

# Possible housing and infrastructure native title amendments

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Attorney-General's Department

Department of Families, Housing, Community  
Services and Indigenous Affairs

7 September 2009

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## SUMMARY

The Law Council of Australia is pleased to provide comments to the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs on the possible housing and infrastructure native title amendments which are outlined in the Discussion Paper of August 2009. The following submissions have been prepared by a sub-committee of the Law Council's standing Advisory Committee on Indigenous Legal Issues, consisting of persons who are leaders in the field of native title, representing both claimants and respondents.

The Law Council welcomes the commitment of the Commonwealth, State and Northern Territory Governments to bring about significant reform in the provision of housing and infrastructure for remote indigenous communities as contemplated by the National Partnership Agreement on Remote Indigenous Housing agreed at the Council of Australian Governments in November 2008. At the same time, it commends recent reforms to the *Native Title Act 1993 (Cth)* (NTA) which emphasize the role of negotiation and agreement in matters concerning native title.

The Law Council recognises the tension between attempting to speed up the processes for provision of public housing and infrastructure in remote indigenous communities, and the possibility of considerable delay to construction if existing NTA processes are used. Nonetheless, it is important to keep in mind the words of the preamble of the NTA in respect of future acts viz, that "whenever appropriate, every reasonable effort [should] been made to secure the agreement of native title holders...".

In the Law Council's submission, it is important that the focus remains on obtaining consent of native title holders in respect of acts done on native title land. That the future act to be done is one which increases the availability of public housing and infrastructure in remote indigenous communities and to that extent provides a "benefit"<sup>1</sup> should not alter that focus.

The application of the non-extinguishment principle in any specific process under the NTA for provision of public housing and infrastructure in remote indigenous communities is supported by the Law Council, although noting that the potential for "permanent" suppression of native title by construction of public housing and infrastructure highlights the importance of consent being obtained from native title holders given the long term effect on native title.

The Law Council suggests that consideration be given to an approach which recognizes a life cycle of remote indigenous public housing of up to 30 years<sup>2</sup> and limits the effective period for application of the non-extinguishment principle to, say, 40 years, with an opportunity for native title holders to obtain ownership of the houses at

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<sup>1</sup> Noting that in most States and Territories, provision of public housing specifically for indigenous people has largely focused on urban areas: W Sanders, *Housing Tenure and Indigenous Australians in Remote and Settled Areas*, CAEPR Discussion Paper No 275/2005, at p12.

<sup>2</sup> [http://www.anu.edu.au/caepr/system/files/Publications/DP/2005\\_DP275.pdf](http://www.anu.edu.au/caepr/system/files/Publications/DP/2005_DP275.pdf)  
National Partnership Agreement on Remote Indigenous Housing, clause 13(c)  
(Outputs):  
[www.coag.gov.au/...agreements/.../national\\_partnership/national\\_partnership\\_on\\_remo\\_t\\_e\\_indigenous\\_housing.rtf](http://www.coag.gov.au/...agreements/.../national_partnership/national_partnership_on_remo_t_e_indigenous_housing.rtf)

the end of the period. Other infrastructure facilities such as police stations, schools and medical clinics may require a different approach.

The Law Council would be pleased to make further comments on the proposed amendments, or expand on anything raised in this submission, if required.

## **SUBMISSION**

The proposal is to include a specific future act process in the NTA for *public* housing and *public* infrastructure in remote indigenous communities.

The proposed process for public housing and infrastructure projects is intended to have the following elements:

- expedition
- genuine consultation with native title parties but no necessary agreement
- application of the non-extinguishment principle
- compensation
- heritage and environmental protection laws would continue to apply

### **Housing tenure systems in remote indigenous communities**

The previous debates on housing tenure in remote indigenous communities has had an emphasis on promoting home ownership as an alternative to indigenous community housing, funding for which has been supplied by the Commonwealth through the Community Housing and Infrastructure Program (CHIP)<sup>3</sup> which was replaced by the Australian Remote Indigenous Accommodation (ARIA) program in 2008-2009.

The proposed amendment to the NTA to expedite the provision of housing and infrastructure on remote indigenous communities is specific to *public* housing and infrastructure. Where other community or private housing projects to benefit indigenous people are proposed in remote communities, the existing processes of the NTA will have to be utilised.

The Law Council notes that a possible consequence of a specific NTA process to “fast-track” public housing and infrastructure in remote indigenous communities is that public rental housing opportunities will increase at the expense of communal housing or individual home ownership. Whilst recognising the need to increase the supply of houses in remote indigenous communities, the Law Council draws attention to the need to balance the role of public rental housing which may be required in the short term, with community housing and individual home ownership which may have longer term benefits for native title holders and other indigenous people.

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<sup>3</sup> See W Sanders, Housing Tenure and Indigenous Australians in Remote and Settled Areas, CAEPR Discussion Paper No 275/2005, at fn 1.

## **Compliance with the future acts regime**

The discussion paper (at page 7) appears to contemplate the possibility that “in many cases it may be strictly unnecessary to comply with the future acts regime in order to proceed with public housing and infrastructure projects in Indigenous communities”.

The proposed amendment is intended to apply for projects in remote indigenous communities. It is likely that the definitions of “remote” and “remote indigenous community” will be as defined in clause 10 of the National Partnership Agreement on Remote Indigenous Housing - that is, as defined or classified under the Accessibility/Remoteness Index of Australia (ARIA) which is the standard Australian Bureau of Statistics (ABS) endorsed measure of remoteness. Attachment B is a map of Discrete Indigenous communities by Remoteness Area prepared by the ABS.<sup>4</sup>

It appears to the Law Council that a prudent assumption would be that native title is likely to exist in any unallocated Crown land in or around the relevant indigenous communities.<sup>5</sup> It is difficult to conceive of a housing or infrastructure program which would not have some effect on native title.

There are processes in the future act regime which could be used to ensure the validity of public housing and infrastructure, whether in remote indigenous communities or elsewhere. In respect of vacant Crown land, those processes are the negotiation of an Indigenous Land Use Agreement (ILUA) or compulsory acquisition of any native title.

The compulsory acquisition of native title is contradictory to the Commonwealth Government’s emphasis on negotiation and agreement. The Law Council submits it should not be used in these circumstances (if at all).

Putting aside the use of compulsory acquisition (which is not supported by the Law Council) a consequence of introducing an additional future acts process specifically aimed at (public) development in remote indigenous communities is that there will be an expedited process for native title holders in remote communities which does not require consent, and another process for native title holders in non-remote areas which requires consent (an ILUA).

Section 24KA could not be relied upon to validate the provision of public housing and infrastructure for the benefit of indigenous people in remote indigenous communities. In the first place, many of the things which it is intended to construct fall outside section 24KA(2). In any event, it cannot be said that the things are to be operated for the “general public”.

Section 24JA has limited application to those areas where there is a “reservation”<sup>6</sup> or lease of land before 23 December 1996 to be used for a particular purpose. It would clearly have no application for leases granted after 23 December 1996 for the purposes of public housing and infrastructure.

## **Genuine consultation**

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[http://www.abs.gov.au/AUSSTATS/abs@.nsf/95553f4ed9b60a374a2568030012e707/a e34db3435ef319eca2572bf00195de7/\\$FILE/Map3\\_1.pdf](http://www.abs.gov.au/AUSSTATS/abs@.nsf/95553f4ed9b60a374a2568030012e707/a e34db3435ef319eca2572bf00195de7/$FILE/Map3_1.pdf)

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It is noted that s47B, NTA would operate (in most circumstances) to allow prior extinguishment to be disregarded.

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See section 24JA(d) NTA.

The proposal is that there will be “genuine consultation” but no requirement for agreement, in respect of public housing and infrastructure developments in remote indigenous communities.

Genuine consultation is characterised by processes that provide maximum opportunities for the expression of opinions and is a process where those opinions are intended to influence outcomes. That is to be contrasted with the type of consultation where participants generally listen to information and where little or no value is placed on their ideas.

The Law Council would support an amendment requiring “genuine consultation” in place of the existing “consultation” procedures in the NTA, particularly where there is likely to be a significant impact on native title. The development of housing and infrastructure is a case in point.

Undertaking genuine consultation with “native title parties”<sup>7</sup> in remote indigenous communities may not result in any real expedition as a result of an additional future act process provision of public housing and infrastructure in those communities, compared with a requirement to consent.

The Law Council notes that in the Northern Territory, the majority of remote indigenous communities are on Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Under that Act, the informed consent of traditional owners is required before a lease is granted under section 19 for the Department of Local Government and Housing to “own” and manage public housing and infrastructure on Aboriginal land.

As most remote indigenous communities in the Northern Territory are on Aboriginal land the proposed new future act process will have very limited operation in the Northern Territory.<sup>8</sup>

### **Areas of consultation**

Comment is sought on particular requirements of consultation to ensure native title is taken into account in the design and delivery of housing and infrastructure services to indigenous communities. The Law Council submits that the essential areas for consultation are location and design, particularly taking into account cultural considerations which include, in many areas, a cultural obligation to provide shelter for other family members and persons with kinship connections.

Whilst recognising there is an immediate need in remote indigenous communities for the provision of housing in the short term, consultation should also include the issue of the most suitable mix of long term housing tenure systems in indigenous communities, whether community housing, individual ownership or public rental. It should not be assumed that each indigenous community will have the same requirements.

### **Non-extinguishment principle**

The Law Council supports the application of the non-extinguishment principle wherever possible but is concerned that the principle should not result in permanent or long term

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<sup>7</sup> See definition of “native title party” in s 253 NTA, referring to ss 29(2)(a) and 30.

<sup>8</sup> See s 210(c) NTA.

suppression of native title which would have the same practical effect as extinguishment.

There is a particular anomaly here where indigenous persons are potentially being required to forgo their native title rights for an extended period in return for the provision of public housing and infrastructure on their traditional lands in return for which they will be required to pay rent and be subject to public housing policies which may not be culturally appropriate for the particular region.

In this regard, the Law Council notes that the National Partnership Agreement on Remote Indigenous Housing at clause 13(c) indicates a life-cycle of up to 30 years for public housing in remote indigenous communities. In that circumstance, care should be taken to ensure that any future act process utilised for public housing and infrastructure should provide for the potential return of ownership of houses and (where appropriate) infrastructure to the community or to individual ownership.

It is noted that such an approach is already feasible under the ILUA process which would enable agreement to be reached as to future ownership of houses and other infrastructure after the useful life-cycle of those assets as public infrastructure.

### **Compensation and heritage protection**

Whether by way of a new process or utilisation of existing processes under the NTA, compensation should be available for any impact native title and heritage protection through other legislation should be a precondition.

### **Conclusion**

The Law Council recognises the tension between expediting the provision of public housing and infrastructure on remote indigenous communities to relieve the housing situations in those areas, and the commitment of the Commonwealth to work with indigenous people and to proceed by way of agreement in native title matters wherever possible.

In the particular case of the provision of public housing and infrastructure for the benefit of remote indigenous communities the Law Council urges the Commonwealth not to diminish the native title rights of indigenous persons in the long term in order to provide what may ultimately be a short to medium term solution to the provision of housing and other infrastructure on those communities.

Any future act process for the provision of public housing and infrastructure, whether in remote indigenous communities or elsewhere, should include (where possible) the consent of the relevant native title holders.<sup>9</sup>

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<sup>9</sup> Including those yet to be determined.

## **Attachment A**

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### Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

# ATTACHMENT B

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## Discrete Indigenous communities by Remoteness Areas

