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Dear Ms Edwards

### **SUBMISSIONS ON POSSIBLE AMENDMENTS TO THE NTA: PUBLIC HOUSING AND INFRASTRUCTURE**

The Western Desert Lands Aboriginal Corporation RNTBC (WDLAC) is the Prescribed Body Corporate which holds the exclusive native title rights and interests to approximately 136 000sqkm of the Western Desert for and on behalf of the Martu People. The Martu People's exclusive native title rights and interests include the right to make decisions about access to, and, activities on the Martu Determination Area as well as the right to protect their culture and heritage.

There are three communities within the Martu Determination Area and the Martu native title determination application area<sup>1</sup> (Martu Lands): Parngurr, Punmu and Kunawarritji. However, many Martu People also live at a number of communities outside of Martu Lands including Jigalong, Parnpajinya, Irrungadji, Wankajankja and Bidydanga.

WDLAC would like to provide this submission in response to the discussion paper "*Possible Housing and Infrastructure Native Title Amendments: August 2009*" released by the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs ("Discussion Paper").

The submission will address the "Issues for Discussion" highlighted by the Discussion Paper.

#### **Question 1:**

**Would the addition of a specific native title process for public housing and infrastructure in remote Indigenous communities assist the supply of adequate housing and raise the standard and range of services delivered to Indigenous families in remote communities?**

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<sup>1</sup> WAD6110/98



Question 1 raises a number of other questions which require consideration before it can be definitively answered. Any response would depend primarily on the content of the specific native title process as well as why such a process would be limited to “remote” communities and, even if such processes are to be limited to remote communities, how would “remote” be defined? Question 1 also supposes that proper levels of funding exist to supply Indigenous communities with housing and infrastructure to “close the gap” between the Indigenous and non-Indigenous living standards.

WDLAC supports the proposal to create a new native title process for the purposes of housing and infrastructure projects for Indigenous communities. WDLAC supports the creation of a process which is certain, appropriate and importantly, does not extinguish native title.

WDLACs’ own experience is that the delivery of essential and often urgent housing and infrastructure tends to be delayed while the parties wrangle over the appropriateness of the use of either sub-section K or J of the *Native Title Act 1993* (Cth) (“NTA”), particularly where such works may, through the operation of the *Public Works Act 1902* (WA) and the *Land Administration Act 1997* (WA), extinguish native title. It is beyond the comprehension of native title parties how it can be that the doing of such acts on and in Indigenous communities may extinguish native title.

WDLAC does not support the proposition that a new native title process be restricted in its application to remote communities only. Aside from the fact that no other future act provision in the NTA operates in this way, it appears to be contrary to the spirit of the NTA as evidenced by its Preamble. The Preamble captures the underlying philosophy of the legislation and relevantly states that as a consequence of dispossession Indigenous people “have become, as a *group*, the most disadvantaged in Australian society”.

An amendment which explicitly seeks to apply to one sector of the Indigenous community but not the other would be discriminatory and divisive. Furthermore, it perpetuates the view held by the wider Australian community that “ ‘real’ Aboriginal communities only exist in rural and remote areas”.<sup>2</sup> This is certainly not the case.

At the recent workshop on the Discussion Paper held in Perth, Western Australia<sup>3</sup> representatives from FAHCSIA suggested that remoteness would most likely be defined by reference to the Accessibility Remoteness Index Australia. WDLAC has no comment on whether this is a suitable measure as in our view the concept of remoteness should not be included in any new provisions.

It is assumed that the desire to insert the concept of remoteness into the proposed provisions stems from the question of need, that is, those in remote locations are more isolated from service centres and therefore more in need.

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<sup>2</sup> This misconception is explored by Larissa Behrendt in her article “The Urban Aboriginal Landscape” [http://uws.clients.squiz.net/\\_data/assets/pdf\\_file/0007/6928/Behrendt\\_Final.pdf](http://uws.clients.squiz.net/_data/assets/pdf_file/0007/6928/Behrendt_Final.pdf)

<sup>3</sup> 24 August 2009



Allocation of resources for communities most in need is a policy issue and is the responsibility of those who make funding decisions. While it is reasonable, and often accurate to assume that those living in remote communities have least access to services and proper housing and infrastructure, it should not be legislated that they will benefit from particular statutory processes over other Indigenous communities. It would be unpalatable to see a situation where funding decisions were made on the basis of easier or more efficient processes rather than need. This may happen where a non-remote community is in greater need but funding is allocated to the remote community because the native title issues are easier to settle because of the new process.

It would also be unpalatable for non-remote communities to suffer potential extinguishing future acts while their remote counterparts do not suffer the same fate.

At the Perth workshop, it was suggested that instead of reference to “remoteness” the new provisions could apply to communities located on particular tenure, for example, those communities allocated on Aboriginal Lands Trust lands<sup>4</sup>. WDLAC opposes any amendments that would discriminate between communities located on particular types of tenure. A number of communities in the Western Desert are allocated on Unallocated Crown Land<sup>5</sup> which is subject to determined exclusive native title rights and interests.

In summary, the proposal to create a new native title process to deal with the provision of housing and infrastructure on Indigenous communities is welcomed by WDLAC. In addition to ensuring that the content of a new process is appropriate, the process must also ensure consistency and fairness in its application to the diverse range of Indigenous communities.

## Question 2:

**What particular requirements about consulting with native title holders would ensure native title is taken into account in engagements between governments, service providers and Indigenous communities about the design and delivery of housing and infrastructure services?**

WDLAC submits that any process of engagement between native title parties and proponents<sup>6</sup> must include both native title holders and claimants.

Native title parties, as a general rule, want sincere and meaningful interaction with proponents about future acts, regardless of the degree to which the future act may impact on native title.

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<sup>4</sup> The Aboriginal Lands Trust holds land including former Aboriginal reserves under the *Aboriginal Affairs and Planning Authority Act 1972*.

<sup>5</sup> Crown land that is not subject to any interest (other than Native title interests under the *Native Title Act 1993*) and which is not reserved or declared or otherwise dedicated under the *Land Administration Act 1997* or any other Act.

<sup>6</sup> WDLAC uses the term “proponent” to mean both the Government Party and the party carrying out the future act.



The Discussion Paper recognises that strong relationships between parties are essential and envisages native title parties contributing to the “how, where and what” of housing and infrastructure facilities. WDLAC submits that the current regimes of “opportunity to comment”<sup>7 8</sup> and “right to be consulted”<sup>9</sup> may not achieve these aspirations.

*The right to be notified and opportunity to comment*

The “right to be notified and the opportunity to comment” does not and will not result in meaningful participation of native title parties in the future act process, particularly one which is specific to activities that will occur on Indigenous communities.

The meaning of “opportunity to comment” was considered by the Full Federal Court in *Harris v Great Barrier Reef Marine Park Authority*<sup>10</sup>. Justices Heerey, Drummond and Emmett held that the right to comment only provided native title parties with the right to explain why, in their opinion, the act shouldn’t be done or, if it is to be done, on what conditions. It provides no ability for the native title party to participate in a decision-making process about whether the act can be done and it in no way entitles the native title party to require information from the proponent about how their concerns may be addressed.<sup>11</sup> Part of the rationale for this decision is that the provisions of the NTA provide “carefully graded”<sup>12</sup> procedural rights to native title parties. The NTA was drafted to intentionally provide different levels of rights and native title party involvement from the “opportunity to comment” through to the “right to negotiate”.

Heerey, Drummond and Emmett JJ saw the “opportunity to comment” as

a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate. The subsection does not confer any greater right on the native title interests.<sup>13</sup>

Given that the “opportunity to comment” precludes native title parties from being actively involved with the doing of a future act, it would not only not meet the expectations of the native title party, but it would also not meet the aspirations of the Government to have native title parties involved in the “how, where and what” of housing and infrastructure proposals.

*The right to be consulted*

The “right to be consulted,” which in the case of section 24MD(6B) is combined with the right to object, requires that the proponent consults with the objecting party about

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<sup>7</sup> At the Perth Workshop, the State Solicitors’ Office of Western Australia proposed that the new native title process be subject to the right to be notified and opportunity to comment as currently exists in the NTA.

<sup>8</sup> Examples of the right to be notified and opportunity to comment can be found at sections 24GB(9) and 24HA(7) of the NTA

<sup>9</sup> The right to be notified and consulted can be found at section 24MD(6B) of the NTA

<sup>10</sup> (2000) 173 ALR 159

<sup>11</sup> *Ibid* at 38

<sup>12</sup> *Ibid* at 27 and 38

<sup>13</sup> *Ibid* at 38



the way to minimise the impact of the future act on native title, access to the relevant land/waters or the way in which the future act may be done.

While the “right to be consulted” on the face of it appears to be more inclusive of the views of the native title party and slightly more substantive than the “opportunity to comment”, it still does not provide native title parties with a high degree of input into the way the future act is done (or if it should be done at all). Furthermore, the current provisions provide that an objection may be referred to an “Independent Person” to make a determination either upholding the objection or allowing the doing of the act subject to conditions. The Independent Person, unlike the arbitral body making a section 38 determination, has no power to consider jurisdictional issues and cannot consider, in the first instance, whether either party has actually complied with the consultation provisions of the NTA. The Independent Person may only hear the objection<sup>14</sup>. This means that a failure by the proponent to comply with the provisions of the NTA has no bearing on whether the Independent Person can proceed to make a determination about the doing of the act.

SM Heath in *Gobawarra Minduarra Yinhawanga People and Innawonga People v Western Australia* gave some direction on what “consultation” should include. In his view consultation involved genuine effort by the proponent to consult, including, going beyond merely presenting or telling; providing the native title party with proper information and time to consider that information; the proponent keeping an open mind and the proponent being ready to accommodate changes to their plans.

While the direction given in *Gobawarra Minduarra Yinhawanga People and Innawonga People v Western Australia* about what “consultation” means is useful, the fact remains that there is no compulsion in the NTA for a proponent to actually comply with the consultation provisions before the matter can be referred to the Independent Person for determination.

WDLAC submits that the “right to be consulted” does not provide native title parties with sufficient procedural rights to be genuinely involved in the “how, where and what” of housing and infrastructure proposals.

At the Perth workshop, FAHCSIA representatives stated that they would like “genuine consultation” although left the content of what such consultation might entail for discussion. WDLAC is of the view that any new process must include the following elements:

- (a) Formal notification of the proposed future act;
- (b) Provision of all relevant information to the native title party;
- (c) Adequate time frames for native title parties to:
  - (i) Obtain third party advice if necessary or desired;
  - (ii) Inform, discuss and consult with other members of the native title party (this requirement would be particularly important in the case of a

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<sup>14</sup> *Gobawarra Minduarra Yinhawanga People Innawonga People v Western Australia*, 2 May 2005 at [12]-[14]



Prescribed Body Corporate who are required pursuant to regulation 8 of the *Native Title (Prescribed Body Corporate) Regulations 1997* to consult with common law holders about any act that may affect native title);

- (iii) Translate or develop information into culturally appropriate forms for members of the native title party so as to allow genuine discussions and informed consent. For example many of the native title holders of WDLAC speak English as a 4<sup>th</sup> or 5<sup>th</sup> language and many senior people speak no English at all.

- (d) Face to face meetings between the proponent and the native title party;
- (e) Adequate funding of the process by the proponent; and
- (f) A process to resolve the matter which does not result in having the future act being forced on the native title party.

The opportunity to comment and the right to be consulted in its current forms imposes the future acts on the native title party regardless of their views regarding the doing of the act or how the act may be done. WDLAC submits that a process which genuinely involves native title parties will not result in an outcome being imposed on that party.

### Question 3:

**Are there any concerns raised by the Government's proposed positions, that:**

- (a) The 'non-extinguishment principle' should apply to acts covered by the new process?**

WDLAC supports the proposal that the "non-extinguishment principle" applies to a new process.

- (b) Compensation should be available for impact on native title of acts validated by the new process?**

WDLAC submits that compensation should be made immediately available for any impact on native title rights and interests for acts validated by the process or done validly pursuant to the process.

Proponents should be open to discussion and agreement of compensation during the process rather than insisting that native title parties can later make an application for a determination of compensation pursuant to the NTA.

- (c) heritage protection through other legislation should be a pre-condition to the new process being available?**

It is not clear from the Discussion Paper what this means and it is presumed that the question is asking whether heritage protection legislation has to be in existence before a new process can apply to the doing of an act?



WDLAC submits that heritage protection through other legislation should not be a pre-condition to the new process being available. The protection of heritage is of utmost importance to native title parties and will always form part of any discussion (whether that be consultation or negotiation) between the proponent and the native title party and will be central to any agreement made between the two. In Western Australia, the *Heritage Act 1972* (WA) applies in addition to any procedural rights or obligations under the NTA however the absence of any heritage protection legislation would only make the need for a properly inclusive process even more acute.

For further information or comment WDLAC can be contacted at the following:

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