NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Bill

The Bill is to amend the *Body Corporate and Community Management Act 1997, the Integrated Planning Act 1997,* the *Land Act 1994* and the *Land Title Act 1994*.

The amendments to the *Body Corporate and Community Management Act 1997* are to:

- retrospectively validate orders made by adjudicators under the dispute resolution provisions of the Act that may be invalid where the order of the adjudicator relied on the evidence of the report of a community titles inspector who did not have a proper delegation to conduct the investigation. The amendment is required as a result of an unreported decision of the District Court in 1998 in *The Body Corporate of "Westlake Villas" –v- RA Meek, The Commissioner for Body Corporate and Community Management, and Lothar Wilhelm Deichsel, Erna Maria Deichsel, Richard Zande and Jocelyn Catherine Zande* (Westlake decision). The Court found that the unauthorised delegation rendered the report invalid and therefore the decision of the adjudicator.
- establish the capacity to delegate the investigative powers of an adjudicator under the *Body Corporate and Community Management Act 1997*.

The amendments to the *Integrated Planning Act 1997* provide that a covenant registered under the *Land Act 1994* and the *Land Title Act 1994* cannot be inconsistent with a planning scheme or a condition of a development approval under the *Integrated Planning Act.*

The amendments to the *Land Act 1994*:

- streamline the machinery provisions of the leasehold land registration process about the issue of duplicate lease, licence and permit documents and the subsequent use of those documents for dealings with a lease licence or permit in the land registry;
- clarify the criteria used to consider an application to close a road,
- provide further transitional provisions in the *Land Act 1994* to ensure the continued application of the repealed *Land Act 1962* to leases granted as additional areas under the 1962 Act;
- expand the types of statutory covenants which may be registered under the Act;
- expand the capacity of the State local government and other bodies to enter into statutory covenants over non-freehold land for specified purposes.

The amendments to the *Land Title Act 1994* expand the types of statutory covenants which may be registered under the Act.

How the objectives will be achieved

Amendments to the *Body Corporate and Community Management Act 1997.*

The *Body Corporate and Community Management Act 1997* allows adjudicators to investigate applications made for an order under the dispute resolution provisions of the Act. Some investigations had been conducted by community titles inspectors who were not adjudicators. The inspectors acted under a purported delegation.

The District Court's decision in the Westlake decision found that the purported delegation to the community titles inspectors was not valid and consequently the report was invalid.

Approximately 50 adjudicator's decisions had been made using reports from departmental community titles inspectors as evidence. Without limiting the appeal rights of persons affected by an adjudicator's order on other grounds, the retrospective amendment will avoid the possible invalidation of those decisions on a ground similar to that in *Westlake Villas*. It will also avoid any need to re-hear those matters on that basis, limiting additional costs and uncertainty for all relevant parties.

Amendments to the *Land Act 1994*.

- *Streamlining of administrative processes*

The administrative processes relating to the issue of tenure documents and correcting errors in registered documents is cumbersome and not aligned with similar successful processes in the freehold land registry under the *Land Title Act 1994*.

Copies of registered lease, licence or permit tenure documents will not need to be held by the lessee, licensee or permittee. Instead the original document will be held in the land registry with the person being provided with details of registration. The person will have already been provided with full details of the terms of the tenure prior to registration. The amendment will also remove the necessity to produce documents where there is a subsequent dealing to be registered in the land registry. Copies of documents that are still in circulation will be required to be produced to the land registry for cancellation when a subsequent dealing is lodged.

Where a deed of grant is issued, an indefeasible tile under the *Land Title Act 1994* is created. While the *Land Act 1994* provides for a deed's correction, any correction process needs to be attended to under the *Land Title Act 1994*. The amendment will remedy the inability of the present process to do this.

The resulting streamlining will result in improved service for these processes.

- *Road Closures*

The use of the provisions in the Act, under which an application to close a road was dealt with, has caused public disquiet as it is perceived that the provisions could be used to arbitrarily refuse applications without having regard to the merits of each case. The Parliamentary Commissioner for Administrative Investigation (the Ombudsman) expressed similar concerns. The changes provide a more relevant and reasonable set of criteria to be considered in any road closure application.

The amendments will also remove the unintended limitation that an applicant for a road closure must be an adjoining owner. This limitation effectively prevented a person who was not an adjoining owner but who had a legitimate right to benefit from the closure, from being an applicant.

- *Continued application of the intent of the repealed Land Act 1994*

Under the (now repealed) *Land Act 1962* (section 269) an “additional area” lease could be issued to a person without competition when it was for property build-up purposes. That Act also stated that the Governor in Council's consent was required for the transfer of such an additional area without its parent property.

Supported by section 20(2)(6) of the *Acts Interpretation Act 1954,* leases issued under the repealed Act continued to be administered using the provisions of the repealed Act. Similar leases issued under the *Land Act 1994* are dealt with in a different way.

Notwithstanding the *Acts Interpretation Act 1954* and the transitional provisions of the *Land Act 1994*, the amendment will remove any doubt that the leases can be dealt with as if they were continued under the 1994 Act, including the process of releasing the tie to a parent property.

- *Covenants*

The range of covenants capable of registration under the *Land Act 1994* has been expanded to allow the State, statutory bodies representing the State and local governments to register covenants about the use of land, a building, or a proposed building or relate to the conservation of a physical or natural feature of the land including soil water plants or animals. Indeed a covenant may be used to achieve an objective, provided it is consistent with planning scheme or a condition of development approval, where a planning objective might not otherwise be achieved.

These covenants are purposely limited to exclude things like architectural standards ie the “red roof”, “white fence” or all brick construction requirements.

Entry into a covenant must be voluntarily. To assist in achieving this, the covenantor and the State, statutory authority or local government receiving the benefit of the covenant must sign the covenant document.

The requirement that the Minister, administering the *Land Act*, has to consent to the covenant will provide a filtering mechanism to ensure bodies seeking to use covenants over non-freehold land have an adequate power to do so and the covenants are used for a proper purpose.

As local governments or statutory bodies representing the State may enter into a covenant, it is not intended that a covenant replace or circumvent a planning scheme or a condition of a development approval

However covenants may be a useful tool for environmental, conservation or related use where there is statutory support for their use or perhaps where there are supported by a planning scheme but no development approval is being sought. These bodies would not however be able to use covenants for matters for which an easement is the appropriate tool.

Amendment to the *Land Title Act 1994*

The types of covenants capable of registration under the *Land Title Act 1994* have also been expanded in the same manner as the *Land Act 1994.*

Alternative ways of achieving the policy objectives

The alternative to the proposed amendments to the *Body Corporate and Community Management Act 1997, the Intergrated Planning Act 1997,* the *Land Act 1994* and the *Land Title Act 1994* was to ignore the problem areas of these Acts and allow the potential of litigation to occur, the cumbersome administrative practices to continue and to ignore the changing needs of the State and local government to manage land and development. The amendments to the Acts are considered to be the only practical mechanism to achieve the necessary objectives of this Bill.

Administrative cost to government of implementing the Bill

There are no administrative costs to Government in implementing the proposed amendments to the *Body Corporate and Community Management Act 1997, the Intergrated Planning Act 1997,* the *Land Act 1994* and the *Land Title Act 1994*

Consistency with fundamental legislative principles

There are two retrospective provisions in the Bill.

The first matter is the retrospective validation of decisions made by adjudicators under the *Body Corporate and Community Management Act 1997.* In these decisions, the adjudicator, as part of the evidence used to

reach the decision, relied on an investigation report prepared by departmental community titles inspector. The inspector had acted under a purported delegation of the adjudicators' powers under the *Body Corporate and Community Management Act 1997*.

The District Court of Queensland in the Westlake decision, found that as the purported delegation to the community titles inspectors was not valid, the report was invalid and therefore the adjudicator's decision was also invalid. On that basis alone, the Court, having said the reasoning of the adjudicator was sound, ordered the matter be referred back to the adjudicator for a fresh determination after the adjudicator personally conducted the investigation.

Approximately 50 adjudicator's decisions had been made using reports from community titles inspectors as evidence. All these decisions, if appealed, could be the subject of a determination similar to that in the Westlake decision.

The retrospective amendment will avoid the possible invalidation of those decisions on grounds similar to the Westlake decision. Subsequent rehearing of those matters on that basis would cause confusion, additional costs and uncertainty for all relevant parties.

Failure to validate these decisions will have a greater adverse impact across all affected parties than the potential adverse impact on the parties to any individual decision if validation did not occur. The right of appeal against the adjudicator's decision on other grounds will not be lost by this amendment. Accordingly, it is considered that the proposed amendments do not breach fundamental legislative principles.

The second matter is the *Land Act 1994* amendment seeking to preserve the intent of section 269 of the now repealed *Land Act 1962* (the repealed Act).

Section 269 of the repealed Act required the Governor-in-Council to consent to any separate sale of two "linked" leases where one had been allocated as an additional area during a property build-up process. On the basis of section 20(2)(b) of the *Acts Interpretation Act 1954*, the Department of Natural Resources has continued to apply the provisions of the repealed Act for those leases after the commencement of the *Land Act 1994*. (Section 20(2)(b) of the *Acts Interpretation Act 1954* provides that the repeal of an Act does not "affect the previous operation of the Act or anything suffered, done or begun under that Act".)

The Department is not aware of any cases where its application of the provision of the repealed Act has adversely affected either the present lessees or proposed purchasers of affected leases. Notwithstanding that, doubts have been raised as to whether the transitional provisions of the *Land Act 1994* and the *Acts Interpretation Act 1954* adequately provide for the continuation of the intent of section 269(12) of the repealed Act.

While the proposed retrospective amendment will put beyond doubt the continued application of section 269 of the repealed Act to existing "linked" leases, it does not impose any additional burden on existing lessees nor does it adversely affect the rights of any person. It is considered that the amendment does not breach fundamental legislative principles.

Consultation

Consultation has taken place with the School of Law of the Queensland University of Technology about the amendment to the *Body Corporate and Community Management Act 1997*.

The amendments to the *Land Act 1994* and the *Land Title Act 1994* about covenants have been discussed extensively with the Department of Communication, Information and Local Government and Planning, the Department of Public Works, the Department of Justice and Attorney-General and Department of Housing. The Departments support the amendment. The amendments to these Acts about road closures and the streamlining of administrative processes was discussed with other stakeholders including the United Graziers Association, the Queensland Grain Growers Association, the Cattlemen's Union, the Australian Finance Conference and the Queensland Law Society.

NOTES ON CLAUSES

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Act.

PART 2—AMENDMENT OF *BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997*

Clause 2 identifies the Act to be amended

Clause 3 is to establish the power for an adjudicator to delegate the adjudicator's investigative powers, under Chapter 6 Part 9 of the Act, to appropriately qualified persons.

The section does not extend the delegation of the adjudicator's power to make an order in terms of Section 220(2) of the Act.

Sub-clause 3(2) provides an inclusive meaning for "appropriately qualified" and gives an example of what may constitute the "standing" of a delegate who is a public servant.

Clause 4 is a transitional provision to provide legislative certainty to particular adjudicators' orders made under Chapter 6 of the *Body Corporate and Community Management Act 1997* following the District court's decision in *The Body Corporate of "Westlake Villas" –v- RA Meek, The Commissioner for Body Corporate and Community Management, and Lothar Wilhelm Deichsel, Erna Maria Deichsel, Richard Zande and Jocelyn Catherine Zande*. In that case the Court found that an unauthorised delegate of the adjudicator conducted the investigation of matters raised in an application for an order under Chapter 6 of the Act.

To achieve the validation of other adjudicator's orders which may have relied on evidence obtained in similar circumstances and which may be affected by the Court's decision, the clause provides:

(a) the circumstances where the clause is to apply,

(b) the validation of the order of the adjudicator made in those circumstances, and

(c) an expiry provision that is specific to this transitional provision.

PART 3—AMENDMENT OF *LAND ACT 1994*

Clause 5 identifies the Act to be amended.

Clause 6 amends section 98 to provide a more specific link to Section 99.

Sub-clause 7(1) amends the section heading.

Sub-clause 7(2) is to specifically relate section 99(1) to permanent road closure.

Sub-clause 7(3) will allow any person to apply for a temporary road closure. It is intended that a wider class of persons who may benefit from the road closure may apply.

For example, a primary producer, who installs a pipeline that crosses a number of properties under an easement, may apply for a temporary road closure of a road crossed by the pipeline even though the road may be some distance from his property.

Sub-clause 7(4) alters the criteria to be considered in an application to permanently close a road to include more relevant matters.

Clause 8 amends the heading of Chapter 3 Part 2 Division 3 to more accurately reflect the divisions content.

Clause 9 will allow a road licence to issue to a person other than an adjoining owner.

An example, a primary producer, whose land does not adjoin the road but who would benefit from a water pipeline crossing the road to supply water to his land could apply for a road licence.

Clause 10 aligns section 104(c) with the intent of section 103(2) The provision will now allow the Minister to issue a road licence to a person other than an adjoining owner where the land, which receives the benefit of the road licence, may not actually adjoin the land owned by the applicant.

Clause 11 is a machinery provision to relocate the existing section 105 from the "Division 3 Road Licences" to the new "Division 3A - Temporarily closed roads".

Clause 12 is a machinery provision to insert a new Division heading about temporarily closed roads.

Clause 13 renumbers existing provisions to achieve better placement of the sections in the new Division 3A.

Clause 14 clarifies the intent of section 109. It specifies that a simultaneous opening and closure of road may occur either within a single deed of grant or within two adjoining deeds held by the same owner.

Clause 15 omits a redundant provision. Section 189 was intended to apply the intent of the (now repealed) *Land Act 1962* about a leasehold rental system based on unimproved rental valuations. The section however, has never been used since the commencement of the *Land Act 1994*.

Clause 16, in amending section 210, removes the need to issue a duplicate tenure document to a lessee, licensee or permittee after the registration of the document has been completed.

The terms of the tenure are provided to the person to hold the tenure at the time the offer of the tenure is made. This notification occurs well before the entry of the details in the register.

The non-issuance of duplicate tenure documents also more closely aligns the leasehold and freehold registration systems by ensuring the central repository of information about land is the registers in the Land Registry. The process will ensure that the registers in the land registry are the primary source of changed information about a lease, licence or permit.

These amendments to section 210 require existing tenure documents to be returned to the land registry.

Clause 17 continues the approach taken in clause 19 to have any existing tenure documents returned to the land registry when a change is to be recorded in the register after an appeal against a change in tenure conditions has been lost. The holder of the tenure already has notice of the changes prior to their entry in the land register.

Clause 18 amends section 214 to require any existing tenure documents are to be returned to the land registry where the conditions of a remedial action notice are to be recorded. No new document will be issued as the tenure holder has previously been provided with notice of the remedial action conditions.

Amendments to the register where there has been a successful appeal against imposed remedial conditions will be carried out by the chief executive

Clause 19 also applies the revised approach about dealing with tenure documents to section 279.

In some instances the person who holds the tenure may not be in possession of the tenure document eg a mortgagee, solicitor or accountant or an estranged partner of the person may hold it. Subclause 2 will require any person who has the document to return it.

Clause 20 amends section 296 to positively reinforce the requirement to return tenure documents to allow the registration of transfer documents or other documents. If the document is not returned the transfer or other document cannot be registered.

Clause 21(1) is a machinery provision to clarify the section heading of section 358 by more accurately describing the purpose of that section.

Sub-Clause 21(2) clarifies how the deed of grant or deed of grant in trust, when surrendered, is dealt with under section 358(3).

Sub-Clause 22(1) is amended to provide that if a road licence is issued over a road, the licence may also be the subject of a covenant.

Sub-Clause 22(2) allows statutory bodies which represent the State, eg, the Queensland Housing Commission, to enter into a covenant.

Sub-clause 22(3) subjects section 373A(3) to a new subsection (4)

Sub-Clause 22(4) provides the limited types of covenants that may be registered under the *Land Act 1994*. Covenants that are about architectural standards eg a style of house, type of construction or having a particular colour scheme cannot utilise this provision. It is not intended that matters, which would usually be the subject of an easement which is recognised at law, could use the covenant provisions.

Sub-Clause 22(5) allows a covenant to impose positive obligations eg carrying out work or spending money, or negative ones eg restricting the use of the land to low cost housing.

Sub-Clause 22(6) provides interpretative meanings for particular words used in the section.

Clause 23 clarifies the requirements for an amending document where the document is to be registered. The Minister administering the *Land Act 1994* retains the power to approve covenants entered into over land under that Act

The clause also renumbers two sections.

Clause 24 replaces section 373D. The clause clarifies who may sign the release of a covenant.

The provision allows the covenantee to unilaterally release the covenant. For example, if the State had entered into and registered a covenant about the use of the land for particular environmental purposes the State could discharge the covenant if the need for such purpose had changed.

The release of a covenant may be partial or complete to the extent specified in the release document. The registration of the release document gives effect to the release of the covenant only to the extent allowed.

Clause 25 is an editorial provision to include transitional provisions as Chapter 9 Part 1A under the *Land Act 1994.*

The Clause clarifies that "additional area" leases issued under Section 269 of the repealed *Land Act 1962* continue as an interest under the *Land Act 1994*. It also establishes that the tying of the additional lease to the "parent" lease as required by Section 269 of the repealed *Land Act 1962* is now continued as a condition of the "additional area" lease under Section 205 of the *Land Act 1994.*

Clause 26 establishes definitions of 'adjoining owner', 'encumbrance' and 'pastoral lease' in Schedule 6 (Dictionary).

The inclusion of the inclusive definition of "encumbrance" allows a registered covenant under chapter 6, part 4, division 8 to be carried forward on any new tenure including the issuing of a deed of grant, in a manner similar to other registered encumbrances.

PART 4—AMENDMENT OF *LAND TITLE ACT 1994*

Clause 27 identifies the Act to be amended.

Sub-Clause 28(1) will now allow covenants entered into statutory bodies which represent the State, eg, the Queensland Housing Commission, to be registered in the freehold land register.

Sub-clause 28(2) omits section 97A(3) and inserts a new provision which:

- provides the limited types of covenants that may be entered into. Covenants that are about architectural standards eg a style of house, type of construction or having a particular colour scheme cannot utilise this provision. It is not intended that matters which would usually be the subject of an easement which is recognised at law, could use the covenant provisions;
- allows a covenant to impose positive obligations eg carrying out work or spending money, or negative ones eg restricting the use of the land to low cost housing;
- is binding on the registered proprietor of the lot and successors. This provision binds mortgagees and lessees as well as the registered owner; and
- provides interpretative meanings for particular words used in the section.

Clause 29 amends section 97C to clarify the circumstances in which an amended covenant document may be registered.

The section will then exclude amendments that change the areas of land and/or the parties that are subject to the covenant. Where land, encumbered by the covenant, is to have land added to it or have land subdivided from it, a new covenant would have to be entered into and registered. The previous covenant would be released in terms of section 373D.

Clause 30 clarifies who may sign the release of a covenant.

The provision allows the covenantee to unilaterally release the covenant. . For example, if the State had entered into and registered a covenant about the use of the land for particular environmental purposes the State could discharge the covenant if the need for such purpose had changed.

The release of covenant may be partial or complete to the extent specified in the release document. Registration of the release releases the covenant to the extent permitted.

The Clause also ensures the *Property Law Act* 1974 provisions about covenants applies to registered covenants.

Clause 31 inserts the definition of ‘building’ into the Dictionary.

PART 5—MINOR AMENDMENT OF ACTS

Part 5 of the Bill includes a number of minor amendments to various Acts in a Schedule.

Clause 32 is self-explanatory.

Body Corporate and Community Management Act 1997

Clause 1 corrects the erroneous references to the "Commissioner" in Sections 221 (3) and (4) and relaces that term with that of the "adjudicator". This correctly indicates one of the adjudicator's operational roles in dealing with applications for orders.

Clause 2 inserts a new Chapter Heading for Chapter 8.

Integrated Planning Act 1997

Clauses 1 and 2 are to preclude covenants registered under the *Land Act 1994* and the *Land Title Act 1994* from being inconsistent with planning schemes and development approvals under the *Integrated Planning Act 1997.*

Land Act 1994

Clause 1 is a machinery provision to correct an error in section 38(4) that identified "reserves" rather than "deeds of grant in trust" as the form of trust land being dealt with in the provision.

Clause 2 is to amend the heading to section 359 to more accurately describe the purpose of that section.

Clause 3 amends the heading to section 360 to more accurately describe the purpose of that section.

Clause 4 is to correct a typographical error in section 399(2).

Clause 5 omits the definitional subsection from the section as the definition has now been included in Schedule 6 (Dictionary) by clause 26 of the Bill.

Clause 6 is an editorial amendment.

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