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RE: Submission on Discussion Paper: Possible housing and Infrastructure native title amendments

The following are my personal comments. They are brief, and excuse any aspect that becomes unfortunately repetitive.

A. The Substantive legal Questions

- Whether the **mere assertion** that native title is not extinguished and just suppressed and can be revived at a later date, has the legal effect, for all time, of actually extinguishing any native title in that land which the courts of Australia will recognise and enforce;
- Are the proposed amendments capable of surviving arguable invalidity as not a ‘special measures’ and just plain unlawful racial discrimination;

The effect of Exclusive Possession

The Government contends that the *Possible housing and infrastructure native title amendments* do not necessarily extinguish native title. It was said that if it affected native title at all, it did no more than *suspend* the right of the traditional owners to exercise their native title (the enjoyment of which, it is proposed, may well have continued in fact).

It is difficult to logically view existing native title rights and interest co-existing with a house or other public community building without there being either the legal affect of the future act as an outright acquisition of any native title interests or the legal need to firstly do so.

To be extra sure of avoiding racial discrimination and attempts be consistent with either the NTA or some other legal process applied to all other land holders, the proposal states that if native tile was “impacted upon” by these proposed future acts designed to speed up accessibility of much needed public housing and other community buildings, which an *unintended* legal effect of “exclusive possession” of the land results, than compensation would be available to validate title to the land the public housing buildings are on; meaning there was a possibility in designing this proposal that compulsory acquisition of any native title rights and interest could most likely occur.

The proposed provision for compensation is not just an afterthought or cautionary insurance; direct acquisition of native title was a serious consideration in these amendments. In other words, by the inclusion of the proposed compensation

safeguard- provision, there was more than a remote chance that an actual acquisition would happen under these amendments.

Experimenting with property rights [read native title holders] that the same processes or treatment are not directed at any other land holder places the entire NTA on a greater slippery slide of unlawful racial discrimination. Tagging opportunistically a “special measures” peg under the RDA to make such discriminatory treatment legal will not save the unlawful legal effect of this proposed amendment.

The stated purpose and goals of the Government is not the legal test. Courts could well examine legislation to ensure that the declared purpose and goals are genuine and non discriminatory; especially with property rights. A bald declaration by Government that:

The Government is considering amending the Native Title Act (NTA) to include 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 for an Indigenous land use Agreement (ILUA)

does not *ipso facto* meet the lawful discriminatory legal effects that will survive the amendments as a “special measure”; as the High Court stated:

A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on a people of a particular race”

[Western Australia v the Commonwealth (1993) 183 CLR 373 at 461.]

The Government cannot employ such a naked declaration of a non extinguishment principle as a shield to protect an unlawful discriminatory proposed enacted provision into the NTA that struggles to survive as “special measure” under the RDA itself. The NTA survives because there is yet to be a Constitutional legal challenge to its validity as a special measure.

To pretend that the speedy delivery of new public homes and other public community infrastructures, usually a normal and non discriminatory function and service of government to all its citizens, misunderstands the criteria for the beneficial or discriminatory effects of a ‘special measure.’”

The public infrastructures envisage building medical clinics, schools and police stations, street lighting, water supply and electricity distribution. These are thought to fall safely in the “special measures” criteria because of being targeted solely “to service the relevant [remote] Indigenous community and such basic services will be a “benefit” to the relevant Indigenous community.

The Government steps onto slippery legal ground when basic community services can be provided or offered using race as a criteria. These amendments are confusing desired government policy outcomes by attempting to creep pass racial discrimination under the shadow of law; meaning “special measures under the Racial Discrimination Act 1975 (Cth) –see s10.

As to the NTA itself being a “special measure,” there was scant evidence on this point argued or submitted in the 1995 *Native Title Act case*. The then High Court Judges had to unanimously lean heavily on the NTA’s *Preamble* to justify the discriminatory treatment of the NTA to ensure that the NTA survives under both the Constitutional Race Power and s8(1) of RDA [special measure]. Though the High Court in the *Native Title Act case* decided obiter dicta that the Act was a beneficial law and therefore did not consider the wider issues of whether a non-beneficial law is permitted by the race power. That point was left to another High Court case, *Kartinyeri*. The eventual Constitutional legal challenge of special measures is a day just waiting to happen. The NTA Preamble states in part:

The people of Australian intend:

- (a) **to rectify the consequences of past injustices by the *special measures*** contained in this Act, announced at the time of introduction of this Act into Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
- (b) **to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation** to which their rich and diverse culture, fully entitle them to aspire.

For all other property holders, there are appropriate legislation in place as to both the process of intention to acquire and compensation procedures well known and followed.

Just to indicate that all Indigenous remote communities and existing native title holders (include those outside of the statutory recognition under the NTA) will have afforded a process “*consultation*” away from the normal procedures of acquisition continues the masquerade of legitimacy to obfuscate unlawful racial discrimination to deliver non discriminatory public services.

Summary Overview

If the proposed future act, grant, license, lease or any other process to build public homes and other public community infrastructures had this effect of both extinguishment and acquisition on the right to exercise native title, it was stated by Government that the legal effect ceased when the land came once again to be held by the native title holders. This is legal illogic and unlawful racial discrimination.

The legal question is not whether the Government mere assertion and new amendments to the NTA **with consultation** “would support the non-extinguishment” principle being part of the new [amended future act of NTA] process because it is committed to minimising the impact of public housing and infrastructure on native title” but whether the future housing and other community infrastructure future acts are of such a legal nature as being “inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title.”

The test of inconsistencies is the current broad and accepted legal test for valid native title extinguishment and not policy assertions of Government coloured by amendments to the NTA that states regardless of any inconsistencies, native title "would be fully suppressed and could fully revive in the future."

Just in case, if the Government's proposed new public housing and other community infrastructure future acts do actually "extinguish" native title then the amendments would also include a provision for "compensation;" just terms for compensation if the "impact" is actually an acquisition may still be argued to apply regardless of the specific limiting compensation provision noted only in the NTA as the proposal considers that there may be other avenues to speed up the buildings. This is referred to in a strange term of an "alternative process".

The proposed amendments to the NTA further states that:

Though, the parties can still "utilise ILUAs for public housing and infrastructure projects on Aboriginal land" the proposed new process would provide parties with an *alternative process* to assist in the timely supply of public housing and infrastructure in Indigenous communities.

The contention that native title in these circumstances "would be fully suppressed and could fully revive in the future" must be rejected as legally flawed and the "alternative process" unlawful racial discrimination. [see s10 of RDA 1975 (Cth)].

At least in my submission, any existing native title is fully extinguished because the rights that are given by a grant, license, lease or other process for the building of public housing and other community infrastructure in Indigenous communities, remote or not, are rights that are plainly inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title on that specific portion of land (and would include what ever the house block or public infrastructure area required would be- including any required "buffer zones.")

The inescapable legal fact is that in a normal situation (meaning non discriminatory) either a house or other community building infrastructure would normally require exclusive possession rights to construct or are required to be obtained before building; and because of the permanent nature of a building, the extinguishment of native title occurs at the moment of the grant, license, lease or other process and not when actual building commences.

Once built, without agreement, the house or community infrastructure (depending on the nature of the building purposes and use) becomes a permanent fixture owned legally as of right by whoever owns the land (native title holder) which the house or infrastructure is built on.

. Thus, as Brennan J said in *Mabo v Queensland [No 2]*:

"Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not

necessarily by the grant of lesser interests (eg, authorities to prospect for minerals)."¹

Similar references to extinguishment are to be found elsewhere in *Mabo [No 2]*:

"... common law native title, being merely a personal right unsupported by any prior actual or presumed Crown grant of any estate or interest in the land, was susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which was inconsistent with the rights under the common law native title"²

and:

"The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession."³

To like effect are statements in the *Native Title Act Case*:

"... a grant cannot be superseded by a subsequent inconsistent grant made to another person ... At common law, however, native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title ..."⁴

and in *Wik Peoples v Queensland*:

"The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it."⁵

¹ [\[1992\] HCA 23](#); (1992) 175 CLR 1 at 69.

² [\[1992\] HCA 23](#); (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ.

³ [\[1992\] HCA 23](#); (1992) 175 CLR 1 at 110 per Deane and Gaudron JJ.

⁴ [\[1995\] HCA 47](#); (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

⁵ [\[1996\] HCA 40](#); (1996) 187 CLR 1 at 84 per Brennan CJ. See also *Newcrest Mining (WA) Ltd v The Commonwealth* [\[1997\] HCA 38](#); (1997) 71 ALJR 1346 at 1398; [\[1997\] HCA 38](#); 147 ALR 42 at 112-113 per Gummow J.

The references to *suspension* rather than *extinguishment* of native title rights are not to be understood as being some incautious or inaccurate use of language to misdescribe the legal effect of a grant of interest in native title when the legal effect is known *exclusive possession*. A building of a house, **unless it is not a fixture” (maybe a kit home suspended by removable footings)** does not have some *temporary effect* on native title rights or some other *suspended legal effect* that is conditioned by statute upon the land pretending to be not held by the Crown at the moment of the grant and in the future able to be somehow passed back to native title.

Following “a building of a house, **unless it is not a fixture” (maybe a kit home suspended by removable footings)**” highlights that the building designs will play an important interpretation of the legal effects of a future act on native title.

Regardless of identifying the future act as a *specific future act process*, either under the NTA or some other process or procedure, the legal issue remains; it is a future act if it affects native title. Remedies for future acts are not the sole realm of the NTA. If the NTA or some other process or procedure does not provide an effective or adequate statutory remedy for a failure to afford the usual procedural rights for acquisition of property, equity can intervene to protect or give effect to them.

As a timely reminder, back in 1997, the then Department of Foreign Affairs and Trade publication entitled *In the National Interest (No 147)* at para 24 stated:

The Government’s unqualified commitment to racial equality and to eliminate racial discrimination is a non negotiable tenet of our national cohesion, reflected in our racial diversity, and must remain a guiding principle for our international behaviour. The rejection of racial discrimination is not only a moral issue, it is fundamental to our acceptance by, and engagement with, the region where our vital security and economic interest lie. Racial discrimination is not only a morally repugnant, it repudiates Australia’s best interest.

The Negotiations of Individual House blocks and other Community Public Infrastructures.

Noting the potential invalidity of the proposed amendments, a non discriminatory approach should be considered. Housing is always a community and individual need; no matter what region, remote or urban and no matter what race. Race is not a criteria for homes. Native title also exists in urban areas and new proposals to close the gap by housing should not be isolated just to remote areas.

The more complicated aspects of public housing on remote Indigenous lands will be to what final body actually is set up to administered such public housing and other public infrastructures.

The recent problems of the “New Arrangements for Indigenous community housing organisations in Queensland” with the Commonwealth are stark reminders of the complexity of housing and property against the vision and aspirations of local

Indigenous housing organisation. The problems noted here where existing Indigenous Housing bodies will not sign over their housing assets to Queensland Housing Department should inform a better direction for remote Indigenous housing.

The use of existing Indigenous local government structures as the new “housing administrators’ of their community need realistic considerations. These local government bodies are able to hold the new public housing and other community infrastructures in trust (as they already do). Where local native title holders do not have a decision making ability on the *Community Housing Trusts* (proposed to be set up under the local Council powers) than arrangements will need to ensure they are included.

Individual Home Ownership

Home ownership should drive new reforms where clearly that is a stated and informed desire of the local community native title holders, be it remote or elsewhere. Public housing by its nature is far removed from individual home ownership. Just building “fancy boxes” as homes will not close the gap either unless a whole approach to addressing individual family needs of those to occupy homes; especially those of early childhood and school age children.

The proposed *Community Housing Trusts* can consider delivering security of individual 99 year home leases to community members within their local council jurisdictions. Larger areas outside the local area jurisdiction will need negotiations and approval with the native title holders. The latter arrangements are not to be viewed in any fixed manner but tailored to local considerations.

The same for all new and urgent community infrastructures; the Local Council in cooperation with native title holders need to place the potential challenges of “title” aside; as well as Government bodies attempting to expedite the whole timely process and supply of essential community services.

As to heritage issues, it is not only particular heritage laws that can be activated for protection of Indigenous culture and heritage (as existing heritage laws, be it Commonwealth or State, have been largely ineffective- it is noted the Commonwealth law is currently being reviewed). The equitable remedies are fully available as well.

The only way to stop making laws because of race is to stop making laws because of race.

B. Additional information on existing native title process.

Mostly the additional information is cautious with assumptions. Once certain future act provisions of the NTA are invoked, the complexities become quickly apparent. For respective State Governments, utilising their own Acts to achieve the outcome of public housing and community infrastructure is essential to achieve a speedy solution.

The NTA is also currently being amendment and places all future act actions on hold as these new amendment bed down with potential case law construction and interpretation of the legal effects of these proposed provisions will have on native title and the predictable native title challenges; and not all challenges are from Indigenous people. The broader the native title outcomes are resulting from these new proposed amendments then the more uncertainty for all other interest able to be adversely affected or otherwise. A whole new native title litigation phrase is waiting by these amendments. Agreed Statement of Facts proposed to speed up a native title outcome will only ensure litigation for those others who do not agree. Once law is governed by a hand shake than uncertainty and litigation develops as a consequence.

In May 2008, the Queensland Government passed new laws affecting remote identified Aboriginal lands as to housing and commercial development; the new laws will allow residential and commercial leases of up to 99 years; these laws will “encourage economic development and help establish essential community infrastructure....These historic reforms hopefully will herald a new era” [Or a new error.]

But what is important to note that “leases up to 99 years for social housing projects” are able to be initiated; meaning, under Queensland law, the Aboriginal Local Council authority in joint agreement with the local native title holders (by formal Agreement as an executed Deed) can potentially lease *community land* held by the council as trustees to a Community Housing Trust (being the local Council) without the need to consider a future act process effects onto existing native title.

The housing is targeted where it can be to individual need to community native title families or individuals, and those community non native holders, with a 99 year lease; the more flat type larger public housing buildings (if that is wanted) and other community infrastructure can easily be held under and constructed with a similar 99 year lease Deed agreement.

The issue of both racial discrimination and potential extinguishment of native title becomes a non issue. A native title holder living on their own community land cannot without agreeing to, extinguish their own native title.

Yours sincerely,

George Villaflor

18/08 09

Extracts from Fejo High Court case (the Freehold case)

[46] Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection.

[47] As Brennan J pointed out in *Mabo [No 2]*, the conclusion that native title has been extinguished by a later grant of freehold to the land is a result that follows not from identifying some intention in the party making the later grant but because of the effect that that later grant has on the rights which together constitute native title.

The rights of native title are rights and interests that relate to the use of the land by the holders of the native title. For present purposes let it be assumed that those rights may encompass a right to hunt, to gather or to fish, a right to conduct ceremonies on the land, a right to maintain the land in a particular state or other like rights and interests. They are rights that are inconsistent with the rights of a holder of an estate in fee simple.

Subject to whatever qualifications may be imposed by statute or the common law, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit and may exclude any and everyone from access to the land. It follows that, as there was no reservation or qualification on the grant that was made to Benham in 1882, that grant was wholly inconsistent with the existence thereafter of any right of native title.

[95] Kirby J:

It is clear law in this country, whatever may be the position elsewhere, that native title may be extinguished by the valid exercise of the sovereign power to grant inconsistent interests in land to third parties.

[96] Thus, in *Mabo [No 2]* Brennan J said:

"Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not

necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals)."

[97] The observations of Deane and Gaudron JJ in the same case were to like effect, suggesting that native title would be "extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession".

The same opinion was repeated in *Western Australia v The Commonwealth* ([Native Title Act Case](#)) where the joint judgment contained the following statement

"[A]fter sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aborigines to enjoy native title to that parcel - for example, a grant by the Crown of a parcel of land in fee simple".

[99] Several observations in *Wik Peoples v Queensland* ("Wik") also affirm this view. Thus, Gummow J said:

"The extinguishment of existing native title readily is seen as a consequence of a grant in fee simple. That is because the fee simple, as the largest estate known to the common law, confers the widest powers of enjoyment in respect of all the advantages to be derived from the land itself and from anything found upon it."

In my own opinion in *Wik* I expressed a like conclusion:

"It is the peculiarity of the legal rights conferred by ... statutory leases ... which permits the possibility of co-existence of the rights under the pastoral lease and native title. Such would not be the case where an estate or interest in fee simple had been granted by the Crown. Such an interest, being the local equivalent of full ownership, necessarily expels any residual native title in respect of such land."

[100] There are no expressions of opinion in this Court which contradict the foregoing conclusions. However, it must be accepted that none of the opinions cited was legally essential to the decision in the several cases referred to. To that extent, there is no holding on the point which is binding, as a matter of legal precedent. It is therefore necessary to consider the appellants' submission in terms not only of the dicta in recent legal authority but also by reference to legal principle and legal policy. The issue now being squarely presented for decision, this Court must provide the answer which most closely accords with established authority, including the reasoning sustaining its earlier decisions in native title cases. Sometimes when an important point must be decided, obiter dicta, once analysed, are found to be wanting. But is that so here?