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By Email

Dear Ms Edwards

**Submission - *Native Title Act, 1993*
Proposed Housing and Infrastructure Amendments**

1. ***Purpose***

- 1.1 This is a submission by Ergon Energy Corporation Limited ("Ergon Energy").
- 1.2 It is in response to the discussion paper issued by the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs ("FaHCSIA") in August 2009.

2. ***Background***

- 2.1 Ergon Energy is a Queensland government owned corporation under the *Government Owned Corporations Act, 1993 (Qld)*. It is responsible for the supply of electricity in all of Queensland's remote Aboriginal and Torres Strait Island communities under the *Electricity Act, 1994 (Qld)*.
- 2.2 Ergon Energy has a considerable investment in existing electricity infrastructure in the communities and has extensive associated tenure and operational interests. In most of the communities, Ergon Energy owns and



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operates discreet electricity supply schemes unconnected to the electricity grid.

- 2.3 Each local supply scheme includes power generation (either through diesel powered generators or alternative power generation facilities) and extensive electricity distribution lines and associated infrastructure.
- 2.4 There is considerable growth in demand for electricity in many of the communities. Even prior to the most recent Government programs for improvements to community housing and infrastructure, increases in demand were occurring as a result of the installation and use of more electricity intensive equipment (particularly air-conditioning and refrigeration), growth in the size of many communities and other factors.
- 2.5 New Government programs for additional housing and infrastructure will grow demand for electricity further. In many communities that is likely to require expansion of existing, and the construction of new, electricity supply infrastructure.
- 2.6 There are a few other points to be noted by way of background:-
 - (a) The supply of electricity is an essential community service. A reliable supply is critical to the proper functioning of homes, business, community facilities (such as sewerage treatment plants, hospitals, schools etc) and many other types of community services.
 - (b) Special safety considerations apply to where and how electricity infrastructure is constructed. Construction and operational issues are

often more complex than for many other types of community infrastructure.

- (c) There are considerable lead in times and very considerable capital cost in the construction of new electricity infrastructure.
- (d) The operational costs of generating electricity in remote communities are higher. For example, most remote communities operate diesel power stations where the cost of diesel fuel and its transportation to a remote location is very high.
- (e) Capital and operational costs of electricity supply in the communities is only partially recovered through electricity tariffs paid by community members. Nonetheless, Ergon Energy is committed to its community obligation to supply reliable and affordable electricity in the communities where it operates.

3. **Native Title**

3.1 Ergon Energy has a long history of addressing native title both in relation to its *existing interests* in native title claim areas and in relation to *future acts*:-

- (a) *Existing interests* - Ergon Energy will readily consent to determinations which provide adequate recognition and protection of its existing interests. Usually consent determinations are made in conjunction with ILUAs¹ which contain more detailed provisions for the ongoing (co-existing) operations of Ergon Energy in determination areas and which include appropriate future act consent processes

and cultural heritage compliance processes for future works anywhere in those areas. Ergon Energy uses the opportunity of claim mediation to put together a package of such outcomes for the whole determination area.

- (b) *Future acts* - Where an ILUA of that kind has not been completed (most claims in Queensland have not yet been determined), Ergon Energy assesses which of the subdivisions in Part 2 Division 3 of the *Native Title Act, 1993* applies to the relevant future act. It then satisfies any applicable procedural rights under the relevant subdivision. Ergon Energy undertakes separate compliance processes for any physical activities in accordance with its obligations under the *Aboriginal Cultural Heritage Act, 2003 (Qld)* or the *Torres Strait Islander Cultural Heritage Act, 2003 (Qld)*.

- 3.2 Ergon Energy has developed constructive working relationships with native title parties in the communities where it operates

4. ***More on Future Act Compliance***

- 4.1 Although Ergon Energy can negotiate claim resolution ILUAs (with a future act element) in conjunction with the resolution of native title claims, timeframe and cost considerations generally mean that a separate ILUA is not practical or viable for most individual future acts, many of which are small scale.
- 4.2 As the discussion paper anticipates, Ergon Energy currently finds that many of its future acts are covered by Subdivision J or Subdivision K.

¹ Ergon Energy has developed more ILUAs of this kind than just about any other respondent party to claims in Queensland.

- 4.3 In relation to Subdivision J, Ergon Energy agrees that uncertainty surrounds the application of those provisions in some circumstances because of the statutory need for a reservation to be for a *particular* purpose. Section 24JB(2) can give rise to extinguishment which can also be undesirable and which can also cause uncertainty (e.g. as to the geographic extent of the extinguishment).
- 4.4 In relation to Subdivision K, it does usefully (and usually uncontroversially) cover many of Ergon Energy's future acts. The procedural rights under the subdivision (although perhaps a little uncertain in the statutory drafting) are practicable and give native title parties opportunities for input. The main benefit is that the non-extinguishment principle applies. Difficulties relate to some of the statutory wording (which should be clarified in any proposed amendments) and the fact that Subdivision K cannot be applied to future acts which involve tenure grants affording rights inconsistent with the non-extinguishment principle (e.g. freehold grants).
- 4.5 Given Ergon Energy's current practice (and presumably that of many infrastructure providers), the preferable course would be for the Commonwealth to take the following measures:-
- (a) Preserve Subdivision K generally in its current terms while making some minor amendments to provide clarity in the following respects:-
 - i) Include in Section 24KA(1)(b)(i) an example so that "*permits or requires*" clearly includes the grant of a co-existing interest in land. Such as: "*Example: the grant of an interest in land may be a future act which permits or requires such things*".

- ii) In section 24KA(2)(d) replace the words "*any electricity transmission or distribution facility*" with the words "*electricity supply facility*". The words "*transmission*" and "*distribution*" could be wrongly construed to have a very narrow technical meaning incongruously leaving some parts of a local electricity supply system covered and others not. For essential services (such as water and electricity) Subdivision K should apply to future acts necessary for the "*supply*" of the service. That is already the approach taken in Section 24KA(2)(h) in relation to water (the reference there is to "*water supply facility*"). The provision in relation to electricity should be framed in consistent terms.
- (b) If the Commonwealth is minded to include a further compliance *alternative* (in addition to Subdivisions B to N), account should be taken of Section 24AB in the ordering of the additional subdivision. It is submitted that any additional subdivision should *come after Subdivision K*. This will ensure that established practices by infrastructure providers in using Subdivision K (which comes lower in the list), can continue to be applied. Many infrastructure providers (including Ergon Energy), have in-house compliance systems which would only need to be modified, rather than substantially reworked, if Subdivision K features lower in the list than any proposed new subdivision.

5. ***Proposed Amendment***

5.1 Subject to the comments contained in paragraph 4.5 of this submission and adequate protections for native title, Ergon Energy would not object to an amendment which introduces a targeted future act process for public housing and infrastructure in remote indigenous communities.

5.2 Having said that, Ergon Energy would be wary about a provision which, in its global operation, involved greater disadvantage to native title holders in Indigenous communities than to native title holders in other communities or indeed ordinary title holders. In that regard, the Government should probably consult more widely than the limited opportunity for input provided by the discussion paper and its very short period for responses.

5.3 Other general comments on the additional targeted future act process proposal are as follows:-

(a) The process must be a truly *additional* process. That is, additional to other compliance options which may already be available for some types of housing or infrastructure related future acts - such as ILUAs, Subdivision J, Subdivision K, etc.

(b) Care should be taken in limiting any new process on geographic grounds. There are numerous Indigenous communities (including remote ones) outside the DOGIT communities in Queensland and there may even be remote Indigenous communities which are not covered by the National Partnership on Remote Service Delivery. It will probably be unwise to prescribe application of the process based on geographic criteria. After all, the intended benefit of the process is

for homes and infrastructure which particularly *benefits* Indigenous people.

(c) The discussion paper refers to the new process covering "*infrastructure facilities*" and refers to "*electricity distribution*" as an example. There are several potential traps for the Commonwealth to avoid:-

i) The new process would need to cover both future acts which permit or require the infrastructure (which should specifically include the grant of interests in land which provide tenure security) and the construction, operation, maintenance and repair of the facilities. In relation to non-electricity infrastructure, there are already indications that some facilities are being constructed in Indigenous communities without proper tenure security being first put in place. Ergon Energy cannot make a substantial capital investment in any site unless it has appropriate tenure security.

ii) The drafting of any amendment to provide for the new process must not use the phrase "*electricity distribution*" (as does the discussion paper at the top of the third page). As previously noted the phrase "*electricity supply facilities*" should be used. The word "*distribution*" could be wrongly construed as just limited to powerlines. Many other types of electricity-related works are necessary before electricity can actually be supplied to

Indigenous homes and community facilities in remote communities.

- (d) It is agreed that the "*non-extinguishment principle*" should apply. In relation to a tenure interest, such as a lease, granted for an infrastructure site, any amendment should be as consistent as possible with tenure grant processes under State and Territory legislation. For example, in relation to land in Queensland which is *transferred land* under the *Aboriginal Land Act, 1991*, Section 40E requires Ministerial consent for commercial purpose leases in some circumstances. Section 40F requires, in some circumstances, for the Minister to be satisfied that the Aboriginal people particularly concerned with the lease land are generally in agreement with the grant of the lease. If one of the intentions is to expedite infrastructure, any requirements under the process for consultation, engagement, etc with the Indigenous community and native title parties should be consistent with, and indeed integrated with, any similar statutory requirements in State or Territory legislation.
- (e) The discussion paper says that the new process would require "*genuine consultation with native title parties on the nature and location of the proposed project*". Details of exactly what that means need to be clear before any specific amendment is proposed.
- (f) It is accepted that heritage and environmental protection laws would need to continue to apply. Increasing fragmentation of statutory compliance processes for infrastructure facilities (particularly smaller

scale facilities in remote communities), is concerning. There are now numerous separate and largely unintegrated pieces of Commonwealth and State legislation which need to be individually considered to ensure the lawful construction of electricity infrastructure in remote communities. That includes sometimes overlapping Commonwealth and State legislation and regulations dealing with land tenure, native title, cultural heritage, environmental issues and coastal protection. The extent of due diligence required and the associated delays and costs is considerable. If one of the objectives is to make the process of delivering infrastructure in Indigenous communities more expeditious and cost effective, Governments at all levels need to become more adept at integrating and streamlining the various compliance requirements.

- (g) The discussion paper says that the new process would provide for compensation for any impact that the relevant future act would have on native title. Ergon Energy raises no objection to that proposition, *but only on the basis that the compensation provision is framed in a way that is equivalent to the current provision in Section 24KA(6).*

If you have any queries, please contact Neil Webley at our Townsville office on telephone 47276773.

Yours faithfully



Neil Webley – Property Acquisition Manager