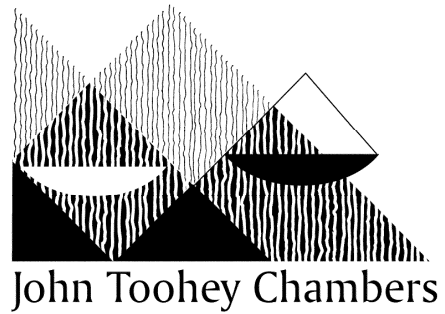


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Submission concerning the Discussion Paper on Possible housing and infrastructure native title amendments

Introduction

The need for new housing and infrastructure including public housing in Indigenous communities in remote areas, and elsewhere for that matter is obvious and not in dispute. It is important to ensure that this is achieved with full respect for the rights of Indigenous Australians in this case, relevant native title-holders.

In the time available to me to make this submission I wanted to firstly offer some general comments and a note of caution to any proposal to include a new consultation only procedure in the *Native Title Act, 1993 (NTA)*.

The Right to Negotiate and the NTA

One of the primary returns for native title holders in the “original” NTA in 1993 given the belated historical recognition of native title in 1992 by the High Court of Australia and the validation of all grants of non-indigenous titles was the Right to Negotiate provisions of the NTA.

This was a significantly lesser outcome than that proposed by Indigenous leaders to the then Prime Minister in 1993, which was a requirement for consent.¹ The Federal Parliament in 1998, which passed the *Native Title Amendment Act, 1998* over the specific objections of Aboriginal representatives, (which were read into the Senate Hansard) substantially diminished the scope and content of the RTN provisions of the Act. This was primarily achieved by the replacement of the RTN to suit various interest groups with various consultation regimes, which often applied the non-extinguishment principle and then suppressed the native title.

¹ See point 3 of the Aboriginal Peace Plan available at
<http://www.austlii.edu.au/au/journals/AboriginalLB/1993/19.html>

The requirement to use these consultation procedures by government is not mandatory, as it does not affect the validity of the future act once granted unlike the RTN procedures.

The National Indigenous Working Group (NIWG), the predecessor to the current National Native Title Council proposed that flexibility for the future act process, which also respected native title rights was best advanced by new Indigenous Land Use Agreement (ILUA) provisions. The provisions drafted and proposed by the NIWG were largely adopted in the current NTA.

These are the main future act provisions that can clearly be utilised to provide clear, certain and valid title to government to achieve its policy goal of long term leasing to government to allow for the provision of new housing and infrastructure in remote areas.

What is proposed?

A new consultative mechanism:

- that applies the non-extinguishment principle and a right to claim compensation;
- include genuine consultation with native title parties on the nature and location of the proposed project;
- that would only validate future acts relating to *public* housing and other *public* infrastructure.

Comment

The difficulty with such a proposal is that large scales works - the provision of housing and infrastructure that is not to be owned by the native title holders nor the relevant Indigenous residents will be able to be built by government without the consent of the native title holders (the native title landholders or registered claimants) as would be required with an ILUA or a mandatory requirement to negotiate such as the RTN.

In essence, such a proposal would appear to be in the same terms as the existing consultation procedures in the NTA, which were enacted in the 1998 Amendment Act without the consent of Indigenous representatives. Although a requirement for “genuine consultation” if enacted in legislation would be a more substantive requirement than existing consultation procedures.

The existing consultation procedure requirements suffer from significant shortcomings for the holder of any native title property interests or registered claimants. These procedural requirements consist of the provision of notice to native title-holders, an opportunity to comment to government about the development, the application of the non-extinguishment principle and provision for the right to apply for compensation for the affect upon native title if native title is found to exist in the future.

These shortcomings are outlined in the Explanatory Memorandum to the *Native Title Amendment Bill, 2007*² and confirmed in the Federal Court cases of *Lardil Peoples v Queensland*³; *Harris v Great Barrier Reef Marine Park Authority*⁴.

² For example, see para 10.20 of the EM “Failure to notify will not affect the validity of the future act”.

³ (2001) 108 FCR 453

⁴ 162 ALR 651

In essence these are that:

- a failure by government to comply with these procedures does not affect the validity of the future act unlike the RTN, and
- it involves no right to be involved in the decision making process;

The Court in *Harris* described procedures of this nature as “precautionary” and were to ensure that native title holders or registered claimants were not “overlooked when the decision-maker makes its final decision.”⁵

Analagous Legal regimes

In the Northern Territory where another Commonwealth Act - the *Aboriginal Land Rights (Northern Territory) Act, 1976* applies the informed consent of traditional owners is required before a lease is granted under section 19 of the Act for Territory Housing to “own” and manage public housing and infrastructure on Aboriginal land.

Conclusion

The Discussion paper in essence states that much delay is occasioned to the building of new housing and infrastructure in remote Indigenous communities because of the “uncertainty” as to whether native title exists or not in a particular area. That, of course is one of the very reasons the future act regime was enacted to allow developments to proceed that can validly affect native title while the legacy of over 200 years of the non-recognition of native title is being addressed. It is only 17 years since the *Mabo* decision in 1992.

The question that clearly arises here, as it does so often in the current debate about addressing Indigenous disadvantage is to what extent does the future act regime therefore include substantive legal rights for Indigenous native title holders.

The application of the non-extinguishment principle whilst seemingly attractive (and it should be utilised wherever possible) belies the important fact that where public housing and infrastructure are concerned there is a perpetual, full time 100% suppression of native title. It is effectively permanent extinguishment in most cases as the government as a matter of policy requires that long-term exclusive possession leases are held by public housing authorities. This surely must require the consent of the Indigenous native title-holders given the long-term consequences.

There is no doubt that what are called “transaction” costs being the time and cost of negotiating with native title holders – which requires consent of a group of people can be sometimes difficult, costly and lengthy. The question that arises is does that justify the substantial diminishment of Indigenous rights to achieve an urgent social need. That is the question for government to answer – as there is no doubt that a consultation procedure of the type described in the Discussion paper is in large measure a minimal procedural right that will rely upon the good will of government – it is not a substantive legal right that will require government to involve the Indigenous land holders in the decision making process about their own land.

In my opinion, the more appropriate course is for government to negotiate an agreement with Indigenous people to facilitate or fast track this remote housing program and specifically resource and fund the “transaction” or negotiation costs of utilizing the ILUA provisions of the NTA.

⁵ See Perry, M & Lloyd, S “Australian Native Title Law) Lawbook Co 2003 at 251 for example.

Unfortunately, the negotiation costs of such large housing programs don't seem to be included within the funding of the program.

The agreed prioritisation of agreement making involving government's own agencies and the Native Title Representative Bodies concerning this important social program buys relevant parties into a process. Thus enhancing prospects for its success. The goodwill of government is essential and is not in question but it should not be done in a manner in my opinion that would further diminish the rights of native title holders as occurred in the *Native Title Amendment Act, 1998*.

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4 September 2009.