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**DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES
AND INDIGENOUS AFFAIRS ('FAHCSIA')**

**POSSIBLE HOUSING AND INFRASTRUCTURE NATIVE TITLE AMENDMENTS
DISCUSSION PAPER**

Submission from Queensland South Native Title Services Limited

September 2009

Introduction

Queensland South Native Title Services ('QSNTS') welcomes the opportunity to make submissions on 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.

QSNTS acknowledges the pressing need to improve public housing and infrastructure in remote communities as recognised by the Council of Australian Governments ('COAG'). We agree that the standard and range of services delivered to Indigenous families must be broadly comparable with those provided to other Australians in similar sized and located communities. Further, QSNTS supports the Government's commitment to ensure that vital investment in housing and community infrastructure proceeds expeditiously and in a manner consistent with its broader commitment to work in partnership with Indigenous Australians.

We note that the object of the proposed amendments to the Native Title Act is to bring about a more timely delivery of public housing and infrastructure in Indigenous communities by reducing or eliminating the purported uncertainty about the application of the existing specific future acts processes. As legislation that was intended to be beneficial to Indigenous Australians, it would be antithetical to that intention if the Native Title Act were to contribute in any way to the perpetuation of Indigenous disadvantage.

We broadly agree that the Act ought to be amended if the amendments can facilitate greater clarity, certainty and improvements to the system for the benefit of Indigenous Australians – particularly where broader outcomes can be achieved that will reduce Indigenous disadvantage. QSNTS believes that the proposed amendments offer definite advantages in achieving greater clarity within the future acts regime where public housing and infrastructure in remote communities is concerned. However, we express concerns about losing the opportunity to resolve claims in our region by looking at broader settlements that include housing and infrastructure.

We agree that the Native Title system has not been effectively used in the past to facilitate such development. We believe that this has resulted from:

- a lack of genuine, timely or effective consultation with the members of Indigenous communities affected by government funded development proposals; and
- a failure to use Indigenous Land Use Agreements ('ILUAs') as part of an integrated package of measures addressing all statutory requirements in Queensland.

The points above will be discussed in the proceeding responses to the 'key issues' questions posed in the 'Possible Housing and Infrastructure Native Title Amendments Discussion Paper' ('the Discussion Paper'). This will be followed by an outline of an alternative proposal for a new process that QSNTS is willing to assist in developing.

'Key Issues'

(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?

QSNTS notes that COAG Ministers signed the National Partnership Agreement on Remote Indigenous Housing in February 2009. Under that Agreement, the Commonwealth and States adopted a 10-year funding strategy for the provision of housing for Indigenous people in remote communities and to

address overcrowding, homelessness, poor housing conditions and severe housing shortages in remote Indigenous communities.¹

This agreement is complimented by the National Partnership Agreement on Remote Service Delivery entered into by COAG Ministers around the same time. Under that agreement, some \$292 million will be spent over six years to support improvements to the delivery of services across 26 remote locations across the Northern Territory, Western Australia, Queensland, New South Wales and South Australia. FAHCSIA states that 'these locations represent some of the largest concentrations of Indigenous Australians in remote Australia'.²

It is apparent from the introduction to the Discussion Paper that one of the main catalysts for the proposed remote housing and infrastructure amendments is to achieve the objectives, outcomes and outputs as stated in the two COAG agreements mentioned above.

We note that while the Remote Indigenous Housing Agreement does not specifically identify the locations of the remote communities targeted under it, the Remote Service Delivery Agreement states that 26 communities will be initially targeted. Of those communities, only four are located in North Queensland (Cape York and Gulf regions) and none in the Southern and Southwest Queensland regions.³

If the Remote Service Delivery Agreement is a guide to how funding for improved services and infrastructure will be allocated, then QSNTS expects that its constituents in Southern and Southwest Queensland will not be beneficiaries of the Government's strategy. This is because very few locations within our region are likely to meet the description of a 'remote' community under the proposed amendments.

QSNTS understands that the proposed amendments will adopt a definition of 'remote' based on the Australian Bureau of Statistics' ('ABS') remoteness structure. That structure is a classification designed to provide a measure of remoteness across Australia based on the Accessibility/Remoteness Index of Australia ('ARIA'). According to the ABS, ARIA measures the remoteness of a point based on the road

¹ Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing* (February 2009) art 3.

² FAHCSIA, 'Closing the gap on Indigenous disadvantage: the challenge for Australia' (27 February 2009) <http://www.fahcsia.gov.au/sa/indigenous/pubs/general/documents/closing_the_gap/p3.htm>

³ Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery* (December 2008 - January 2009) art 13.

distances to the nearest urban centre. Thus, the further the distance one must travel to access a full range of services from their home location, the more remote the home location will be.

Preliminary investigations have revealed that it is possible that almost no location within our Native Title service delivery region will meet the ABS definition of remote. For example, Cherbourg is an Aboriginal community within the Wakka Wakka People #2 native title claim area that has a history of overcrowding. It appears that under ARIA, Cherbourg would not be classified as either 'remote' or 'very remote' because of its proximity to larger urban areas.

Overcrowding in this submission is defined using the Canadian National Occupancy Standard for housing appropriateness which is an internationally accepted measure for housing standards.⁴ QSNTS submits that by limiting the scope of the proposed amendments to ABS defined 'remote' locations, many communities in regional areas that are in need of improved housing and infrastructure will not be accommodated. The same applies to Indigenous people living in urban areas. The bulk of the Indigenous population lives in urban and regional areas⁵ and this is increasing each year, particularly in Southern Queensland.

Thus, we submit that the locations targeted under the proposed amendments should not be narrowly focused on the ABS definition of remote, but should include any Indigenous community where overcrowding exists and improved infrastructure and service delivery are needed. For example, in our native title service region, areas that should be targeted are the Deed of Grant in Trust ('DOGIT') communities as well as remote towns such as Dajarra and Urandangie.

QSNTS stresses that an effective strategy to overcome the problem of overcrowding must account for the diverse range of circumstances, residential patterns and social mobility of Indigenous Australians. We submit that the proposed amendments will not address overcrowding and insufficient public housing for the overwhelming majority of Indigenous Australian who live in regional cities and towns.

Even in the minority of circumstances where the amendments might apply, QSNTS is not in a position to speculate on whether they will assist the supply of adequate housing and raise the standard and range of services delivered to Indigenous families in remote communities. We submit that there are too many

⁴ Australian Bureau of Statistics, *Health and Welfare of Australia's Aboriginal and Torres Strait Islander People*. 29 April 2008.

⁵ Ibid.

factors in play that may affect the available supply of housing and the delivery of services. Some of these factors may include:

- the lack of accurate survey plans and cadastral information necessary for registering title;
- planning and environmental legislation regulating how land can and should be used;
- cultural heritage legislation; and
- the provisions of the Aboriginal Lands Act dealing creating interests over trust land (eg, DOGITs)

The proposed process addresses the requirements of only one of the many statutes applicable to developing land in Queensland's remote Indigenous communities.

In addition to statutory factors, there are other external factors such as availability of skilled and other labour, cost and supply of building materials, administrative processes and tenancy management issues that may influence the supply of adequate housing and service delivery. Consequently, we submit that if the purported uncertainty about the application of the existing specific future acts processes does in fact contribute to delays in the delivery of public housing and infrastructure, then that contribution is likely to be negligible at best.

(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?

QSNTS maintains that native title holders should always be engaged in decisions regarding future acts on their land. We submit that the term 'native title holders' should be broadened to include native title claimants, as well as any person who may hold native title. Further, we believe that all Indigenous people living in a location where housing and infrastructure services will be targeted should be given the opportunity to be engaged, whether they are a member of a native title group or not.

QSNTS submits that communities ought to be consulted by the right to comment at a very early stage regarding the provision of housing and infrastructure in their communities. This should be done *before* and not *after* the future act process is initiated. We submit that there are legislative processes in place to effect the policy intent of the proposed amendments and hence it is lack of coordination and will on the ground that seems to be the problem. We believe that ILUAs can be, in many circumstances, the

most appropriate and expeditious vehicle for resolving native title issues so that vital housing and infrastructure can be built. Native title holders and claimants, as well as Indigenous people generally, will be largely receptive to such initiatives so long as there are agreements that are tailored to the local communities' needs. Consultation and planning should take place at that level.

COAG's Fact Sheet on the Remote Indigenous Housing Agreement states that the Indigenous housing reforms will include engagement with Indigenous people residing in remote communities and that those communities will be involved in the design and delivery of programs locally and regionally.⁶ It further states that the housing reforms will also support innovation in design and construction and the sharing of knowledge and ideas.⁷

QSNTS broadly supports COAG's position that Indigenous people have input into the design and location of their housing. However, we will not comment on the most appropriate method of consultation because we believe that is a matter for Indigenous people and their communities.

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

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

QSNTS submits that the non-extinguishment principle will not minimise the impact on native title rights and interests for traditional owners where civil infrastructure is constructed on their land. In practice, such facilities prevent the enjoyment and exercise of native title rights and interests for the lifetime of Indigenous Australians. For this reason, the Australian Government should be forthright with traditional owners acknowledging that they will need to surrender their native title rights for the greater good of their community.

It is QSNTS' position that the proposed amendments do not provide sufficient certainty. Traditional owners in DOGITs and other discrete Indigenous communities need to be certain about what is happening to their native title rights. Likewise, Governments and other land developers need certainty of title and secure access. This proposal fails to provide any of the parties with certainty and leaves neither party with a clear understanding of where they stand in the future.

⁶ COAG, 'Fact Sheet: National Partnership Agreement on Remote Indigenous Housing' (2009) 5.

⁷ Ibid.

QSNTS submits that ILUAs can deliver certainty by validating past acts, providing consent to extinguishment and surrendering native title. ILUAs are also flexible and can include cultural heritage provisions, linkages to local planning schemes and other commitments such as cost of survey and connection to water, power and sewerage.

It is our position that the proposed non-extinguishment principle will erode native title rights because traditional owners will lose the benefit to negotiate over their land. This loss of bargaining position for traditional owners may make it less likely that a broader land settlement agreement can be reached.

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

QSNTS submits that compensation should be available for any impact on native title of acts validated by the new process. Further, we submit that compensation should also be available for any practical (as opposed to legal) impact on the enjoyment of native title rights and interests. This may occur in circumstances where the non-extinguishment principle is invoked (for instance, for the construction of a sewerage treatment plant) but the real effect is that members of the affected Indigenous communities are unable to exercise their rights and interests because of the practical impact of the development.

A compensation package could include a land exchange obviating the need for non-extinguishment. A land exchange would also be beneficial for some groups who may never be able to prove native title due to the heavy evidential burden.

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

QSNTS submits that heritage protection through other legislation should always be a precondition to any new process being available.

An Alternative Proposal for a New Process

QSNTS offers the following alternative proposal for a new process that we believe will achieve better overall outcomes in the provision of adequate supply of housing and infrastructure. The proposal is

based on reversing what appears to be a primary assumption that ILUAs cannot be expeditiously utilised to allow the development of land where native title exists or is likely to exist. QSNTS is confident ILUAs could be negotiated within 12- 18 months that allow much needed housing and infrastructure to be constructed where:

- consultation in initiated at the earliest possible opportunity;
- both the consultation and negotiation stages are appropriately resourced;
- traditional owners are compensated for the loss of their land.

QSNTS' proposal would have the following steps and features:

The Australian Government funds QSNTS to work with its clients to develop a template ILUA that:

- validates past extinguishment within existing townships;
- identifies and secures the surrender of native title areas where future development will occur;
- provides home ownership options through 99-year trustee leases under the Aboriginal Lands Act (mortgage finance provided by IBA) for DOGIT residents; and
- meets the provisions of any existing planning schemes/community/town plans.

If efforts to reach agreement over an appropriately termed ILUA fail within a reasonable time, then compulsory acquisition by consent under the Acquisition of Land Act should be pursued with a compensation package that includes a land swap where practicable. Non-extinguishment should be used only as a last step in the process where it is absolutely necessary.

Conclusion

While QSNTS supports the Commonwealth's and COAG's commitment to invest in remote communities to address the issue of overcrowding and provide equitable access to basic services, we express concerns about losing the opportunity to resolve claims in our region by looking at broader settlements that include housing and infrastructure. Before drafting the proposed amendments, we urge the Government to consider implementing changes to the Native Title Act that will place appropriate triggers into the statutory framework that will encourage parties to negotiate broader settlements.

QSNTS is available to discuss any aspect of the above submissions.