to manage these funds in this critical role. There is a SIHIP-like disaster waiting for Minister Macklin in Queensland, and quite possibly too in WA. The mere fact of that the Indigenous Housing Crisis is as critical as it is evinces that the States and Territory are inexperienced with and not adequate to the ever-expanding task.

¹ Quoted in Jeff Waters, *Gone for a Song: a death in custody on Palm Island*, ABC Books 2008, at159.

² John Wisemen, 'Overcrowding opens door to social tragedy', *The Australian*, 18 August 2008, at 20.

Minister Macklin needs to take a leading role in managing the money and managing these housing programs.

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, in Queensland and in the South Australian communities. Yet the relevant States and the Territory have demonstrably and disastrously failed in providing housing and infrastructure to Indigenous communities. Prime Minister Rudd has nominated Reconciliation as one of his big ticket issues but surely he cannot fail to recognise that it can never occur whilst the States have primary responsibility for Indigenous Affairs.

The offer of 'genuine' consultation

In the discussion paper's introduction, it breathlessly states that 'native title negotiations can provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships'. However, the discussion paper 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. So much for facilitating the reconciliation process and forging new, enduring relationships!

I would submit that this offer of 'genuine' consultation is to be regarded as one would the offer of a 'genuine' Rolex in the alleyways of Hong Kong.

Interestingly, the details of this 'genuine' consultation process are not disclosed in the discussion paper, so one doesn't even get to evaluate the process. If it bears any resemblance to the consultation process surrounding this proposed amendment, 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 canter 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. It's inadequate consultation at best, deceptive at worse.

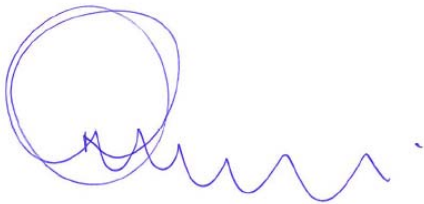
Conclusion

The case for the proposed change to the NTA future act regime concerning public housing and infrastructure in remote Indigenous communities is not persuasive. Assertions in the discussion paper do not appear to have any hard facts or evidence to buttress them.

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, as might monsoonal rains. And there is no evidence from any source that the present future act processes *has* caused any delay, let alone 'considerable delay'.

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.

Yours faithfully

A handwritten signature in blue ink, consisting of a large, loopy initial 'D' followed by a series of smaller, connected loops and a final flourish.

Daniel Lavery

Chambers

4 September 2009

Daniel Lavery is a lawyer who 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 submission he can be emailed at daniel.lavery@jcu.edu.au