



4 September 2009

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Dear Ms Edwards

Comments on the Government’s discussion paper – possible housing and infrastructure native title amendments

Thank you for the opportunity to provide comments on the Government’s discussion paper on possible housing and infrastructure native title amendments (the discussion paper).

I am disappointed with the narrow scope of the paper which proposes a minor amendment to the *Native Title Act 1993* (Cth) (the Native Title Act) without considering more substantial changes which could contribute to the Government’s commitment to improving the operation of the native title system.

In addition, I consider that governments should focus on pursuing Indigenous Land Use Agreements (ILUA) rather than applying a new future acts process which will not have the same long term benefits for the parties that an ILUA would. This preference for ILUAs should be supported by ensuring that any amendments to the Native Title Act are designed in such a way there is a clear preference for parties to reach an ILUA. Non-legislative changes could also make it easier for parties to reach ILUAs.

Finally, I have some concerns with the language of the paper, the definition of key terms, and the lack of clarity around how aspects of the proposal will operate.

These comments are outlined further here.

1. Scope of discussion paper

Given the Governments numerous statements to the effect that it wants to improve the operation of the native title system it is disappointing that this latest discussion paper focuses on one minor aspect of the future acts regime.

I have an acute understanding of the chronic shortage of housing in Indigenous communities, and the social, economic and cultural impacts that this critical need has on Indigenous Australian’s wellbeing. I also understand that the proposed new future acts process is aimed at facilitating building that will alleviate this critical need.

However, I am surprised that the Government has committed resources to pursuing one minor change to the Native Title Act, without using the opportunity to further more pressing and significant improvements that could be made.

As you are aware, many stakeholders have identified various areas for reform of the native title system, including some specifically related to the future acts regime. These proposals have been put forward in good faith, relying on the Government's commitments to improving the system. I strongly recommend that if the Government is considering amending the Native Title Act once again, that it considers other amendments at the same time.

Such amendments would ideally confront the major issues that are currently being discussed by stakeholders, such as shifting the burden of proof.¹ Alternatively, the Government could contain this immediate discussion to changes that could be made to improve the operation of the future acts regime. This could include changes such as:

- Amending s 26 to apply the right to negotiate to the sea and the intertidal zone and to all compulsory acquisitions of native title, including those over a town or city.
- Removing s 38(2) to allow the arbitral body (the NNTT) to determine that a condition for an act to go ahead is subject to a payment worked out by reference to profits made, income derived or things produced by the grantee party.

2. Improving the process for negotiating Indigenous Land Use Agreements

(a) A preference for the parties to reach ILUAs

As recognised in the discussion paper, governments do not need to use the future acts regime to build houses on native title lands. An alternative mechanism the parties could use are the Indigenous Land Use Agreement (ILUA) provisions.

State and territory governments already use the ILUA process to negotiate for the building of houses in Indigenous communities. In fact, it is my understanding that the Western Australian Government has begun negotiating a template ILUA which would be used in this very circumstance. I have been told that the ILUA negotiations have been progressing and that the Indigenous parties are committed to completing and implementing the template.

I strongly encourage governments to preference ILUAs. ILUAs have many advantages. An ILUA can provide certainty for all parties, including certainty around future developments and the long term relationship between the parties. An ILUA can

¹ For my recommendations for improvements that should be made to the native title system, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Attorney-General's discussion paper on proposed minor native title amendments* (19 February 2009). At: http://www.humanrights.gov.au/legal/submissions/2009/20090219_proposed.html; and T Camla, *Submission to the Australian Government's native title payments discussion paper* (4 March 2009). At: http://www.humanrights.gov.au/legal/submissions/sj_submissions/20090304_ntpayments.html.

be tailored to the circumstances of the specific community and can be holistic, covering a range of issues that the parties want to address.

In addition, ILUAs ensure that there is an ongoing and predictable relationship between the parties. As the discussion paper says:

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

In my view, the best way to achieve this commitment to partnership is to pursue ILUAs with the native title party. As, by its very definition, an ILUA requires *agreement* between the parties, as opposed to the proposed new future acts process which simply requires *consultation*.

In this context, I also urge the government to be mindful of its international human rights obligations, including its commitment to free, prior and informed consent as required by the Declaration on the Rights of Indigenous Peoples.

In particular, Article 32 of the Declaration provides that:

- i. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- ii. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.
- iii. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 23 provides that:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

ILUAs are consistent with the rights afforded to traditional owners in the Declaration, and should be promoted as the minimum requirement.

(b) Improving the ILUA process

The ILUA process is often criticised for being too time consuming, and this appears to be the main justification for the proposals in the discussion paper. I recommend

that the Government consider how it could draft any new processes in a way that governments are required to have made their best efforts to reach an ILUA before the new processes are available to them.

To complement this, there are many other changes that could be made to improve the efficiency of the ILUA process. These include requiring governments to provide tenure information and extinguishment reports early in the negotiating process and adequately funding the native title parties to negotiate. In addition, the Government could consider how the six month process for ILUA registration could be reduced, while still recognising that the three month notification period is necessary to protect any other potential native title party's rights.

Overall, any changes made should leave no confusion that the Government's preference is for agreement making; amendments should reflect this by creating incentives for parties to reach an ILUA, ensuring the future acts regime is used as a last resort.

3. Comments on the particulars of the discussion paper – creating a new sub-division of the future acts regime

(c) What constitutes 'genuine consultation'?

The proposed new process relies on building beginning 'following genuine consultation' however it is unclear what this entails. I recommend that if this phrase is used in the Native Title Act, that the law provides clear guidance on what 'genuine consultation' requires.

Australia's international human rights obligations provide some guidance as to what constitutes genuine consultation. When defining 'genuine consultation', the Government should consider principles contained in:

- The United Nations guidelines on engaging the marginalised, which requires participation of indigenous peoples based on the principle of free, prior and informed consent. It also provides that governments establish transparent and accountable frameworks for engagement, consultation and negotiation with Indigenous peoples and communities.²
- The Declaration on the Rights of Indigenous Peoples which provides that indigenous peoples' have the right to free, prior and informed consent before decisions are made which affect their lands (article 28). Articles 19 and 32 of the Declaration urges states to consult and operate in good faith, with Indigenous peoples in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.³

² Australian Human Rights Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, (2005). At: http://www.humanrights.gov.au/social_justice.

³ *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, arts 19, 28.

- The International Covenant on Civil and Political Rights (particularly article 1 - the right to self determination) which the Human Rights Committee has stressed in its concluding observations on Australia, requires Indigenous peoples be given a stronger role in decision-making over their traditional roles and natural resources.⁴

In practice, these principles can be applied by governments through making information accessible, being flexible over the form and time of consultation, approaching the consultation in good faith, and ensuring the parties to the consultation are resourced to participate.

An important part of a transparent and accessible consultation process is having information available that clearly explains: the purpose of the consultation, the proposed process, anticipated impacts on the rights of the peoples affected, and how people can participate.

Governments must provide sufficient resources to ensure that information regarding the proposed future act is both accessible and well understood by the communities that will be affected.

Accessibility requires the government to consider the most appropriate form in which to provide the information, that the information is provided with enough time for the native title party to understand it and consider it before consultation is undertaken, and that there is sufficient time and an ability for the native title party to seek clarification or request more information before engaging in consultation on the proposed future act. Governments will also need to consider how to provide accurate information across each language group in affected communities.

Information should:

- be provided in hard copy, and where possible, be translated across each language group of the affected communities
- also be provided in a plain-English guide, for example a community guide that provides a summary so that community members are able to become familiar with content quickly
- be clear, accurate and comprehensive and understandable for members of affected communities
- where possible, be provided face-to-face by government officers
- where appropriate, use interpreter services.

Native title party/s should also have some control over the most appropriate form and time of the consultation. That is, if the relevant government party is considering multiple future acts over an area, that the native title party/s have the option of requesting that the consultation consider all of the proposed future acts together or

⁴ Office of the High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee: Australia. 24/07/2000. A/55/40, paras.498-528. (Concluding Observations/Comments),* Consideration of reports submitted under article 40, concluding observations of the human rights committee, Australia. At: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40,paras.498-528.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?Opendocument) (viewed 12 January 2009).

separately. Additionally, if there is more than one native title party, that they each have an option to have their views heard separately if they so chose. Native title parties should also be able to have some control over the timing of the consultation. They should be able to change the date for consultation if an event beyond their control occurs, for example, if they must attend sorry business.

The consultation process should include a period of time after any face to face meeting takes place to provide native title party/s with an opportunity to consider further issues that require consideration or alternative options to address any concerns with the future act.

The government party should act in good faith during the consultation, approaching the consultation with an open mind, without having made decisions or having acted pre-emptively on an outcome from the consultation. In addition, the government party should consider alternatives that the native title party proposes, such as alternative locations for housing or administrative arrangements.

Governments should make additional resources available to the native title parties and any relevant NTRBs/SPs to attend any meetings relating to the proposed future act and/or to consult with their members.

Appendix A to this letter provides a more detailed set of criteria that constitutes a process of genuine consultation. Appendix B provides an example of recent federal legislation that requires consultation with Indigenous communities. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (No. 130, 2007) - Schedule 1 - section 123TE (declared relevant Northern Territory area) relates specifically to conducting consultations with Indigenous peoples affected by the Northern Territory Emergency Response. This provision could be used as guidance for any legislative definition of 'genuine consultation' which may be inserted into the Native Title Act.

No matter what definition of consultation is decided upon, the Native Title Act should provide for what the consequences of non-compliance are. If the consultation requirements are going to be effective, I recommend that there should be a consequence for the government party's non-compliance, such as the payment of a penalty to the native title party. This would be in addition to the compensation the native title party receives for the impairment of their native title rights.

(d) How will compensation be determined?

Although not a new issue, the proposal once again raises the issue of how compensation will be determined in the absence of any precedent for compensation for native title.

With regard to compensation for the building of housing for Indigenous communities, I consider that a number of clarifications should be made.

Firstly, the discussion paper does not distinguish between the native title party and the Indigenous community, and does not recognise that these two groups may not be the same people. In fact, the discussion paper states that '[n]one of the existing specific future acts processes is specifically aimed at development in remote Indigenous communities for the benefit of their residents' implying that the

Government has not comprehended the difference between the native title party and the community.

I am concerned that if this distinction is not clearly acknowledged and its implications understood, then governments may try and argue that the provision of housing should constitute part of the compensation for the impairment of native title rights and interests.

Any new future act process should state that housing must not be considered when determining the amount of compensation to be paid.

Secondly, the discussion paper proposes that the non-extinguishment principle should apply. However, the discussion paper acknowledges that in practice leases may in fact be granted in perpetuity (or close to it). The discussion paper states that '*if the lease comes to an end, the native title rights would again be fully effective*' [my emphasis].

Therefore compensation should be determined taking into account the long term nature of the lease and the possibility that the lease will be renewed. In addition, any new process should require that compensation be determined after taking into account the potential long term impact on the native title rights and interests if they are suppressed for multiple generations. Alternatively, if the lease is renewed, the native title party should have the option of seeking a re-assessment of compensation for the period of the renewed lease.

(e) Application of the policy to remote communities only

The discussion paper is drafted in the context of expediting the provision of houses to communities under the COAG National Partnership on Remote Indigenous Housing.

However, the uncertainty around which future acts provisions apply to the building of houses in Indigenous communities applies to any Indigenous community, not simply remote communities. In addition, the shortage of housing in Indigenous communities is not limited to those in remote areas.

In order to create certainty and stability about the applicability of the provisions, I recommend that any new process which requires a more arduous procedure than simply notification and opportunity to comment should be applied to the building of public housing in any Indigenous community.

(f) Application to 'other public infrastructure'

The discussion paper proposes that the new process would apply to future acts '*relating to public housing and other public infrastructure*' on Indigenous land. This raises the question of what constitutes public infrastructure and whether the new process should be extended to it.

Given the limited nature of the procedural rights under the existing future acts provisions for infrastructure, if the requirement for 'genuine consultation' is in line with my recommendations, then I recommend that the new proposed process be applied to other public infrastructure.

However, as I have already stated, ILUAs should be sought as a priority with the future acts regime is used as a last resort. This principle is particularly relevant if the government party is seeking to build a range of public infrastructure and public houses, for which a region-wide ILUA would be more appropriate.

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The discussion paper considers amendments to the future acts regime – a system which was established to provide some protection of a native title party's rights. Because of the requirement for 'genuine consultation', the proposal in the discussion paper should be an improvement on many of the existing future acts processes, but it is not preferable to the parties reaching an ILUA.

For this reason, I recommend that the Government consider how the ILUA process can be improved, and how any new process can be drafted in a way that clearly prioritises agreement making.

Additionally, I am of the opinion that if the Government is going to pursue further amendments to the Native Title Act, it should consider the raft of other amendments which have been recommended to it; recommendations which will go a significant way to achieving the improvements to the system that the Government wants to see.

If you have any questions, please do not hesitate to contact Katie Kiss, Senior Policy Officer in the Social Justice Unit, on +612928 49785 or katie.kiss@humanrights.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Tom Calma', written in a cursive style.

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APPENDIX A

PRINCIPLES THAT CONSTITUTE 'GENUINE CONSULTATION'

There are a number of principles and practices that can be made use of when defining 'genuine consultation'. These include the following:

The consultation process should be proportionate to the potential impacts of the proposed measure.⁵

(a) *Initial Considerations*

- Enter consultations in good faith and with a view towards establishing or improving **long term working relationships** with Aboriginal communities.
- **Recognise the diversity of Aboriginal and Torres Strait Islander communities.** Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.
- Be mindful that well coordinated consultation processes are **time and resource intensive.**
- Do not assume that communities are familiar with your agency or that they understand your mandate or business.
- Be aware that there may be **misinformation** and/or a lack of understanding of the most basic issues related to your consultation topic.
- Make every effort to understand, acknowledge and **respond sensitively** to the alienation that community members may feel from government and government processes.

(b) *Effective Engagement*

- **Involve Aboriginal and Torres Strait Islander people at the outset.** Community leaders (for example traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.
- Respectfully **acknowledge** the involvement that participants have had historically in addressing the issue that is being discussed.

⁵ Australian Government. Best Practice Regulation Handbook. August 2007. At: <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 22 June 2009).

- **Identify the best ways to promote community consultation sessions.** This may involve advertisements in local newspapers, written notices on community notice boards or announcements on community radio.
- **Ensure that the conduct of consultations allow affected communities to have control over timeframes.** It is important to respect a community's right to choose the timing and location of consultations. It is also important to adopt a flexible approach to the consultation process. Be mindful that cultural events or religious priorities and family and work responsibilities may impact on the availability of community members.
- **Ensure that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting: traditional land owners, the Prescribed Body Corporate (PBC) local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital.
- **Ensure that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.
- **Have a prior understanding of and respect for local dispute resolution and decision making processes.** Where difficulties arise in relation to reaching agreement between various communities or groups during consultations, do not get involved. However, you may have to request assistance from local Mediation Centers, the Ombudsman or resource an independent person or body to facilitate resolution of the dispute.
- Consultations must be based on **mutually agreed processes** and utilise **local knowledge** in order to achieve sustainable outcomes in Aboriginal and Torres Strait Islander communities. Provide people with a clear idea of **how their input** will be included in decision making processes.
- Consider how you will structure your sessions to answer your consultation questions and **maximise the quality of input from participants.**
- Be clear about **likely barriers** to stakeholder participation. You should also consider how you will interact with target groups including young people, aged people, people with disabilities, mothers etc.
- Keep consultations **focused, interactive and deliberative.** Creating an environment where people are comfortable with sharing their views may improve the quality of attention and information received from participants.
- **Where you need to consult with large numbers of people, providing for small group engagement is preferable to ensure that all people have an**

opportunity to give and receive information. In some cases, communities or groups may demonstrate preferences for separate meetings based on age, gender or elder status.

- **Where possible, ensure that engagement is structured in a way to provide an incremental skills building process for participants.** For example, community members could develop a more comprehensive understanding of community development practices.
- Use various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation.
- It is important that government officers check for **participant understanding** periodically during the course of any consultation session.
- If necessary, consultation sessions should be **small and targeted** around specific stakeholder groups to protect privacy and confidentiality.
- The consultation should aim for a **gender balance** in relation to overall participant representation.
- Reach agreement with communities about **how feedback will be provided** after the consultation phase is concluded.
- Identify the best ways to **keep communities informed** about developments regarding the issue/proposal.

(c) *Minimum Standard of Information and Transparency*

- Be clear about what **outcomes(s)** the proposal seeks to achieve and what **issue(s)** the proposal seeks to address.
- Be clear about the potential and real **risks, costs** and **benefits** of the proposed measure.
- Be clear about what **aspects of the proposed measure** Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern.
- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with a particular activity, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.
- **Notice of proposed measure/s must be given sufficiently in advance of its authorisation in order to give time for the community to reach informed consent or to arrive at considered points of difference.**

Adequate resourcing should be provided to communities and specific stakeholder groups to support them in their discussions and decision making, prior to a formal consultation process. It is important to be respectful of Aboriginal and Torres Strait Islander peoples' timeframes to ensure inclusiveness around issues. Timeframes may be subject to cultural ceremonies and law, climatic and geographic conditions.

- **Government officers should provide full information regarding the parameters of the consultation, including what options are being considered as part of the consultation.** It is important that you have clear parameters around your consultation process, for example measuring the benefit and effectiveness of a specific measure. However your consultation process should be sufficiently open-ended so that community members have an opportunity to discuss concerns or propose alternative methods that, in their view, may achieve the same or enhanced outcomes. These views should be formally noted. Participants should have an opportunity to fully communicate their wishes and aspirations as they relate to the future of their communities.

(d) *Implementation, Monitoring, and Evaluation*

- Provide **feedback** to communities as agreed at the front end of the process, including how decision making was influenced by the consultation process.
- Explain to community members the **likely timeframes** for the first phase of implementation.
- Identify how you will **accurately collect** and **record data** during consultations.
- Consider what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures.
- Notify communities in a timely manner when **outcomes** are announced.
- Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.
- To ensure that there is **transparency** around the consultation process and that consultation findings correspond to decision making, government agencies make like to appoint an independent observer or request the assistance of the Commonwealth Ombudsman.
- Explain what, if any options community members have to call for a **review of decision making**.
- **Government agencies should publish their consultation protocols.** This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be

provided as to why a full process was inappropriate/not feasible.

- **Regular monitoring** should be undertaken to ensure that actions taken for the purposes of the legislation are aligned with its core objectives.
- Government agencies should **evaluate** and **continuously improve** their consultation processes.
- Be **approachable, contactable** and meet the **commitments** you make to individuals and organisations throughout the consultation process.
- Remember that consent is NOT valid if it obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with **ALL** of the information relevant to a proposed measure.⁶

⁶ United Nations, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*. January 2005. At: http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc (viewed 22 June 2009)

APPENDIX B

1. Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (No. 130, 2007) - Schedule 1

S 123TE Declared relevant Northern Territory area

- (1) The Minister may, by writing, determine that a specified relevant Northern Territory area is a **declared relevant Northern Territory area** for the purposes of this Part.
- (2) A determination under subsection (1) must specify an expiry date for the determination.
- (3) An expiry date must occur in the 12-month period beginning when the determination was made.
- (4) Subsection (3) has effect subject to subsection (7).
- (5) In deciding whether to make a determination under subsection (1), the Minister must have regard to the following matters:
 - (a) the availability in the relevant Northern Territory area of information setting out:
 - (i) the proposal to make the determination; and
 - (ii) an explanation, in summary form, of the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB;
 - (b) the opportunities that have been made available to people in the area to discuss:
 - (i) the proposal to make the determination; and
 - (ii) the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB;with employees or officers of the Commonwealth;
 - (c) the opportunities that have been made available to potentially affected people in the area to:
 - (i) discuss their circumstances with officers of Centrelink; and
 - (ii) give Centrelink information about their expenditure;
 - (d) the extent to which it will be feasible for the Secretary to take action under Division 6 in relation to people who may become subject to the income management regime under section 123UB;
 - (e) such other matters (if any) as the Minister considers relevant.