ATTORNEY-GENERAL'S DEPARTMENT

DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS

DISCUSSION PAPER

Possible housing and infrastructure native title amendments

August 2009

Consultation and feedback:

The Government invites you to make comments on the possible amendment outlined in this discussion paper. If you would like to make a submission, please forward it **no later than Friday 4 September 2009** to:

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FaHCSIA
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You may email your submission to New.NTA.Process@fahcsia.gov.au and nativetitle@ag.gov.au

This paper is available at: <www.ag.gov.au> and <http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/default.aspx>

The Government will not respond individually to submissions, but will have regard to each of them in deciding whether and in what way it will go ahead with this proposal.

Public consultation sessions:

Public consultation sessions to discuss the proposal will be held in Adelaide, Alice Springs, Brisbane, Broome, Cairns, Darwin, Perth and Sydney at dates and times listed below:

DATE	**CITY**	**VENUE**	**TIME**
Monday 24th Aug 2009	Darwin	FaHCSIA NT State Office: Meeting Room 6.26, Level 5, Jacana House, 39-41 Woods Street	3pm-5pm
Tuesday 25th Aug 2009	Alice Springs	Alice Springs Indigenous Coordination Centre: Level 2, 16 Hartley Street.	2pm-4pm
Wednesday 26th Aug 2009	Perth	Hotel Ibis Perth: Green Room, 334 Murray Street.	2pm-4pm
Thursday 27th Aug 2009	Broome	CANCELLED	NA
Friday 28th Aug 2009	Adelaide	Adelaide Town Hall: David Spence room, 128 King William Street.	2pm-4pm
Monday 31st Aug 2009	Sydney	FaHCSIA NSW State Office: 280 Elizabeth Street.	2pm-4pm
Tuesday 1st Sept 2009	Brisbane	Christie Conference Centre: Mayflower Room, Level 1, 320 Adelaide St.	10am-12pm
Wednesday 2nd Sept 2009	Cairns	The Sebel Cairns: Tully 2 room, 17 Abbott Street.	10am-12pm

If you would like to attend one of these sessions please send an email to new.NTA.Process@fahcsia.gov.au indicating your name, organisation and the session you wish to attend or you can call Land Reform Branch, FaHCSIA on (02) 6121 4126.

Confidentiality:

All submissions will be treated as public, and may be published on FaHCSIA's or AGD's website, unless the author clearly asks it not to be.

A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

Introduction

The *Native Title Act 1993* came into operation on 1 January 1994. Its main purpose is to recognise and protect native title. The Native Title Act provides for the recognition of pre-existing rights to land and waters, the doing of acts that impact on native title, and the resolution of claims for compensation.

The Government believes that native title can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians and that native title negotiations can provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships.

The Government has said it is committed to improving the operation of the native title system and has recently introduced amendments to the Native Title Act in the Native Title Amendment Bill 2009. The Bill was introduced into the Parliament on 19 March 2009, passed the House of Representatives on 14 May 2009 and is likely to be considered by the Senate in the Spring sittings. The Bill will give the Federal Court the central role in managing all native title claims, as well as other targeted amendments that will assist in achieving quicker, more flexible settlements. The Government is also considering additional suggestions about how the Native Title Act could be changed to improve the system.

This discussion paper focuses on one important area for possible reform – public housing and infrastructure in remote Indigenous communities – and proposes a new specific process to facilitate these important developments.

Housing and infrastructure are crucial to closing the gap on Indigenous disadvantage

Indigenous Australians living in remote communities remain the most disadvantaged group in the country. The overcrowding and poor standard of housing and public infrastructure in many remote communities is unacceptable.

In 2008, the Council of Australian Governments (COAG) recognised the pressing need to improve public housing and infrastructure in remote communities. It agreed to the National Partnership on Remote Indigenous Housing which sets out a new and comprehensive framework for providing more and better houses. Unprecedented funding of $5.5 billion over 10 years will be directed to raise the standard of housing and infrastructure in remote communities. This investment will fund approximately 4200 new houses and upgrades to 4800 existing houses. COAG has also agreed to the Remote Service Delivery National Partnership which will raise the standard and range of services delivered to Indigenous families to be broadly comparable with those provided to other Australians in similar sized and located communities.

Healthy homes, particularly in remote communities, are one of the key building blocks of the Government's closing the gap strategy. The Government is committed to ensuring vital investment in housing and community infrastructure, including that contemplated by the new National Partnerships, proceeds expeditiously and in a manner consistent with its broader commitment to work in partnership with Indigenous Australians. 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.

The 'future act regime' under the Native Title Act

The Native Title Act establishes a procedural framework within which future activity affecting native title may be undertaken. The 'future act regime' in the Native Title Act ensures that native title rights are taken into account by setting procedures that must be complied with before acts affecting native title can be done. Further information on the 'future acts regime' is available on the Attorney-General's Department website <www.ag.gov.au> and the National Native Title Tribunal's website <www.nntt.gov.au>.

The Native Title Act sets out the processes that apply to the doing of the different types of future acts (Part 2, Division 3, Subdivisions B to N). It also sets out the conditions, if any, which must be satisfied before the act can be validly done, the effect of the act on native title, and whether a compensation liability arises as a result of doing the act.

At present, there is uncertainty about the application of the existing specific future acts processes. This is a contributing factor to the timely delivery of public housing and infrastructure in Indigenous communities.

The issues around the current native title arrangements are set out in further detail on page 7. In short:

- It will often be unclear whether native title exists over a particular area in which a community is located and whether the provision of housing and public infrastructure will trigger the need to comply with Native Title Act processes.
- As a result, while specific legal advice obtained case by case may indicate no procedures need to be followed, governments may prefer to comply with Native Title Act processes as a precautionary measure.
- Compliance with the existing procedural requirements of the Native Title Act may result in a considerable delay to the construction of public housing and infrastructure.
- There is no specific process for housing and infrastructure development for the benefit of Indigenous communities, and substantial uncertainty regarding whether or which of the existing processes can be used.

A targeted future acts process for public housing and infrastructure

The Government is considering amending the Native Title Act to include a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need for an Indigenous Land Use Agreement (ILUA).

The new process could be used for projects benefiting remote Indigenous communities, including locations covered by the National Partnership on Remote Service Delivery, and could enable vital housing and infrastructure projects to proceed with a specific consultation process for this issue.

The infrastructure facilities covered by the new process would include public housing and other developments such as medical clinics, schools and police stations, street lighting, water supply and electricity distribution. The new process would cover such facilities only where they are being established to service the relevant Indigenous community.

The key features of the proposed amendment could be:

- The 'non-extinguishment principle' could apply to projects covered by the new process. This would make sure native title was not extinguished by public housing and infrastructure projects – instead the native title would be suppressed, and could fully revive in future. For example, a lease might be granted to allow a public housing development to go ahead. Under the non-extinguishment principle, while the lease was in force any native title rights over the land would still exist but could not be enforced against the lessee. However, if the lease comes to an end, the native title rights would again be fully effective. The Government would support the non-extinguishment principle being part of the new process because it is committed to minimising the impact of public housing and infrastructure on native title.

- Public housing and infrastructure in remote Indigenous communities could proceed only following genuine consultation with native title parties on the nature and location of the proposed project. This reflects the Government's commitment to make engagement with Indigenous communities, including any native title holders, central to the design and delivery of programs and services.

- The proposed new process would only validate future acts relating to *public* housing and other *public* infrastructure. Acts affecting native title permitting privatisation or commercialisation of public assets constructed under the new process would need to be validated in some other way (for example, through an ILUA).

- Heritage and environmental protection laws would continue to apply.

- The proposed new process would provide for compensation for any impact that future acts validated by the process have on native title.

It will still be open to parties to utilise ILUAs for public housing and infrastructure projects on Indigenous land. The proposed new process would provide parties with an alternative process to assist in the timely supply of public housing and infrastructure in Indigenous communities.

Issues for discussion

Discussion and submissions are invited on any aspect of the Government's proposal to amend the Native Title Act to include a specific process to permit public housing and infrastructure in remote Indigenous communities. The paragraphs below identify some of the key issues which need to be canvassed, but are not intended to confine the discussion.

a) 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?

b) 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?

c) Are any concerns raised by the Government's proposed positions, that:

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

   (ii) Compensation should be available for any impact on native title of acts validated by the new process, and

   (iii) Heritage protection through other legislation should be a precondition to the new process being available?

Additional information on existing native title processes

This last section of the Discussion Paper gives more detail about the current native title arrangements for public housing and infrastructure.

Uncertainty about when future acts regime is triggered

It is unclear whether the provision of housing and public infrastructure on Indigenous land will trigger the need to comply with current Native Title Act processes.

Assuming native title could exist at a particular location, a housing or infrastructure project may or may not interfere with it depending on the nature of the project and the underlying land tenure and management arrangements.

Land rights schemes typically give a managing body the right to engage in limited dealings with the land. When dealing with the land within the scope of its powers, it is unclear whether a managing body's dealings will have any impact on native title. It is unnecessary to comply with the future acts regime for any dealings which do not affect native title.

This means 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. Many such projects could involve acts which go no further (in terms of their impact on native title) than the acts involved in creating the underlying land interest and management body. However substantial due diligence would be required to confirm this in every instance, and in order to be certain that acts are valid, to reduce complexity, and to ensure appropriate consultation, many project proponents (particularly governments) try to comply with the future acts regime anyway.

Uncertainty about how to comply with future acts regime

None of the existing specific future acts processes is specifically aimed at development in remote Indigenous communities for the benefit of their residents. Accordingly, it is unclear whether any of the existing provisions can be used to ensure the validity of public housing and infrastructure.

Subdivision J applies to future acts (including construction of public works) done in accordance with a reservation of land for a particular purpose made before 23 December 1996. However it is unclear whether a grant or reservation under an Aboriginal land rights scheme would be covered by Subdivision J because the grant may not be for a 'particular' enough purpose. In any case, Subdivision J has no application where the grant or reservation was made after 23 December 1996.

Aside from the uncertainty of Subdivision J's application, it is not clear that it constitutes the appropriate framework for this activity. In particular, where the act validated by Subdivision J involves the construction of public works, the act extinguishes native title. By contrast, the 'non-extinguishment principle' is applicable to other acts covered by Subdivision J, enabling the native title to again have full force and effect once the future act ceases to operate. The Government is committed

to the ‘non-extinguishment principle’, wherever possible, and minimising the impact of public housing and infrastructure on native title.

Subdivision K, which covers acts involving facilities for services to the public**,** is also sometimes considered as a path for ensuring validity of public housing and infrastructure. It too suffers considerable uncertainty and uneven application. Some of the infrastructure facilities that governments intend to construct (e.g. houses, police stations, schools, and medical clinics) may fall outside the definition of infrastructure under Subdivision K. It is also uncertain whether these facilities would be considered to be operated for ‘the general public’.