AGRICULTURE, RESOURCES AND ENVIRONMENT COMMITTEE

REPORT NO. 44 ON THE

ABORIGINAL AND TORRES STRAIT ISLANDER LAND (PROVIDING FREEHOLD) AND OTHER LEGISLATION AMENDMENT BILL 2014

QUEENSLAND GOVERNMENT RESPONSE

INTRODUCTION

On 8 May 2014 the Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 was introduced into Parliament.

The Bill was subsequently referred to the Agriculture, Resources and Environment Committee with a report back date of 11 August 2014.

On 11 August 2014, the committee tabled its report no. 44 in relation to the Bill.

The Queensland Government response to recommendations made and clarification on points raised by the committee are provided below.

RESPONSE TO RECOMMENDATIONS

Recommendation 1

The committee recommends that the Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 be passed with the amendments recommended in its report.

Government Response

The government thanks the committee for this recommendation.

Recommendation 2

The committee recommends that, if the Bill is passed and prior to the commencement of the Act, the Department of Natural Resources and Mines devise and implement an education and engagement program across all 34 communities to which the Bill applies.

The purpose of this program is to increase knowledge and understanding about the objectives of freehold and the freehold model established in the Bill. This engagement and education program should involve face-to-face meetings in communities with elders, traditional owners, native title bodies and councils.

Government Response

The government thanks the committee for this recommendation, but does not accept the recommendation for the reasons set out below.

While the committee's recommendation of educating and engaging all community members across all communities is laudable, it is neither practical nor necessarily required.

Further, it is not the government's role to promote the taking up of freehold—this is a decision that communities need to make themselves.

A number of communities have indicated that they would seek to have workshops to discuss the freehold option if the Bill is enacted—the relevant departments are available to participate in any such community workshops if requested.

Additionally, the Department of Natural Resources and Mines is proposing to hold a number of workshops with trustees, native title bodies and councils to work through the freehold model in detail. It is hoped that these workshops could form part of planned conferences and meetings, such as those held by the Local Government of Queensland Association for indigenous councils.

Recommendation 3

The committee recommends that the Bill be amended to provide for a community arbitration process as part of the freehold model to hear disputes or appeals relevant to the making of the freehold instrument or the allocation of available land. This arbitration process should be independent of trustees, involve members and traditional owners, and should consider all disputes prior to referral to the Land Court or judicial review.

Government Response

The government thanks the committee for this recommendation, but does not accept the recommendation for the reasons set out below.

The government accepts the views expressed by the community members and the submitters to the committee that there is concern about the role and function the trustee may undertake when implementing the freehold option under the Bill. In particular, views were expressed that, in some circumstances, there may be a conflict of interest, or that there may be aggrieved community members who may disagree with the decision of the trustee.

The Bill importantly provides appropriate mechanisms and processes for a trustee to deal with a potential conflict of interest. For example, to ensure the integrity of the auction, ballot or tender allocation process, the Bill provides that the trustee appoints a probity advisor to monitor and advise on the allocation process. In addition, the Bill provides appeal rights to the Land Court, for example, where a person is refused an application by the trustee for an allocation of freehold.

There are also appropriate mechanisms and processes otherwise available to the trustee in the freehold process under the Bill to build the required community consensus for the trustee's proposal. For example, there is nothing stopping a trustee employing additional consultation processes, beyond those minimum standards set out in the Bill, where the trustee considers the additional processes are necessary to properly undertake their job as trustee in making decisions for their community.

The views expressed to the committee are fundamentally a matter for the trustee to take into account when they, at the outset, outline to their community the processes they intend to undertake as to how they propose to go about implementing the freehold model option for their community.

Accordingly, the government does not accept the recommendation of the committee.

Recommendation 4

The committee recommends that the Bill be amended to allow community-based indigenous-owned corporations registered under the Commonwealth *Corporations (Aboriginal and Torres Strait Islander) Act 2006* to be eligible for the grant of freehold under the allocation process for available land where there are no interest holders.

Government Response

The government thanks the committee for this recommendation, but does not accept the recommendation for the reasons set out below.

The government notes that, based on the committee's report, this proposal is based on an individual representation received by the committee.

The government in developing the Bill considered the option of allowing corporations to be granted freehold as set out in the discussion paper released on 15 November 2012. In response to that discussion paper and the 2013 consultation draft of the Bill, the government received a number of stakeholder submissions rejecting that any entity, other than an individual, be entitled to obtain freehold. It is based on these representations that the Bill as drafted does not provide the ability to allocate land to corporations of any type, or any level of government.

Accordingly, the government does not accept the recommendation of the committee.

Recommendation 5

The committee recommends that the Bill be amended to include the option for a special ministerial grant of freehold for community land outside of township 'urban' areas where there is agreement from all relevant parties and demonstration that the necessary preconditions for approval of the grant have been met.

Government Response

The government thanks the committee for its recommendation, but does not accept recommendation based on the results of consultation undertaken.

The Queensland Government's election commitment was that Aboriginal people and Torres Strait Islanders living in their own communities should be able to access freehold just as any other Queenslander can.

Following the 2012 discussion paper on making freehold available, responses indicated that freehold outside of town areas was not supported. The 2013 consultation draft of the Bill specifically included a question on making freehold available outside town areas on communal land—the responses through submissions and face-to-face meetings were to restrict freehold to town areas.

However, in regard to Aboriginal and Torres Strait land outside of the indigenous local government areas, the ability to obtain ordinary freehold already exists under the *Land Act 1994*. The Department of Natural Resources and Mines will look at streamlining the process for these lands to move to freehold where all agreements and necessary preconditions are in place.

Recommendation 6

That the Minister for Natural Resources and Mines report biennially to the House on the grant of freehold tenure in indigenous communities.

Government Response

The government thanks the committee for its recommendation but the taking up of freehold is not a reporting matter for the Minister.

Whether freehold is taken up or not is a matter for each community to decide at a time of their choosing. The granting of freehold in indigenous communities is not a performance indicator

in itself—an informed decision by a community to not take up freehold is just as valid as a decision to take up freehold, and therefore the recommendation is not accepted as it would be misleading about the success of the freehold option.

Recommendation 7

That the Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs report biennially to the House on the Freehold Pilot Program and other government initiatives supporting home ownership in indigenous communities.

Government Response

The government thanks the committee for its recommendation. The Honourable Glen Elmes MP, Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs, has advised that the pilot project will include its own evaluation and reporting program, and, similarly, for the various home ownership initiatives undertaken in conjunction with the Honourable Tim Mander MP, Minister for Housing and Public Works, there are numerous reporting arrangements already in place and will be dealt with as part of the pilot project.

Recommendation 8

The committee recommends that the Bill be amended under the new section 431U and/or 431V to include that the Minister be required to ensure that all reasonable steps are taken to negotiate with and resolve beach access disputes directly with the affected property owners prior to the declaration of a beach access area.

Government response

The government thanks the committee for its recommendation, but does not agree with the suggested amendment to the Bill. Where the beach has moved to be within private property, the owner is legally entitled to exclude the public. So, in that sense, there can be no dispute because an owner is merely exercising existing legal rights. And those rights are being exercised against every member of the public who may ever wish to access the beach. Even if it is accepted that a dispute exists, there is no way the government can settle a dispute between an individual and the public as a whole.

The power to declare public access on a beach is not intended as a tool to resolve disputes. Rather, as is the case with the British right of way legislation on which it is loosely modelled, it is about ensuring, in the public interest, that the public continues to have access to areas that have traditionally been used by the public for their enjoyment, and supporting the economy by ensuring the state's attractions are available for tourists to visit and enjoy.

CLARIFICATION ON POINTS RAISED BY THE COMMITTEE

Point for clarification 1

The committee sought clarification regarding the funding that will be provided for the freehold pilot program, how the program will be delivered, how pilot communities will be selected, and how the pilot program may inform the development of improvements to the freehold model in the future.

Government Response

The government thanks the committee for its point of clarification. The funding allocated for the pilot program is $150,000 over two years

The Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs will call for expressions of interest from indigenous communities interested in participating in a pilot

program, as a key part of the Bill is for these communities to self-nominate if they wish to proceed with freehold.

Point for clarification 2

The committee invited the Minister for Natural Resources and Mines to outline for the information of honourable members what evidence relating to consultation and community consensus he will consider when approving freehold instruments to grant freehold tenure.

Government Response

The government thanks the committee for its point of clarification.

Proposed new section 32L of the *Aboriginal Land Act 1991* and proposed section 28L of the *Torres Strait Islander Land Act 1991* respectively set out that the Minister may approve the freehold instrument—meaning the freehold schedule and the freehold policy for the freehold schedule—or refuse the freehold instrument or approve the freehold instrument on condition that the freehold instrument is amended in the way directed by the Minister.

In making a decision about the freehold instrument, the Minister must have regard to the information provided to the Minister by the local government for the freehold instrument. This will occur, in effect, after the local government has published at least one notice about the freehold instrument in a newspaper or other publication circulating generally in the local government area; has carried out public consultation about the freehold instrument; and has provided the Minister with a summary of the matters raised during the public consultation, outlining how the local government or the trustee dealt with the matters raised. This process will have further followed on from the trustee having consulted about the making of the freehold instrument so as to enable the trustee to be reasonably satisfied that it is appropriate for the freehold option land to be granted in freehold.

Under the Bill, the trustee must consult the native title holders; must determine how the trustee will notify the community about the freehold instrument; and must allow suitable and sufficient opportunity for each person the trustee consults to express their view about the freehold instrument.

The Bill requires the trustee to keep records about the consultation undertaken and how the consultation was undertaken consistent with the way determined by the trustee, so that persons were given suitable and sufficient opportunity to express their views, and why the trustee is reasonably satisfied it is appropriate for the freehold option land to be granted in freehold.

Accordingly, the Minister considers the material provided by the local government, from itself and the trustee, in making a decision whether to approve, refuse or approve subject to condition the freehold instrument.

Point for clarification 3

The committee sought clarification regarding the basis for not including native title holders in the definition of 'interest holders' for the purposes of the initial grant of freehold, and to outline how aspects of the freehold model could be applied to protect the interests of native title holders and provide eligibility to native title holders.

Government Response

The government thanks the committee for its point of clarification.

The Bill provides a particular allocation process where there is an 'interest' in the land. The definition of 'interest' in the Bill provides a level of certainty as to who the person is—as they

can be searched on a register. This is not the case for native title, and the reason why native title has not been included as an interest.

The government agrees with the reasons set out in the committee's comment on page 21 of the report noting that the proposed inclusion of native title holder as an "interest" would indeed be administratively difficult and may result in adverse and unintended consequences.

Additionally, as native title could coexist with other interests, if native title were included in the definition of interests, in most cases there could then be two or more different people eligible to apply for freehold where there is an existing interest, such as a lease.

There are two methods that could be applied to protect the interests of native title holders and provide direct eligibility for them.

Firstly, the native title holder could be granted an interest over their traditional land. This would prevent anyone else being able to apply for freehold over that land, and the native title holder could apply for freehold at any time of their choosing.

Secondly, the flexibility of the freehold model means that freehold can be made available so that only native title holders or even individual native title holders are eligible to apply for freehold over particular lands. This is a matter for the trustee and the community.

It should also be added that, as native title consent is required for the grant of freehold, the interests of native title holders have the highest protection possible, and this is provided through the Commonwealth *Native Title Act 1993*.

Point for clarification 4

The committee requests that the Minister for Natural Resources and Mines report to honourable members the outcomes of the department's consultation with the Office of the Queensland Parliamentary Counsel and what, if any, amendments will be made to the Bill in relation to an owner's potential liability over a declared beach access area.

Government Response

The government's intention is that an owner should be liable for any intentional or reckless action by the owner in the beach access area, but should not be liable for any actions of members of the public in that beach access area. Following consultation between the Department of Natural Resources and Mines and the Office of the Queensland Parliamentary Counsel, an amendment is proposed to be moved during consideration in detail to clarify the government's intention.

Point for clarification 5

The committee invites the Minister to clarify for the House that the concerns raised by the Local Government Association of Queensland about maintenance responsibilities over declared beach areas have been resolved.

Government Response

An amendment is proposed to be moved during consideration in detail to clarify the extent of a local government's responsibilities for management of declared beach areas where the local government decides to accept that responsibility. The amendment will confirm that the duty to maintain the beach only extends to what is reasonable and practical, and that the principles set out in section 35 of the *Civil Liability Act 2003* (Principles concerning resources, responsibilities etc. of public or other authorities) will apply. Those principles are that:

(a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;
(b) the general allocation of financial or other resources by the authority is not open to challenge;
(c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);
(d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

In relation to the Local Government Association of Queensland's concerns about maintaining structures, further amendment and clarification about what needs to be maintained will be made to the Bill to clarify that local governments are not required to maintain structures or works, such as a subterranean or other seawall, beach nourishment or beach fencing.

	Paper No.:
	Date: 28 August 2014
	Member: Hon Griffin

✓	Tabled		Tabled, by leave
	Incorporated, by leave		Remainder incorporated, by leave

Clerk at the Table: [signature]