Aboriginal and Torres Strait Islander Land Amendment Bill 2008

Explanatory Notes

Title of the Bill

The short title of the Bill is the *Aboriginal and Torres Strait Islander Land Amendment Bill 2008.*

Policy objectives of the Bill

The Bill amends the *Aboriginal Land Act 1991* (ALA), the *Land Act 1994*, the *Land Court Act 2000*, the *Local Government (Aboriginal Lands) Act 1978*, the *Native Title (Queensland) Act 1993* and the *Torres Strait Islander Land Act 1991* (TSILA). The objectives of the Bill are aimed at improving the lives of Indigenous Queenslanders, through Indigenous land tenure reform that will:

- enabling home ownership and provide leases for social housing;
- provide greater certainty over the governance of townships and assist the transfer process for Deed of Grant in Trust (DOGIT) lands;
- facilitate the establishment of public infrastructure; and
- encourage economic development in Indigenous communities.

Reasons why the proposed legislation is necessary

Under the present legislation, leases over Indigenous lands (Indigenous DOGIT and reserves, Aboriginal land and Torres Strait Islander land) can not be renewed and in the case of DOGIT and Indigenous reserves, are limited to 30 years. This inhibits home ownership, provides little security for social housing and does not provide the necessary certainty or security for commercial investment in the community.

The mayors of Aboriginal shire councils have said that some of the most significant issues confronting councils are difficulties associated with land ownership, management and tenure.

The Palm Island select committee made 65 recommendations in its report including:

- the simplification of existing tenure arrangements and processes; and
- the provision of long-term leases to facilitate home ownership and economic development in the Palm Island community.

The Australian Government identified 'land tenure reform', including long-term leases for public housing bodies, as a precondition for additional funding for housing on DOGIT communities.

Indigenous communities can find it hard to attract commercial development for a range of reasons. In addition to the remoteness of many of these communities, one reason is the inability of the shire councils to issue long-term leases or grant private freehold land to third party proponents.

Amendments to relevant legislation are required to enable renewable long-term leasing for residential, infrastructure and commercial purposes to encourage home ownership and the development of Indigenous communities.

Under the ALA and the TSILA (Indigenous Acts), Indigenous DOGITs are transferable lands and must be transferred to a land trust "as soon as practicable". This means that the whole DOGIT, including most community infrastructure is eligible for transfer to another trustee.

When land is transferred ownership and responsibility for both the land and any infrastructure on the land (unless it is otherwise secured) is effectively put into private ownership. Indigenous Shire Councils currently hold most transferable land, which has on it significant community assets, some secured by leases or reserves but many, such as housing, are not. It is clearly not appropriate to transfer ownership and management of community infrastructure to a sub-group of the community.

Unfortunately, a significant amount of public infrastructure in Indigenous communities is not surveyed and/or does not have its own tenure. Therefore, identifying and isolating the above infrastructure has led to delays in transferring land, DOGITs in particular.

Declaring such particular parcels of land as 'not-transferable' will avoid the expensive and lengthy task of identifying and protecting the vast amount of public infrastructure in these communities. This will significantly speed up the transfer of the balance of the land.

There is no general power to compulsorily acquire all interests in Indigenous lands for essential infrastructure such as schools, police stations, community housing and hospitals. The Bill provides for the compulsory acquisition of Indigenous lands to deliver public infrastructure through the ordinary acquisition process.

How the policy objectives will be achieved

The policy objectives are to be achieved by providing for:

Longer term leasing

Residential purposes—the Bill will enable longer term leasing (99 years) for private residential purposes. Leases for residential purposes were previously available under the *Land Act 1994*, but the term was limited to 30 years on Indigenous DOGITs and reserves. The Bill provides greater security of tenure to Aboriginal people and Torres Strait Islanders in providing longer term (99 years) leases, with the ability to renew the lease. Longer term leases for residential purposes will also be available for persons other than Aboriginal people or Torres Strait Islanders, subject to strict criteria, e.g. person must be a spouse or the person has a to a commercial lease on Indigenous land.

Commercial leases—the Bill will enable longer term leasing (up to 99 years) for commercial leases. This will only be available providing certain requirements are met, including consultation.

Public infrastructure and Social housing—under the new provisions in the Bill the State is able to hold long-term leases (up to 99 years) for public infrastructure purposes or for a purpose under the *Housing Act 2003*. The Australian Government and the local authority can also be granted long-term leases to provide public infrastructure.

Generally—all long term leases, are available on Aboriginal or Torres Strait Islander Land (land granted under the Indigenous Acts), can also be granted over Indigenous reserves and can be renewed. All leases will require the consent of the owner of the land and in some instances, Ministerial consent.

Non-transferability provisions

Aboriginal and Torres Strait Islander DOGITs are 'transferable' land under the ALA and TSILA and are required to be transferred to Indigenous grantees as soon as practicable. However, it is not practicable or appropriate to transfer any community residential, infrastructure and administrative areas away from shire councils to private trustees.

Therefore amendments will provide that certain lands are not-transferable lands, this is land that:

- has been compulsorily acquired;
- is subject to a long-term commercial lease (longer than 30 years); or
- has been declared by gazette as 'not–transferable' due to it being inappropriate or impractical to transfer the land, for example, land on which water infrastructure is located.

Before the Minister declares land to be not transferable the Minister would need to be satisfied that:

- housing or essential or other infrastructure is situated on the land, or
- the land is being used as a town site or part of a town site by Aboriginal people, or
- the land is being used as if it were road, or
- having regard to the nature of use of the land it is not appropriate for the land to be granted in fee simple.

If the Minister proposes to declare land as not transferable then the Minster must notify the trustee, and publish a public notice and consider any representations made in response.

Where the proposed declaration is on the basis that having regard to the nature of use of the land it is not appropriate for the land to be granted in fee simple, then those persons who responded to the notice can lodge an appeal with the Land Court.

The Minster can not make a declaration until the period for appeal has expired, or if there is an appeal, then only after the appeal has been decided.

If applied over DOGIT townships, this will allow the shire council to retain control of community infrastructure on land that will, as it is no longer required to be transferred under the Indigenous Acts, remain as DOGIT land under the Land Act. It is expected that in these circumstances the balance of the DOGIT can be more readily transferred under the Indigenous Acts.

Where land that was gazetted as "not transferable land" now no longer has those characteristics that caused it to be made not transferable land in the first instance, then the land can again be declared to be transferable land.

Compulsory acquisition powers

Currently there is no general power to compulsorily acquire all interests in Indigenous lands for essential infrastructure such as schools, police stations, community housing and hospitals.

This Bill provides for the compulsory acquisition of Indigenous lands in the same way as acquisition of ordinary freehold land occurs. This will make all lands, Indigenous and non-Indigenous lands, subject to the same State acquisition laws. As a result, a constructing authority will be able to call upon the ordinary acquisition process to get the necessary development completed. It should be noted that the application of the acquisition process in no way circumvents the application of the *Aboriginal Cultural Heritage Act 2003* or the *Torres Strait Islander Cultural Heritage Act 2003*, and the responsibilities of developers under that legislation.

Land that has been acquired under the acquisition process for public infrastructure will also automatically become 'not-transferable' land.

General improvements to the ALA

To appropriately reflect Indigenous people's connection to land held under their tradition, amendments will be made to provide that all grants of transferable land are held for the benefit of Aboriginal people particularly concerned with the land, rather than held for the benefit of all Aboriginal people (generally) as is the case now.

The amendments provide for the amalgamation of land trusts where multiple land trusts hold land on behalf of the same tribal or clan groups, and those trusts that consider it would be appropriate to amalgamate.

While currently the ALA provides that an entitlement of mining royalties goes to the grantees of the land and chief executive of the department (to be

applied for the benefit of Aboriginal people of Queensland), the amendment will now direct that the total entitlement goes to the grantees of the land.

The new amendments will now enable land to be transferred to native title holders. This will be achieved by allowing a registered native title body corporate to be the grantee of land under the Indigenous Acts.

The grant of land under the ALA has sometimes been used as a tool by the State to help resolve native title determinations. The amendment will greatly assist the process and help align the Indigenous Acts with the Commonwealth's Native Title Act.

Notes on Provisions—general

Part 1 Preliminary

Describes the title of the Bill

Part 2 Amendment of the Aboriginal Land Act 1991

Provides for the changes to be made to the ALA. The key changes are:

- new sections 16A–I will allow land that is being used for housing, infrastructure, a town site, a road etc to be declared not transferable land under the ALA. This mainly relates to DOGIT community lands. The tenure of the land will remain as DOGIT with the Indigenous shire council as trustee.
- new sections 26A-E provides Aboriginal people with a formal process to express an interest about certain lands.

- new section 27A provides for the appointment of a RNTBC as a grantee.
- new section 28A requires the Minister to advertise grantees before appointing them. This formalises what is already practised.
- new section 39 broadens the scope of dealings that can be done on Aboriginal land by the grantees (now named 'the trustee').
- There is some inconsistency in the ALA about the use of 'grantee' and 'trustee'. Amendments have been made so that when referring to transferred land, 'the grantees' will now read 'the trustee'.
- new sections 40D-N set out new leasing provisions to apply to Aboriginal land, in particular long term leases (99 years), for residential purposes, public housing, commercial purposes and public infrastructure. See discussions at page 2
- new sections 40O-Y sets out the process under which a private residential lease held by an Aborigine may be forfeited.
- new sections 40ZB – ZF provides a process for the rationalisation (e.g. amalgamation) of land trusts
- new section 142 changes the beneficiaries of Aboriginal land that is transferred land from Aboriginal people and their ancestors and descendants to Aboriginal people particularly concerned with the land and their ancestors and descendants.

Where relevant, some of the above sections are repeated to apply to granted land and trust land. For example, leasing provisions are repeated at new sections 77D - N for granted land and at new sections 83R–W for trust land (DOGITs and Reserves).

Part 3 Amendment of the Land Act 1994

Various sections amend the Land Act to allow the new leasing provisions to be applied to DOGIT and Reserve land and compulsory acquisition to Indigenous DOGIT land.

Part 4 Amendment of Land Court Act 2000

Makes minor amendments to the *Land Court Act 2000* to allow the Land Court to exercise its jurisdiction under specific provisions of the ALA and TSILA.

Part 5 Amendment of Local Government (Aboriginal Lands) Act 1978

Provides for a power and a process to resume a lease, or part of a lease, for a purpose for which land may be taken under the *Acquisition of Land Act 1967* by a constructing authority. The process is modelled on that in the *Land Act 1994*.

Part 6 Amendment of Native Title (Queensland) Act 1993

Provides (a) that the power of compulsory acquisition includes the power to compulsorily acquire native title rights and interests in relation to land or waters for the purpose of the compulsory acquisition Act; and (b) that native title rights and interests may be acquired under a compulsory acquisition Act even though the Act would not otherwise apply to the land.

Part 7 Amendment of Torres Strait Islander Land Act 1991

Provides for the changes to be made to the TSILA. The changes are not as broad as the changes being made to the ALA as full consultations on the TSILA have not occurred. The key changes mirror those being made in the ALA in respect of leasing, making land not transferable and compulsory acquisition. They are located in:

- new sections 13A–J, making land not transferable
- new sections 37D-N and sections 80D-J, relating to leasing on transferred land and trust land respectively, and s 38 relating to compulsory acquisition.
- new sections 37O-Y set out the process under which a private residential lease held by a Torres Strait Islander may be forfeited.

Part 5 Minor and consequential amendments

Provides for small changes such as updating current terminology etc.

Notes on provisions—clause by clause

Part 1 Preliminary

Short title

Clause 1 describes the short title of the Act as the *Aboriginal and Torres Strait Islander Land Amendment Act 2008.*

Commencement

Clause 2 provides that the Act commences on a day to be fixed by proclamation.

Part 2 Amendment of the *Aboriginal Land Act 1991*

Act amended in part 2 and schedule

Clause 3 provides that this part and the schedule amend the *Aboriginal Land Act 1991.*

Amendment of s 3—(Definitions)

Clause 4 amends the dictionary to the Act by omitting, amending or including definitions. The definitions in the Act are now also relocated to a newly created schedule to the Act.

Omission of s 5—Meaning of native title interests

Clause 5 omits s. 5, which defines native title interests for the purposes of this Act. Native title is defined under the *Native Title Act 1994,* therefore this definition is unnecessary.

Replacement of s 6—(Crown bound)

Clause 6 replaces s. 6 in which the Act binds the Crown, with new s. 6, Act binds all persons, which binds all persons, including the State.

Amendment of s 10—(Meaning of Aboriginal land)

Clause 7 omits the term, ‘for the benefit of Aboriginal people’. This amendment supports the ability to grant land to a registered native title body corporate (RNTBC). A RNTBC holds the land for the benefit of the native title holders, not for the benefit of 'Aboriginal people' or 'Aboriginal people particularly concerned with the land'. Native title holders will be a subset of either 'Aboriginal people' or 'Aboriginal people particularly concerned with the land' and therefore as it is more restrictive, the more

general category of beneficiaries 'for the benefit of Aboriginal people' was no longer appropriate.

Amendment of s 11—(Meaning of transferable and transferred land)

Clause 8 omits the term, 'for the benefit of Aboriginal people'. This amendment supports the ability to grant land to a registered native title body corporate (RNTBC). A RNTBC holds the land for the benefit of the native title holders, not for the benefit of 'Aboriginal people' or 'Aboriginal people particularly concerned with the land'. Native title holders will be a subset of either 'Aboriginal people' or 'Aboriginal people particularly concerned with the land' and therefore as it is more restrictive, the more general category of beneficiaries 'for the benefit of Aboriginal people' was no longer appropriate.

Amendment of s 12—(Lands that are transferable lands)

Clause 9 expands the list of transferable lands to include particular claimable land decided by the Aboriginal Land Tribunal to be transferable land, and provides that certain lands cease to be transferable land. The latter includes land taken by a constructing authority under the *Acquisition of Land Act 1967,* land leased for more than 30 years for a commercial purpose, or land declared as not transferable land by declaration under s. 16A. The amendments also update terminology.

Amendment of s 13—(DOGIT land)

Clause 10 amends s. 13 to remove roads that were opened following the enactment of the Aboriginal Land Act from being DOGIT land as defined in the Act and updates terminology.

Amendment of s 15—(Aurukun Shire Lease Land)

Clause 11 amends s. 15 to remove roads that were opened following the enactment of the Aboriginal Land Act from being Aurukun Shire lease land as defined in the Act and updates terminology.

Amendment of s 16—(Mornington Island Shire lease land)

Clause 12 amends s. 16 to remove roads that were opened following the enactment of the Aboriginal Land Act from being Mornington Shire lease land as defined in the Act and updates terminology.

Insertion of new pt 2, div 3A

Clause 13 inserts new Part 2 after s. 16

Division 3A Declarations about particular transferable land

New s 16A—Definition for div 3A

New s. 16A defines the term *relevant land* for the purposes of this division. 'Relevant land' means DOGIT land, Aboriginal Reserve land (other than land declared under a regulation for section 14), Aurukun Shire lease land and Mornington Shire lease land.

New s 16B—Particular land may be declared to be not transferable land

New s. 16B allows the Minister to make a declaration that particular land be not transferable because the condition, nature, or use of the land would mean that it was not appropriate or practicable to grant the land in fee simple.

Section 16B(1)(a – c) provide specific situations where the Minister may, if satisfied of the facts, declare land to be not transferable. These situations are where the land is being used for, or has located on it; housing, or essential or other infrastructure; town, or road.

In addition to these specific situations the Minister may declare land to be not transferable under s. 16B(1)(d), if satisfied that the nature or use of the land means that it is not appropriate or practicable to grant the land under the *Aboriginal Land Act 1991*.

In considering to make a decision under s. 16B(1)(d), s. 16B(2) provides that the Minister may have regard to the nature and use of the land.

Two examples are provided in the subsection:

(a) whether the land is required for future town expansion; or

(b) whether the land is in a condition suitable to be granted.

Examples of (b) above would include safety concerns relating to the current condition of the land, for example open mine shafts, or extensive erosion.

A decision under s. 16B(1)(d) is can be appealed and therefore the Minister can not make a decision under s. 16B until the period for appeals has expired, or if there have been any appeals, then until the appeal has been finalised.

New s 16C—Notice of intention to make a declaration

New s.16C provides for a notification process that must be followed if the Minister intends to make a declaration under s. 16B.

If the Minister intends to make a declaration under s. 16B, then the Minister must:

(a) give notice in writing of the Minister's intention to make a declaration under s. 16B to the trustee of the land; and

(b) within 10 days of notifying the trustee, must publish a notice of the Minister's intention to declare the land not transferable in a newspaper or other publication circulating generally in the area of the land; and

(c) consider all representations made within the period set out in s. 16C(1)(3).

The notice provided by the Minister must include a description of the relevant land and state the following:

(a) the reason for the intention to declare the land not transferable; and

(b) that written responses to the intention to declare the land not transferable can be made to the Minister; and

(c) where the responses can be made;

(d) the time allowed for responses – this time must not end until at lease 28 days after the notice has been published.

New s 16D—Minister to consider representations and give notice of decision

If, after considering all responses made under s. 16C(4) the Minister decides to declare the land 'not transferable', then the Minister must notify in writing each person who provided a response, including the trustee, even if the trustee did not provide a response.

This notice must state the reason for declaring the land 'not transferable', the provision under which the declaration was made, and if the decision was made under s. 16B(1)(d), that the person may appeal the decision to the Land Court.

New s 16E—Appeal against particular decision

A person who made a representation under s. 16C(4) may appeal to the Land Court the Minister's decision, if the Minister's decision was made under s. 16B(1)(d).

An appeal is commenced by filing written notice of appeal with the registrar of the Land Court.

The notice of appeal must be filed within 28 days after the person receives notice of the Minister's decision. However the Land Court may (within 28 days of the Minister notifying all persons who made representation) extend the period for making an appeal.

The appeal is a rehearing of the Minister's decision using the material that was before the Minister. The Land Court may allow further evidence.

New s 16F—Powers of the Land Court on appeal

In deciding the appeal, the Land Court has the same powers as the Minister. The Land Court may:

(a) confirm the Minister's original decision; or

(b) set aside the Minister's decision and substitute another decision; or

(c) set aside the Minister's decision and return the issue to the Minister with directions the Court considers appropriate.

If the Land Court substitutes the Minister's decision with another decision, that decision is taken to be the decision of the Minister, except that it can not be appealed under this division.

New s 16G—Notice about declarations - trustee

New s 16G provides that as soon as practicable after a declaration that land is 'not transferable' is made, the chief executive officer must give notice in writing of the declaration to the trustee of the land.

New s 16H—Notice about declarations - registrar

New s. 16H provides that soon after declaring relevant land to be not transferable land, the chief executive must give the registrar written notice of the declaration and specify what must be included in the notice. It also has requirements with regard to the keeping of records for land declared not transferable and for land subject to a declaration that is subsequently repealed.

New s 16I—Requirements about plans of subdivision for declarations under s. 16B

16I inserts a new section that provides that when transferable land is declared to be not transferable land, a plan of subdivision can be lodged by the Minister over the transferable land without application of certain provisions in the *Land Act 1994* and *Land Titles Act 1994* that require other parties to approve the lodgement.

A plan of subdivision is required to be lodged over transferable land proposed to be declared not transferable land to enable the necessary identification of an area of land that is no longer transferable. This is best achieved by lot on plan identification.

Amendment of s 19—(Lands that are available Crown land—general)

Clause 14 replaces 'Crown' with 'State' throughout the section, '*Land Act 1994'* with 'Land Act', and 'Crown land' with 'unallocated State land' (all terminology changes), and also provides that an easement is not an interest that would prevent land from being declared available State land.

New Part 2A Formal expression of interest about land

Insertion of new Part 2A

Clause 15 inserts a new Part 2A after s. 26 (formal expression of interest about land).

New s 26A—Purpose of Part 2A

New s. 26A explains that the purpose of Part 2A is to provide for a formal expression of interest process so that Aboriginal people may express an interest in having particular land made transferable land.

New s 26 B—Land to which Part 2A applies

New s. 26B identifies those lands to which an expression of interest can be lodged.

New s 26C—Expression of interest in having land made transferable land

New s. 26C provides a process that Aboriginal people must follow to lodge a formal expression of interest.

New s 26D—Chief executive to consider expression of interest

New s. 26D provides a process that the chief executive must follow to consider an expression of interest.

New s 26E—Consideration of expression of interest does not impose obligation on State

New s. 26E provides that the chief executive officer's consideration of an expression of interest does not impose an obligation on the State to regulate the land as transferable land.

Amendment of s 27—(Deeds of grant to be prepared)

Clause 16 provides that when land is granted to a registered native title body corporate (RNTBC), the deed of grant must show that the land is held

for the native title holders of the land, or if the land is granted to a land trust, the land is held for the benefit of Aboriginal people particularly concerned with the land and their ancestors and descendants. Where the grantee is a RNTBC, information must be included in the deed of grant to identify the native title holders of the land.

The amendment deletes the requirement for the recording of responsibilities Aboriginal people agree to assume in relation to land (as they are not compelled under the legislation to state those responsibilities).

The amendment also replaces 'registrar of titles' with 'chief executive officer' and deletes the requirement for the registrar of titles to enrol and issue the deed of grant accordingly.

Insertion of new s 27A

Clause 17 inserts new section 27A after section 27

New s 27A—Appointment of registered native title body corporate as grantee

New s. 27A permits the Minister to appoint a registered native title body corporate (RNTBC) to be the grantee of land for the native title holders of the land. In appointing a RNTBC, the Minister must consider a number of matters that may be relevant to the proposed appointment. For example, this could include the following:

- whether the proposed appointment was part of the negotiated settlement of a consent determination that native title exists over the land.
- whether any Aboriginal persons particularly concerned with the land, other than native title holders may be affected by the proposed appointment, for example people residing on the land.
- if Aboriginal persons particularly concerned with the land are likely to be affected by the proposed appointment, any action the RNTBC intends taking to address their concerns, such as granting leases to the people affected or otherwise dealing with their interests.

Amendment also provides that RNTBC appointed as grantee does not become incorporated as a land trust upon the grant of the land, reflecting that they are already an incorporated body.

Amendment of s 28—(Minister to appoint trustees)

Clause 18 inserts a new provision into this section to reflect that this section applies if the Minister does not appoint a registered native title body corporate (RNTBC) as the grantee of land under the new s 27A. Further, the wording 'subject of each deed of grant prepared under s 27' is deleted because land can now be granted to a trustee or a RNTBC.

The amendment also deletes reference to the *Trusts Act 1973* from this section, reflecting its relocation to new section 28B.

Insertion of new s 28A and 28B

Clause 19 inserts new ss 28A and 28B

New s 28A—Procedure for appointing grantees

New s 28A sets out the procedure for appointing grantees. Before appointing grantees the Minister must publish a notice of the Minister's intention to appoint grantees and consider all representations from Aboriginal people particularly concerned with the land, within the prescribed period.

New s 28B—Application of the Trusts Act 1973

New s 28B represents the relocation of this provision from section 28 and the insertion into the section of a reference to a RNTBC as they may become the grantee of transferable land.

Amendment of s 29—(Minister to act as soon as possible)

Clause 20 now requires that after the land becomes transferable, the Minister must make all necessary appointments under section 27A or 28. This provision previously only related to the appointment of trustees under section 28, and now includes the appointment of a registered native title body corporate under section 27A.

Amendment of s 31—(Inclusion of additional areas in deed of grant)

Clause 21 provides that an additional area of transferable land may not be included in a current deed of grant for Aboriginal land held by a registered native title body corporate (RNTBC). This is despite s. 31(1) which states

that an additional area of transferable land may be included in a deed of grant if the Minister has consulted with Aboriginal people particularly concerned with each area of land and there is agreement from the majority of people to the proposal. A RNTBC can, however, hold multiple parcels of land and a further deed could be granted to an existing RNTBC as grantee.

Amendment of s 33—(Existing interests)

Clause 22 expands s. 33 as it relates to interests that are to continue upon the transfer of transferable land under the Act, to include an easement that benefits the land and registered interests held by the State and Commonwealth. The amendment also updates terminology.

Amendment of s 35—(Cancellation of deed of grant in trust)

Clause 23 removes sections 2 – 4, as these sections describe processes that are either provided for under other legislation or policy, making them unnecessary for inclusion in the *Aboriginal Land Act 1991*. The head power to issue a deed of grant over a transferable deed of grant in trust, or part of one, remains. The clause also provides a terminology change.

Replacement of ss 39 and 40

Clause 24 inserts new Subdivision 1 General

Subdivision 1 General

New s 39—Power to deal with transferred land

New s. 39 broadens the scope of dealings that can be done on Aboriginal Land by the trustee.

These amendments now provide that the grantee can enter into any dealing on their land other than that which is prohibited by the Act (e.g. sell the land), and for some of those dealings they can do, they are now restricted (e.g. conditions and restrictions on leasing). This differs as to how it currently stands in the Act, in that the grantee can only do that which is specified under s. 39 (some things are conditional), and a dealing that is not permitted under s. 39 would be void because of s. 40.

New s 40—Requirement for consultation

New s. 40 provides for the relocation of part of s. 39 from the current Act, for Aboriginal people to explain proposed dealings in their land, but removes the requirement that they give one month's notice of their intention to enter into a dealing. This was considered necessary because it was considered that people had already been provided with adequate consultation in the initial stages of the consultation process. To *deal* with land is explained (now including and excluding certain dealings), and it is made clear that the *trustee* of transferred land for application of this section, does not include a registered native title body corporate (reflecting that it is incorporated under other legislation and is not a land trust).

New s 40A—Provision about Minister's consent

New s. 40A provides that the Minster's consent may be given for the grant of a particular lease or licence to a particular person or particular interest in a lease or licence, or if the minister considers appropriate, all leases and licences granted by the trustee, and the creation of all interests created under a lease or licence.

New s 40B—Provision about particular leases

New s 40B provides that a lease for not more than 10 years or 30 years is taken to be lease for more than 10 years or more than 30 years if it includes an option to renew or extend the lease, and such extension would extend the lease for more than 10 years or 30 years.

Subdivision 2 Sale or mortgage prohibited

New s 40C—Prohibition on sale or mortgage of transferred land

New s. 40C reinserts the existing, though not explicitly stated provision in the Act, that the trustee of transferred land must not sell or mortgage the land. This relates to the original grant of the land to the trustee and not to subsequent interests created.

Subdivision 3 Grant of leases

New s 40D—Grant of lease for transferred land

Section 40D sets our broadly who can obtain a lease and the term of the lease. The maximum term of leases is 99 years.

Leases can be granted to three categories of people;

(a) an Aborigine,

(b) the State; or

(c) to another person.

The term 'another person' captures anyone who is not an Aborigine or the State, including joint ventures with Aboriginal people.

However, a person who is not an Aborigine can be a party to a lease under (a) if the lease is for private residential purposes and the person is the spouse of an Aborigine.

Also a person who is not an Aborigine may be granted a lease under (a) for private residential purposes if they are the spouse of an Aborigine, or the former spouse of an Aborigine, or the former spouse of an Aborigine who is deceased.

A lease to another person for not more than 10 years does not require Ministerial consent.

For a lease to another person for a commercial purpose or for a private residential purpose in support of a lease for commercial purpose for more than 10 years and not more than 30 years, the minister's consent is exempted.

New s 40E—Particular restrictions on grant of leases

New s. 40E places particular restrictions on grants of leases under s. 40D.

A lease granted to an Aboriginal person under s. 40D(1)(a) for more than 30 years requires Ministerial consent unless it is granted for private residential purposes

A lease granted to the State under s. 40D(1)(b) for more than 30 years requires Ministerial consent unless it is granted for a purpose under the

Housing Act 2003; or providing public infrastructure; or providing housing for public service employees.

A lease granted to another person under s. 40D(1)(c) requires Ministerial consent unless it is granted for not more than 10 years or is a commercial lease or private residential lease supporting a commercial lease, both of which are not more than 30 years in term – see s. 40D(1)(c)(i) and s. 40D(3).

A lease may only be granted for private residential purposes to another person under s. 40D(1)(c) where that lease is to support a lease granted for a commercial purpose.

A lease for more than 30 years for commercial purposes must only be granted over an entire lot, that is, it can not be over part of a described lot.

Where the Minister's consent is required under this section the Minister is required to be satisfied that the grant of the lease will benefit the persons for whom the trustee holds the land.

In reaching this view the Minster will have regard to the nature of the lease, this includes any terms and conditions, the rent or other monies to be paid and the relative size of the lease in comparison to the balance of the land the trustee is responsible for.

New s 40F—Requirements for Minister's consent—general

New s. 40F sets out requirements for a person seeking the Minister's consent to the grant of a lease. For example, a lease for more than 30 years for commercial purposes requires the Minister be presented with a business plan, evidence to show that a reasonable return can not be achieved with a lease under 30 years, and any other information that the Minister may require. Before consent is given, the Minister must be satisfied that the trustee has explained to the Aboriginal people particularly concerned with the land, the nature, purpose and effect of the dealing and that these people are in general agreement with the grant of the lease.

New s 40G—Particular requirement for Minister's consent for lease for commercial purpose

New s. 40G requires that before consenting to a lease for more than 30 years for a commercial purpose, the Minister must obtain an independent assessment (paid for by the proponent) of the business plan and the evidence given under s 40F(2)(a) and (b), and the proponent's financial and

managerial capabilities. It further provides for considerations the Minister must be satisfied with in making a decision.

New s 40H—Conditions of leases—general

New s. 40H sets out a number of conditions for leases. An interest created under a lease, other than a mortgage of the lease, requires the Minister's consent if it is for more than 10 years.

The Minister's prior consent to an interest under a lease is not required if the interest:

- is to an Aborigine for not more than 99 years
- is to an Aborigine, or another person who is not an Aborigine if the person is the spouse or former spouse of an Aborigine, including where the Aborigine is deceased
- is to be created under a lease that did not require the Minister's consent for granting the lease in the first place.

The section further provides for the use of a standard terms document and stipulates that a leaseholder must not transfer a lease or create an interest under a lease, other than a mortgage without the written consent of the trustee.

This section does not limit the conditions that may be imposed on a lease.

New s 40I— Requirement for Minister's consent for creation of interest under a lease

New s. 40l applies where an interest under a lease is created only with the Minister's written consent and provides that the creation of the interest must be for the benefit of persons for whom the trustee holds the land. Where the interest is for more than 30 years, the interest must be consistent with the purpose for which the lease was granted or the interest would not diminish the purpose for which the lease was granted.

It further provides that a person seeking the Minister's consent must provide certain information and documents reasonably required by the Minister, e.g. showing that the interest is for the benefit of persons for whom the trustee holds the land.

New s 40J—Leases for private residential purposes—general conditions and requirements

This amendment sets out the general conditions relating to leases for private residential purposes.

A lease for private residential purposes may only be issued for a fixed term of 99 years.

Private residential purpose leases are to be purchased—that is an up front lump sum payment which is an amount equal to the value of the lease land as decided by the trustee In deciding the value, the trustee should have the valuation undertaken by a certified practising valuer using the methodology approved by the Chief Executive Officer and using the benchmark purchase price prescribed under a regulation. The annual rental is the amount of not more than $1.00 decided by the trustee. Further, the lease must not be granted unless the consideration has been paid to the trustee.

Where there is no private residential premise on the land then the leaseholder must construct a private residential premise within eight years from when the lease is granted.

Private residential purpose leases can not be subleased however, they can be rented out as a residential tenancy agreement (e.g. where the leaseholder has moved away for work purposes).

If requested, the chief executive must give a person a copy of the valuation methodology and may make the methodology available for inspection on the department's website.

New s 40K—Leases for private residential purpose—particular requirements if dwelling situated on land

New s. 40K clarifies the situation where it is proposed to issue a private residential lease and there is a dwelling situated on the land.

The trustee must give notice to the chief executive of the department administering the Housing Act, of the trustee's intention to issue a lease where there is an existing dwelling.

After receiving the notice the housing chief executive has 28 days to respond to the trustee in writing. The response must include whether the housing chief executive considers that the dwelling subject of the proposed lease has been used to provide subsidised housing for residential use.

The trustee cannot issue the lease before the housing chief executive has responded.

If the housing chief executive considers the dwelling has been used for providing subsidised housing then a range of provisions apply. These are:

- the value of the dwelling must be decided by using a valuation methodology agreed between the trustee and the housing chief executive
- the consideration payable for the lease must include as a lump sum payment—an amount equal to the value of the house, as decided above (the consideration for the lease will also include a lump sum payment for the land—this is covered in s. 40J)
- the trustee cannot grant the lease without the written approval of the housing chief executive or if the value of the house has not been paid to the trustee
- after granting the lease the trustee must, within 28 days of the lease being registered, provide the housing chief executive with:
    - notice of the lease registration date
    - the parties to the lease
    - evidence showing that the lump sum payments for the land and the dwelling have been paid to the trustee.

In deciding to give an approval, the housing chief executive must have regard to whether the dwelling is required to continue to be used for the provision of subsidised housing.

New s 40L—Renewal of lease or sublease

New s. 40L provides that a lease or sublease of a lease may include an option to renew the lease or sublease. It further provides that the term of a renewed lease or sublease must not be longer than the initial term.

New s 40M—Transfer or amendment of lease or sublease

New s. 40M provides that a lease or sublease must not be transferred without the consent of the trustee or the Minister, if the granting of the lease or sublease was subject to approval from the trustee or Minister. It provides that the Minister may consent to the amendment if it does not significantly change the terms of the lease or sublease, and the amended

lease or sublease is for the benefit of persons for whom the trustee holds the land.

To approve a lease transfer the Minister must consider whether the proposed transferee can comply with the lease conditions. The exception to this is a lease for commercial purposes for more than 30 years - for these, the Minister must obtain an independent assessment of the proposed transferee's financial and managerial capabilities, and be satisfied that these capabilities are appropriate for complying with the conditions of the lease. The cost of the assessment must be met by the transferee and is not refundable.

New s 40N—Lease, sublease and transfer, amendment or surrender of lease or sublease to be registered

New s. 40N provides that all leases and subleases, transfers, amendments or surrenders of leases or subleases must be registered under the Land Title Act. This section also provides that an instrument of lease must include a plan of survey.

Subdivision 4 Forfeiture of particular leases

New s 40O—Application of subdivision 4

The forfeiture provisions in this subdivision only apply to private residential purposes granted to an Aborigine for 99 years under s. 40D(1)(a).

New s 40P—Grounds for forfeiture of lease

A lease may be forfeited only if a relevant condition of the lease is breached and the lessee fails to remedy the breach within 6 months after receiving written notice of the breach from the trustee, or if that lease was acquired by fraud.

A 'relevant condition' in this section means a condition of the lease mentioned in s. 40J(1)(b) or another condition if the trustee reasonably considers the breach of the condition is of such a nature that warrants forfeiture of the lease. An example of this could be where a lessee uses a residential lease to run a commercial enterprise.

New s 40Q—Application to Land Court for forfeiture

Before a lease is forfeited, the trustee must refer the matter to the Land Court to decide if the lease may be forfeited.

At least 28 days written notice of the trustee's intention to refer the matter to the Land Court must be given to the lessee and any mortgagee of the lease. The notice must state the grounds for forfeiture.

The Land Court in making its decision must have regard to:

(a) the stated grounds for forfeiture; and

(b) if, where the lease is proposed to be forfeited for a breach of condition, whether the Court considers the breach of condition(s) is of such a serious nature that it warrants forfeiture of the lease.

The trustee must file a copy of the notice - provided under s. 40Q(2) - in the Land Court at the same time as the trustee refers the matter to the Court.

New s 40R—Trustee's options if Land Court decides if lease may be forfeited

If the Land Court decides that the lease may be forfeited, the trustee may forfeit the lease, or (if the proposed forfeiture is because of a breach of a condition of the lease) decide not to forfeit the lease, but to allow the lease to continue subject to conditions agreed to between the trustee and the lessee.

New s 40S—Notice and effect of forfeiture

If the trustee forfeits the lease then the trustee must give written notice within 60 days after receiving notice of the Land Court's decision that the lease has been forfeited to the lessee of the lease, any mortgagee, and the registrar.

This section provides for recording details of the forfeiture in a register and that forfeiture of the lease takes effect on the day the registrar records the forfeiture in the appropriate register.

Upon forfeiture of the lease the lease ends, the lessee is divested of any interest in the lease, and any person occupying the lease must vacate the land.

New s 40T—Payment by trustee for forfeited lease

If the lease is forfeited, the trustee must pay the person who was the lessee the value of the lease land and any lawful improvements on the day the lease is forfeited less any amounts set out in s. 40V.

Section 40T also provides methodology for calculating the value of such land and improvements and provides a means by which a decision of the trustee must be conveyed to the lessee. It further provides means by which the valuation methodology can be made available to the lessee.

A person may appeal against the amount payable to them as decided by the trustee.

New s 40U— Unclaimed amounts

In the event that the lessee cannot be located within 9 years of the forfeiture, any monies due and payable to the lessee are forfeited to the trustee.

New s 40V—Amounts owing to trustee or mortgagee to be deducted

New s. 40V provides that in the event of forfeiture the trustee may deduct certain amounts from the amount payable to the lessee, incurred in relation to forfeiture action.

New s 40W—Payment of amount to mortgagee in discharge of mortgage

New s 40W provides that where the trustee forfeits the lease and an amount is owing to a mortgagee of the lease by the lessee, then the trustee must pay the mortgagee an amount owing less costs and expenses incurred by the trustee. The includes costs incurred in forfeiting the lease, costs of rectifying damage caused to the lease land by the lessee, and any amount owing to the trustee by the lessee.

Section 40W(2)(a) provides that the mortgagee is paid the amount owed on the mortgage (s.40V(d)) if the amount owed is less than the maximum amount payable (s.40T(1)) after the amounts in s.40V(a), s. 40V(s) and s. 40V(c) have been subtracted.

Otherwise under s.40W(2)(b) the mortgagee is paid the maximum amount payable (s.40T(1)) less the amounts in s. 40V(a), s. 40V(b) and s. 40V(c).

If the trustee pays any amount to the mortgagee in relation to a mortgage of the lease then the mortgagee must use that amount in discharging the mortgage.

New s 40X—Appeal against decision under s. 40T

Section 40X provides the process for appealing the amount the trustee has determined under s. 40T is payable.

New s 40Y—Powers of Land Court on appeal

The Land Court has the same powers as the trustee in deciding the appeal.

The Land Court may:

- (a)confirm the trustee's original decision; or
- (b)set aside the trustee's decision and substitute another decision; or
- (c)set aside the trustee's decision and return the issue to the trustee with directions the Court considers appropriate.

If the Land Court substitutes the trustee's decision with another decision, that decision is taken to be the decision of the trustee, except that it can not be appealed under this subdivision.

Subdivision 5 Grant of licences

New s 40Z—Grant of licence for transferred land.

New s. 40Z provides that a licence may be granted to an Aborigine or the state, for no more than 30 years, and to another person for no more than 10 years. However, with the Minister's consent a licence to another person may be granted for more than 10 years but not more than 30 years. Under the current legislation it is unclear as to the term that a licence can be granted. This amendment establishes the maximum term available.

New s 40ZA—Conditions of licences

New s. 40ZA provides the restrictions that are to apply on the grant of an interest under a licence provided for under section 40Z. This is a

reinsertion from the current Act. The amendment further provides that an interest created under the licence can not be transferred.

Subdivision 6 Transfer of land held by land trust

New s 40ZB—Application of subdivision 6

New s. 40ZB explains that transferred land for this provision does not include Aboriginal land held by a registered native title body corporate.

New s 40ZC—Transfer of transferred land held by a land trust

New s. 40ZC provides that the trustee of transferred land, with the Minister's approval, may transfer all or part of the land to another land trust. It further provides arrangements for dealing with the improvements on the land and the assets and liabilities of the land trust upon transfer. The provision also provides for a land trust that transfers all its land to be dissolved.

New s 40ZD—Application for approval to transfer

New s. 40ZD provides that a trustee may apply to the Minister for approval to transfer land, and specifies what the application should include.

New s 40ZE—Minister's approval to transfer

New s. 40ZE outlines the circumstances under which the Minister may give approval. It provides that at least 75 per cent of the transferor's members and transferee's members must be present at a general meeting, and agree to the transfer. It also provides that the chief executive must give notice of the Minister's approval and sets out the content of the gazette notice.

New s 40ZF —Effect of gazette notice about transfer

New s. 40ZF provides that the proposed transfer may proceed following the publication of the gazette notice in 40ZE.

Subdivision 7 Transfer of land held by registered native title body corporate

New s 40ZG—Transfer of transferred land held by registered native title body corporate

New s. 40ZG provides that a registered native title body corporate may transfer transferred land only with the Minister's prior written approval and to another native title body corporate that under the Commonwealth Native Title Act, has replaced the original body corporate.

Subdivision 8 Land in Cape York Peninsula Region

New s 40ZH—Dealing with particular transferred land in Cape York Peninsula Region

New s. 40ZH repositions a provision about a permitted dealing over granted land as inserted by the *Cape York Peninsula Heritage Act 2007* to fit with the proposed amendments to section 39.

Subdivision 9 Other matters

New s 40ZI—Trustee to advise chief executive of change to description of land

New s. 40ZI provides that where the description of the transferred land changes through certain dealings, notice of the change must be provided to the chief executive by the trustee of the land.

New s 40ZJ—Particular dealings in transferred land void

New s. 40ZJ provides that the grant, transfer or other creation of an interest in transferred land in contravention of this division is void, unless the interest is registered. It also provides that this section applies despite any other Act.

Amendment of s 41—(No resumption of transferred land etc.)

Clause 25 modifies the Act to enable the resumption of transferred land. The exception contained in s. 41 of the Act is amended to allow transferred land to be resumed, taken or otherwise compulsory acquired, sold or dealt with under an Act provided that Act expressly provides for the resumption of land and the payment of just compensation for the land.

Amendment of s 43—(Reservations of forest products and quarry material etc.)

Clause 26 updates terminology replacing the words 'Crown' with 'State' and 'grantees with 'trustees'.

Amendment of s 48—(Time limit for making of claims)

Clause 27 clarifies that the time for making a claim ended on 22 December 2006.

Amendment of s 63—(Deeds of grant to be prepared)

Clause 28 replaces 'registrar of titles' with 'chief executive officer' and deletes the requirement for the registrar of titles to enrol and issue the deed of grant accordingly.

Amendment of s 64—(Leases to be prepared)

Clause 29 replaces 'registrar of titles' with 'chief executive', replaces *Land Act 1994* with Land Act and changed reference to a register maintained under the Land Act to register, which is now a defined term under the Act.

Amendment of s 71—(Existing interests)

Clause 30 expands s. 71 as it relates to interests that are to continue upon the transfer of transferable land under the Act, to include an easement that benefits the land and registered interests held by the State and Commonwealth. The amendment also updates terminology.

Omission of s 72—(Interests to be endorsed on deed)

Clause 31 omits an unnecessary section in the Act which is otherwise undertaken under existing legislation or procedure.

Amendment of s 73—(Cancellation of existing deed of grant)

Clause 32 replaces 'grantees' with 'trustee' and replaces *Land Act 1994* with Land Act.

Replacement of s 76 and 77

Clause 33 replaces s. 76 and s. 77 with new Subdivision 1 General.

Subdivision 1 General

New s 76—Power to deal with granted land

New s. 76 broadens the scope of dealings that can be done on Aboriginal Land by the grantees.

These amendments now provide that the grantee can enter into any dealing on their land other that that which is prohibited by the Act (e.g. sell the land) and for some of those dealings they can do, they are now restricted (e.g. conditions and restrictions on leasing). This differs as to how it currently stands in the Act, in that the grantee can only do that which is specified under s. 76 (some things are conditional), and a dealing that is not permitted under s. 76 would be void because of s. 77.

This provision differs from the equivalent for transferred land, in that it captures Aboriginal leases (a defined term under the Act) which are an alternative tenure to a deed of grant that could be provided when a claim for claimable land is successful.

New s 77—Requirement for consultation

New s. 77 provides for the relocation of part of s. 76 from the current Act, for Aboriginal people to explain proposed dealings in their land but removes the requirement that they give one month's notice of their intention to enter into a dealing. This was necessary because it was considered that people had already been provided with adequate consultation in the initial stages of the consultation process. To *deal* with land is explained (now including and excluding certain dealings).

New s 77A—Provision about Minister's consent

New s. 77A provides that the Minister's consent may be given for the grant of a particular lease or licence to a particular person, or particular interest in a lease or licence, or if the Minister considers appropriate, all leases and licences granted by the trustee, and the creation of all interests created under a lease or licence.

New s 77B—Provision about particular leases

New s 77B provides that a lease for not more than 10 years or 30 years is taken to be lease for more than 10 years or more than 30 years if it includes an option to renew or extend the lease, and such extension would extend the lease for more than 10 years or 30 years.

Subdivision 2 Sale or mortgage prohibited

New s 77C—Prohibition on sale or mortgage of granted land and sale of Aboriginal lease

New s. 77C reinserts the existing, though not explicitly stated provision in the Act, that the trustee of granted land must not sell or mortgage the land if held as a deed of grant, or sell the land if held as an Aboriginal lease. This relates to the original grant of the land to the trustee and not to subsequent interests created.

Subdivision 3 Grant of leases

New s 77D—Grant of lease for granted land

Section 77D sets our broadly who can obtain a lease and the term of the lease. The maximum term of leases is 99 years.

Leases can be granted to three categories of people;

(a) an Aborigine,

(b) the State; or

(c) to another person.

The term 'another person' captures anyone who is not an Aborigine or the State, including joint ventures with Aboriginal people.

However, a person who is not an Aborigine can be a party to a lease under (a) if the lease is for private residential purposes and the person is the spouse of an Aborigine.

Also a person who is not an Aborigine may be granted a lease under (a) for private residential purposes if they are the spouse of an Aborigine, or the former spouse of an Aborigine, or the former spouse of an Aborigine who is deceased.

A lease to another person for not more than 10 years does not require Ministerial consent.

For a lease to another person for a commercial purpose or for a private residential purpose in support of a lease for commercial purpose for more than 10 years and not more than 30 years, the minister's consent is exempted.

New s 77E—Particular restrictions on grant of leases

New s. 77E places particular restrictions on grants of leases under s. 77D.

A lease granted to an Aboriginal person under s. 77D(1)(a) for more than 30 years requires Ministerial consent unless it is granted for private residential purposes

A lease granted to the State under s. 77D(1)(b) for more than 30 years requires Ministerial consent unless it is granted for a purpose under the *Housing Act 2003*; or providing public infrastructure; or providing housing for public service employees.

A lease granted to another person under s. 77D(1)(c) requires Ministerial consent unless it is granted for not more than 10 years or is a commercial lease or private residential lease supporting a commercial lease, both of which are not more than 30 years in term – see s. 77D(1)(c)(i) and s. 77D(3).

A lease may only be granted for private residential purposes to another person under s. 77D(1)(c) where that lease is to support a lease granted for a commercial purpose.

A lease for more than 30 years for commercial purposes must only be granted over an entire lot, that is, it can not be over part of a described lot.

Where the Minister's consent is required under this section the Minister is required to be satisfied that the grant of the lease will benefit the persons for whom the trustee holds the land.

In reaching this view the Minster will have regard to the nature of the lease, this includes any terms and conditions, the rent or other monies to be paid and the relative size of the lease in comparison to the balance of the land the trustee is responsible for.

New s 77F—Requirements for Minister's consent—general

New s. 77F sets out requirements for a person seeking the Minister's consent to the grant of a lease. For example, a lease for more than 30 years for commercial purposes requires an appropriate person must provide to the Minister a business plan, evidence to show that a reasonable return can not be achieved with a lease under 30 years, and any other information that the Minister may require. Before consent is given, the Minister must be satisfied that the trustee has explained to the Aboriginal people particularly concerned with the land, the nature, purpose and effect of the dealing and that these people are in general agreement with the grant of the lease.

New s 77G—Particular requirement for Minister's consent for lease for commercial purposes

New s. 77G requires that before consenting to a lease for more than 30 years for a commercial purpose, the Minister must obtain an independent assessment (paid for by the proponent) of the business plan and evidence given under 77F(2)(a) and (b), and the proponent's financial and managerial capabilities. It further provides for considerations that the Minister must be satisfied with in making a decision.

New s 77H—Conditions of leases—general

New s. 77H sets out a number of conditions for leases. Generally an interest created under a lease—other than a mortgage of the lease—requires the Minister's consent if it is for more than 10 years.

The Minister's prior consent to an interest of more then 10 years under a lease is not required if:

- is to an Aborigine for not more than 99 years

- is to an Aborigine, or another person who is not an Aborigine if the person is the spouse or former spouse of an Aborigine, including where the Aborigine is deceased
- the interest is to be created under a lease that did not require the Minister's consent for granting the lease in the first place.

The section further provides for the use of a standard terms document and stipulates that a leaseholder must not transfer a lease or create an interest under a lease, other than a mortgage without the written consent of the Minister or trustee.

This section does not limit the conditions that may be imposed on a lease.

New s 77I – Requirements for Minister's consent for creation of interests under a lease

New s. 77I applies where an interest under a lease is created only with the Minister's written consent and provides that the creation of the interest must be for the benefit of persons for whom the trustee holds the land. Where the interest is for more than 30 years, the interest must be consistent with the purpose for which the lease was granted or the interest would not diminish the purpose for which the lease was granted.

It further provides that a person seeking the Minister's consent must provide certain information and documents reasonably required by the Minister, e.g. showing that the interest is for the benefit of persons for whom the trustee holds the land.

New s 77J—Leases for private residential purposes—general conditions and requirements

This amendment sets out the general conditions relating to leases for private residential purposes.

A lease for private residential purposes may only be issued for a fixed term of 99 years.

Private residential purpose leases are to be purchased—that is an up front lump sum payment which is an amount equal to the value of the lease land as decided by the trustee. In deciding the value, the trustee should have the valuation undertaken by a certified practising valuer using the methodology approved by the Chief Executive Officer and using the benchmark purchase price prescribed under a regulation. The annual rental is the amount of not

more than $1:00 decided by the trustee. Further, the lease must not be granted unless the consideration has been paid to the trustee.

Where there is no private residential premise on the land, the leaseholder must construct a private residential premise within eight years from when the lease is granted.

Private residential purpose leases can not be subleased, however, they can be rented out (as a residential tenancy agreement) for example where the leaseholder has moved away for work purposes.

If requested, the chief executive must give a person a copy of the valuation methodology and may make the methodology available for inspection on the department's website.

New s 77K – Leases for private residential purposes - particular requirements if dwelling situated on land

New s. 77K clarifies the situation where it is proposed to issue a private residential lease and there is a dwelling situated on the land.

The trustee must give notice to the chief executive of the department administering the Housing Act of the trustee's intention to issue a lease where there is an existing dwelling.

After receiving the notice the housing chief executive has 28 days to respond to the trustee in writing. The response must include whether the housing chief executive considers that the dwelling subject of the proposed lease has been used to provide subsidised housing for residential use.

The trustee cannot issue the lease before the housing chief executive has responded.

If the housing chief executive considers the dwelling has been used for providing subsidised housing then a range of provisions apply. These are:

- the value of the dwelling must be decided by using a valuation methodology agreed between the trustee and the housing chief executive
- the consideration payable for the lease must include as a lump sum payment an amount equal to the value of the house as decided above (the consideration for the lease will also include a lump sum payment for the land—this is covered in s 77J)

- the trustee can not grant the lease without the written approval of the housing chief executive or if the value of the house has not been paid to the trustee
- after granting the lease the trustee must, within 28 days after the lease is registered, provide the housing chief executive with:
    - notice of the lease registration date
    - the parties to the lease
    - evidence showing that the lump sum payments for the land and the dwelling have been paid to the trustee.

In deciding to give an approval, the housing chief executive must have regard to whether the dwelling is required to continue to be used for providing subsidised housing for residential use.

New s 77L—Renewal of lease or sublease

New s. 77L provides that a lease or sublease may include an option to renew the lease or sublease. It further provides that the term of the lease or sublease must not be longer than the initial term.

New s 77M—Transfer or amendment of lease or sublease

New s. 77M provides that a lease or sublease must not be transferred without the consent of the trustee or the Minister, if the granting of the lease or sublease was subject to approval from the trustee or Minister. It provides that the Minister may consent to the amendment if it does not significantly change the terms of the lease or sublease, and the amended lease or sublease is for the benefit of persons for whom the trustee holds the land.

To approve a lease transfer the minister must consider whether the proposed transferee can comply with the lease conditions. The exception to this is a lease for commercial purposes for more than 30 years - for these the Minister must obtain an independent assessment of the proposed transferee's financial and managerial capabilities, and be satisfied that these capabilities are appropriate for complying with the conditions of the lease. The cost of the assessment must be met by the transferee and is not refundable.

New s 77N—Lease, sublease and transfer, amendment or surrender of lease or sublease to be registered

New s. 77N provides that all leases and subleases, and transfers, amendments or surrenders of leases or subleases must be registered under the Land Title Act. This section also provides that an instrument of lease must include a plan of survey.

Subdivision 4 Forfeiture of particular leases

New s 77O—Application of subdivision 4

The forfeiture provisions in this subdivision only apply to private residential purposes granted to an Aborigine for 99 years under s. 77D(1)(a).

New s 77P—Grounds for forfeiture of lease

A lease may be forfeited only if a relevant condition of the lease is breached and the lessee fails to remedy the breach within 6 months after receiving written notice of the breach from the trustee, or if that lease was acquired by fraud.

A 'relevant condition' in this section means a condition of the lease mentioned in s. 77J(1)(b) or another condition if the trustee reasonably considers a breach of the condition is of a nature that if breached it would warrant forfeiture of the lease. An example of this could be where a lessee uses a residential lease to run a commercial enterprise.

New s 77Q—Application to Land Court for forfeiture

Before a lease is forfeited, the trustee must refer the matter to the Land Court to decide if the lease may be forfeited.

At least 28 days written notice of the trustee's intention to refer the matter to the Land Court must be given to the lessee and any mortgagee of the lease. The notice must state the grounds for forfeiture.

The Land Court in making its decision must have regard to:

(a) the stated grounds for forfeiture; and

(b) if, where the lease is proposed to be forfeited for a breach of condition, whether the Court considers the breach of condition(s) is of such a serious nature that it warrants forfeiture of the lease.

The trustee must file a copy of the notice - provided under s. 77Q(2) - in the Land Court at the same time as the trustee refers the matter to the Court.

New s 77R—Trustee's options if Land Court decides lease may be forfeited

If the Land Court decides that the lease may be forfeited, the trustee may forfeit the lease, or (if the proposed forfeiture is because of a breach of a condition of the lease) decide not to forfeit the lease, but to allow the lease to continue subject to conditions agreed to between the trustee and the lessee.

New s 77S—Notice and effect of forfeiture

If the trustee forfeits the lease then the trustee must give written notice within 60 days after receiving notice of the Land Court's decision that the lease has been forfeited to the lessee of the lease, any mortgagee, and the registrar.

It provides for recording details of the forfeiture in a register and that forfeiture of the lease takes effect on the day the registrar records the forfeiture in the appropriate register.

Upon forfeiture of the lease the lease ends, the lessee is divested of any interest in the lease, and any person occupying the lease must vacate the land.

New s 77T—Payment by trustee for forfeited lease

If the lease is forfeited, the trustee must pay the person who was the lessee the value of the lease land and any lawful improvements on the day the lease is forfeited less any amounts set out in s. 77V.

Section 77T also provides methodology for calculating the value of such land and improvements and provides a means by which a decision of the trustee must be conveyed to the lessee. It further provides means by which the valuation methodology can be made available to the lessee.

A person may appeal against the amount payable to them as decided by the trustee.

New s 77U—Unclaimed amounts

In the event that the lessee cannot be located within 9 years of the forfeiture, any monies due and payable to the lessee are forfeited to the trustee.

New s 77V—Amounts owing to trustee or mortgagee to be deducted

New s. 77V provides that in the event of forfeiture the trustee may deduct certain amounts from the amount payable to the lessee, incurred in relation to forfeiture action.

New s 77W—Payment of amount to mortgagee in discharge of mortgage

77W provides that where the trustee forfeits the lease and an amount is owing to a mortgagee of the lease by the lessee, then the trustee must pay the mortgagee an amount owing less costs and expenses incurred by the trustee. The includes costs incurred in forfeiting the lease, costs of rectifying damage caused to the lease land by the lessee, and any amount owing to the trustee by the lessee.

Section 77(W(2)(a) provides that the mortgagee is paid the amount owed on the mortgage (s.77V(d)) if the amount owed is less than the maximum amount payable [s.77T(1)] after the amounts in s.77V(a), s. 77V(b) and s. 77V(c) have first been subtracted.

Otherwise under s.77W(2)(b) the mortgagee is paid the maximum amount payable (s.77T(1)) less the amounts in s. 77V(a), s. 77V(b) and s. 77V(c).

If the trustee pays any amount to the mortgagee in relation to a mortgage of the lease then the mortgagee must use that amount in discharging the mortgage.

New s 77X—Appeal against decision under s 77T

Section 77X provides the process for appealing the amount the trustee has determined under s. 77T is payable.

New s 77Y—Powers of Land Court on appeal

The Land Court has the same powers as the trustee in deciding the appeal.

The Land Court may:

(a) confirm the trustee's original decision; or

(b) set aside the trustee's decision and substitute another decision; or

(c) set aside the trustee's decision and return the issue to the trustee with directions the Court considers appropriate.

If the Land Court substitutes the trustee's decision with another decision, that decision is taken to be the decision of the trustee, except that it can not be appealed under this subdivision.

Subdivision 5 Grant of licences

New s 77Z—Grant of licence for granted land

New s. 77Z applying only to Aboriginal land held as a deed of grant provides that a licence may be granted to an Aborigine or the state, for not more than 30 years, and to another person for not more than 10 years. However, with the Minister's consent a licence to another person may be granted for more than 10 years but not more than 30 years. Under the current legislation it is unclear as to the term that a licence can be granted – this amendment establishes a maximum term available.

New s 77ZA—Conditions of licences

New s. 77ZA provides the restrictions that are to apply on the grant of an interest under a licence provided for under s. 77Z. This is a reinsertion from the current Act. The amendment further provides that an interest created under the licence can not be transferred.

Subdivision 6 Transfer of land

New s 77ZB—Transfer of granted land

New s. 77ZB applying only to Aboriginal land held as a deed of grant provides that the trustee of granted land, with the Minister's approval, may transfer all or part of the land to another land trust. It further provides arrangements for dealing with the improvements on the land and the assets

and liabilities of the land trust upon transfer. The provision also provides for a land trust that transfers all its land to be dissolved.

New s 77ZC—Application for approval to transfer

New s. 77ZC provides that a trustee may apply to the Minister for approval to transfer land, and specifies what the application should include.

New s 77ZD—Minister's approval to transfer

New s. 77ZD outlines the circumstances under which the Minister may give approval. It provides that at least 75 per cent of the transferor's members and transferee's members must be present at a general meeting and agree to the transfer. It also provides that the chief executive must give notice of the Minister's approval that sets out the content of the gazette notice.

New s 77ZE—Effect of gazette notice about transfer

New s. 77ZE provides that the proposed transfer may proceed following the publication of the gazette notice in 77ZD(2).

Subdivision 7 Land in Cape York Peninsula Region

New s 77ZF—Dealing with particular granted land in the Cape York Peninsula Region

New s. 77ZF repositions a provision about a permitted dealing over granted land as inserted by the *Cape York Peninsula Heritage Act 2007* to fit with the proposed amendments to section 76.

Subdivision 8 Other matters

New s 77ZG—Trustee to advise chief executive of change to description of land

New s. 77ZG provides that where the description of the granted land changes through certain dealings, notice of the change must be provided to the chief executive by the trustee of the land.

New s 77ZH—Particular dealings in granted land void

New s. 77ZH provides that the grant, transfer or other creation of an interest in granted land in contravention of this division is void, unless the interest is registered. It also provides that this section applies despite any other Act.

Amendment of s 78—(No resumption of granted land, etc.)

Clause 34 modifies the Act to enable the resumption of granted land. The exception contained in s. 78 of the Act is amended to allow transferred land to be resumed, taken or otherwise compulsory acquired, sold or dealt with under an Act provided that the Act expressly provides for the resumption of land and the payment of just compensation for the land.

Amendment of s 79—(Devolution of granted land)

Clause 35 provides for a terminology change. Upon application of this section, land is held for the benefit of 'Aboriginal people particularly concerned with the land' rather than the broader 'Aboriginal people' unless otherwise decided by the Minister. It also provides that the chief executive rather than the grantees inform the registrar of such a change, and that the registrar notes the vesting in the appropriate register rather than on the deed.

Amendment of s 81—(Reservations of forest products and quarry material)

Clause 36 updates terminology replacing the words ‘Crown’ with ’State’ and ‘grantees’ with ‘trustees’.

Amendment of s 82—(Rights of access preserved)

Clause 37 provides definitions for ‘coast’ and ‘highest astronomical tide’. It is necessary to place the definition wording in the Act as the current Act’s reference to the *Beach Protection Act 1968* is no longer relevant due to the repeal of that Act.

Amendment, relocation and renumbering of s 83—(National park subject to lease to State etc.)

Clause 38 provides that a national park that is to be transferred under the transferable land provisions must be leased back to the state for national park purposes. Because of that, the amendment also provides for the relocation of the amended section to a more relevant part of the Act that will reflect that it applies to both transferable and claimable land.

Further, the amendment provides for acknowledgement that a registered native title body corporate may be the grantee of Aboriginal land.

Amendment, relocation and renumbering of s 83E—(Land trust to enter into indigenous management agreement)

Clause 39 broadens the entities that may now enter into an indigenous management agreement, to be inclusive of a registered native title body corporate. This is to reflect that they now may be the grantee of transferred land. Amendment also provides for the relocation of this section from a part of the Act that deals with matters only in relation to land trusts, to reflet that this section has application to an RNTBC.

Amendment of s 83G—(Requirements for indigenous management agreement)

Clause 40 ‘replaces land trust’ with ‘trustee or proposed trustee for the land’ to reflect the new situation where a trustee can be either a land trust or a registered native title body corporate.

Amendment of s 83H—(Amending indigenous management agreement)

Clause 41 replaces ‘land trust’ with ‘trustee, or proposed trustee’ to reflect the new situation where a trustee can be either a land trust or a registered native title body corporate.

Amendment of s 83I—(Recording of indigenous management agreement)

Clause 42 replaces ‘land trust’ with ‘a trustee’ to reflect the new situation where a trustee can be either a land trust or a registered native title body corporate.

Amendment of s 83J—(Requirements about grant of national parks in Cape York Peninsula Region)

Clause 43 replaces 'land trust' and inserts the words 'trustee or proposed trustee' in s 83J(2) to reflect the new situation where a trustee can either be a land trust or a registered native title body corporate.

Insertion of new parts 5D to 5F

Clause 44 inserts new parts 5D to 5F after s. 83L

New part 5D Decision making process

New s 83M—When agreement of Aboriginal people is given

New s. 83M provides for the translocation of these provisions from the Aboriginal Land Regulation 1991 to the Act. The substance of this section currently appears in section 44 of the Regulations to the Act. It is more appropriate that it appear in the Act and not the Regulation.

New s 83N—Decision making by trustee

New s. 83N provides for the translocation of these provisions from the Aboriginal Land Regulation 1991 to the Act. The substance of this section currently appears in section 45 of the Regulations to the Act. It is more appropriate that it appear in the Act and not the Regulation.

New part 5E Provisions about mortgages of leases over Aboriginal land

New s 83O—Application of part 5E

New s. 83O provides that this section prevails where there is any inconsistency between a provision of this part and a particular part of the *Land Title Act 1994* or the *Property Law Act 1974* in relation to mortgaging of a lease.

New s 83P—Provisions about entering into possession, and selling, lease

New s. 83P applies to when a mortgagee enters into possession of a lease granted over Aboriginal land, and provides that the mortgagee must give the trustee written notice within 28 days of entering into possession.

It also provides that the mortgagee must sell the lease within four years and if the land is not sold in that period to a person entitled to a lease under the Act, the mortgagee may negotiate with trustee for a longer period of time (2 years) to sell the property, which can be further extended for not more than 2 years at a time if the property does not sell.

A further provision permits the trustee to provide an extension for a further period of two years (at a time and with no limit of extensions) where the mortgagee can provide evidence of due diligence in taking steps towards achieving a sale and upon application in writing.

In the event that that trustee sells the lease, it cannot be sold for an amount that is less than that which is outstanding in the loan amount owing to the mortgagee or otherwise an amount that is agreed upon by the trustee and the mortgagee.

New s 83Q—How trustee deals with proceeds of sale

New s 83Q provides that where a trustee sells a mortgaged lease, the trustee must apply the proceeds of the sale under the *Property Law Act 1974* as if the lease were sold by the mortgagee and the proceeds of the sale were received by the mortgagee.

It further provides for costs, charges and expenses incurred by the trustee in a sale or attempted sale to be considered in applying the proceeds of the sale.

Part 5F Leasing of Aboriginal trust land

Division 1 Preliminary

New s 83R—Definitions for part 5F

New s. 83R provides definitions for Aboriginal trust land trustee and trustee (Aboriginal) lease.

New 83S—Relationship with Land Act

New s. 83S sets out which provisions of the Land Act do not apply to Aboriginal trust land when leased.

Division 2 Leases

New s 83T—Trustee (Aboriginal) leases

New s. 83T provides that leasing over Aboriginal trust land is to follow, as far as practical (subject to modifications in this division), the procedure provided for the leasing of transferred land in the *Aboriginal Land Act 1991*.

It further provides that the trustee must not grant a lease for more than 30 years unless Aboriginal people particularly concerned with the land have been consulted about the purpose and effect of the proposed lease, that they have been given opportunity to express their views, and are generally in agreement with the grant of the lease,

New s 83U—Amending trustee (Aboriginal) lease

New s. 83U provides that a document of amendment of a lease must not increase or decrease the area leased, add or remove a party to the lease, or be lodged after the term of the lease has expired. It further provides for a meaning of term of the lease.

New s 83V—Mortgage of trustee (Aboriginal) lease

New s. 83V provides that a leaseholder of Aboriginal trust land may, under the Act, mortgage a trustee lease. It also provides that certain mortgage provisions in the *Land Act 1994* apply before the surrender of a lease or sublease. Agreement must be provided by the registered mortgagee and registered sublessee of the interest.

New s 83W—Surrender of trustee (Aboriginal) lease

New s. 83W provides that all or part of a trustee lease or sublease may be surrendered only if each registered mortgagee and registered sublessee has given written agreement to the surrender.

Division 3 Other matters

New s 83X—Trustee to advise about ending of particular lease for commercial purpose

New s. 83X requires that the trustee must give the registrar written notice if a lease granted by the trustee for commercial purposes ends for the purpose of the registrar of titles noting the transferable land status of the land.

New s 83Y—Recording information about land

New s. 83Y provides that the registrar must record that transferable land is no longer transferable, where a trustee (Aboriginal) lease for more than 30 years for commercial purposes, on transferable land, is registered.

It also requires that if the trustee notifies the registrar (under S. 83X(2)) that a lease that was granted for more than 30 years for commercial purposes has ended that the registrar must record that the land is again transferable land.

Amendment of s 84—(Crown's use of Aboriginal land preserved)

Clause 45 provides for terminology changes. It also provides that the state's right to use and occupy the land will cease if a lease is granted for private residential purposes. This is relevant in those situations where the Department of Housing has protected its interest to provide social housing

on land transferred, but now with the application of the new leasing provisions for private residential purposes, is wishing to relinquish its interest.

Amendment of s 85—(No rent payable by Crown)

Clause 46 provides for terminology changes.

Amendment of s 86—(Access to land used by Crown)

Clause 47 provides for terminology changes and deletes the requirement for trustees to give one month's notice of intention to enter into an agreement. It excludes a registered native title body corporate from the consultation process undertaken by a land trust in determining other routes of access across Aboriginal land as that provision is specific in application to land trusts. Amendment also clarifies a subsection reference in the provision.

Amendment of s 87—(Application of Mineral Resources Act)

Clause 48 provides for terminology changes and application in relation to Aboriginal land held by a registered native title body corporate.

Amendment of s 88—(Royalties in relation to mining on Aboriginal land)

Clause 49 provides that the chief executive is no longer entitled to receive a percentage of royalties and that all prescribed royalties are to go to the land trustee.

Insertion of new s 114A

Clause 50 inserts new section 114A after s. 114.

New s 114A—Tribunal may order that particular claimable land is transferable land

New s. 114A provides a process whereby the claimants of claimable land may seek to have, and if the Land Tribunal considers appropriate, claimable land become transferable land under the Act.

Amendment of s 131—(Creation of interests in transferable and claimable land)

Clause 51 provides that certain interests now no longer require Ministerial consent to be created, and allows the Minister to dispense with having to consent to the creation of particular interests.

Amendment of s 132—(Rights of access to interests preserved)

Clause 52 provides for changes in terminology and removes the need for the trustees of Aboriginal land to give one month's notice of agreeing on a route of access. Further, it excludes a registered native title body corporate from the consultation process undertaken by land trusts with their beneficiaries in determining other routes of access across Aboriginal land. This is because they are specific requirements that are only applicable to land trusts. Amendment also clarifies a subsection reference in the provision.

Amendment of s 134—(Delegation by Minister)

Clause 53 inserts reference in s 134 to sections 16B and 27A to capture that the Minister's powers under section16B and 27A may not be delegated.

Amendment of s 136—(Amendment of description of land)

Clause 54 provides for changes in terminology and to reflect current practice, shifts responsibility from the registrar of titles to the chief executive in respect of giving a notice to the trustee of land to surrender their deed.

Insertion of new ss 136A and 136B

Clause 55 inserts new ss 136A and 136B after s. 136

New s 136A—Dealing with particular trust property

New s. 136A provides that trustees (other than the state) who receive payment for dwellings where private residential leases were issued (see s. 40K or s. 77K) must use an amount equal to the amount received under s. 40K or 77K in providing housing services for Aboriginal people concerned with the land held by the trustee.

The amendment defines the 'housing services' that the consideration must be used on.

New s 136B—Application of Residential Tenancies Act 1994

New s. 136B sets out that private residential purpose leases issued under the Act are not residential tenancy agreements under the *Residential Tenancies Act 1994.*

Amendment of s 137—(Application of the Financial Administration and Audit Act 1977)

Clause 56 changes 'land claims registrar' to the 'chief executive.'

Amendment of s 138—(Regulation-making power)

Clause 57 changes 'land claims registrar' to the 'chief executive', provides for changes in terminology and provides a broadening of the regulations making powers to indemnify trustees of Aboriginal land to include members of a land trust that were not the original grantees.

The provision also provides the power to set the minimum annual rental amount that the state would pay to a trustee for a lease granted to the state under the Act. This does not prevent a negotiated rent being higher then the minimum rent.

Insertion of new s 139A

Clause 58 inserts new s. 139A

New s 139A—Existing interest in transferable land

New s. 139A provides that residential tenancy agreements over transferable land in force at time of commencement of this section are taken to have been created as if it received Ministerial consent under s.131 of the Act.

Insertion of new part 11, division 2

Clause 59 inserts new part 11, division 2 after s. 140.

New Division 2 Transitional provisions for the Aboriginal and Torres Strait Islander Land Amendment Act 2008

Subdivision 1 Preliminary

New s. 141 provides a definition for 'commencement' of the provision.

Subdivision 2 Transitional provisions

New s 142—Transferred land—change to beneficiaries

New s. 142 provides that transferred land that was granted prior to commencement of this section is now held for the benefit of Aboriginal people particularly concerned with the land rather than Aboriginal people, which is too broad.

New s 143—Interests in Aboriginal land continue

Provides that an interest created under s. 39 and s. 76 of the current Act are not affected by amendments in this Bill to those sections.

Part 3 Amendment of Land Act 1994

Act amended part 3

Clause 60 amends the *Land Act 1994.*

Insertion of new s 34P

Clause 61 inserts new s. 34P

New s 34P—Requirement about covenant for DOGIT land

New s. 34P ensures that any indefeasible title created under the *Land Title Act 1994* as a result of subdividing land subject to DOGIT will be tied by a covenant lodged by the state. Although a trustee of a DOGIT is authorised to surrender all or part of the land, the trustee is not authorised to otherwise dispose of trust land.

The requirement that indefeasible titles created by a subdivision of land be tied by covenant will not apply to land dedicated to public use, land resumed under the authority of an act or land surrendered by the trustee under s. 55 of the *Land Act 1994*. A covenant placed over DOGIT is removable by the covenantee under existing *Land Titles Act 1994* provisions.

Amendment of s 43—(Only Parliament may delete land from or cancel an existing deed of grant in trust)

Clause 62 inserts new subsection (4), which enables the use of the *Acquisition of Land Act 1967* to undertake resumptions of DOGIT land. Previously resumptions of DOGIT land could only be undertaken by an Act of Parliament.

Amendment of s 57—(Trustee leases)

Clause 63 inserts a noting in s. 57(6) that particular provisions in relation to leasing Aboriginal trust land do not apply to this division. New provisions have been established for the leasing of Aboriginal trust land in the Aboriginal Land Act.

Insertion of new ch 9, pt 1E

Clause 64 inserts new Part 1E

Part 1E Transitional provision for Aboriginal and Torres Strait Islander Land Amendment Act 2008

New s 521P—Trustee leases

New s. 521P provides that trustee leases on trust land that are in force on the commencement of this section will continue in force in relation to trust land, despite the new leasing regime commencing.

Part 4 Amendment of Land Court Act 2000

Clause 65 amends the *Land Court Act 2000*

Amendment of s 32J—(Land Court has power of the Supreme Court for particular purposes)

Clause 66 inserts new s 32J(1) that provides that the Land Court in its general division is exercising jurisdiction under the *Aboriginal Land Act 1991*, part 3, division 2, subdivision 4 or the *Torres Strait Islander Land Act 1991*, part 3, division 2, subdivision 4

Amendment of s 60 (Questions of law from a land tribunal)

Clause 67 in the definition of presiding member, the words ‘section 3 and’ are replaced with ‘schedule and’.

Part 5 Amendment of Local Government (Aboriginal Lands) Act 1978

Act amended in pt 5

Clause 68 amends the *Local Government (Aboriginal Lands) Act 1978*

Amendment of s 2—(Definitions)

Clause 69 inserts into section 2 of the *Local Government (Aboriginal Lands) Act 1978* additional definitions for the purposes of new Part 5A of that Act.

Insertion of new pt 5A

Clause 70 insert new Part 5A in to *Local Government (Aboriginal Lands) Act 1978* which provides for a power and a process to resume a lease, or part of a lease, for a purpose for which land may be taken under the *Acquisition of Land Act 1967* by a constructing authority. The process is modelled on that in the *Land Act 1994*.

Part 5A Resumption of leases

New s 33A—Definitions for pt 5A

New s. 33A includes definitions for Part 5A.

New s 33B—Resumption of lease

New s. 33B provides that a lease or part of a lease may be resumed by order in council but only for a relevant purpose. Relevant purpose means a purpose under the Acquisition of Land Act other than a purpose under the *State Development and Public Works Organisation Act 1971,* if the taking of the land for the purpose is for conferring rights or interests in the land taken on a person other than the State, a local government, or a local body as defined under that Act, or the *Petroleum and Gas (Production and Safety) Act 2004*.

New s 33C—Effect of resumption

New s. 33C provides that once resumed, the land becomes unallocated State land and is freed of any interest arising under the resumed lease.

New s 33D—Service of order in council

New s. 33D provides that the Minister under the *Local Government (Aboriginal Lands) Act 1978* must serve a notice of the order in council on each person who has a registered interest.

New s 33E—Compensation under Acquisition Act

New s. 33E provides for a right of compensation under the processes of the *Acquisition of Land Act 1967* for person who have a lawful interest in the lease, or part of the lease, that is resumed.

New s 33F—Revoking a resumption

New s. 33F provides for the power to revoke a resumption.

New s 33G—Compensation by Minister if resumption is revoked

New s 33G provides for a right of compensation to a person but only for their loss, reasonable costs and expenses incurred in relation to a resumption which is revoked.

New s 33H—Appeal against decision under s 33G

New s 33H provides that a person seeking a right of compensation in relation to a resumption which is revoked may appeal to the Land Court.

New s 33I—Powers of Land Court on appeal

New s 33I provides the powers of the Land Court when deciding an appeal from a person seeking a right of compensation in relation to a resumption which is revoked.

Part 6 Amendment of Native Title (Queensland) Act 1993

Clause 71 amends the *Native Title (Queensland) Act 1993.*

Amendment of s 144—(Declaration about compulsory acquisitions)

s 144—Compulsory acquisition of native title

Clause 72 amends section 144 of the *Native Title (Queensland) Act 1993* to remove any doubt that (a) the power of compulsory acquisition includes power to compulsorily acquire native title rights and interests in relation to land or waters for the purpose of the compulsory acquisition Act and (b) that native title rights and interests may be acquired under a compulsory acquisition Act even though the Act would not otherwise apply to the land.

Part 7 Amendment of Torres Strait Islander Land Act 1991

Act amended Part 7 and schedule

Clause 73 provides that this part and the schedule amend the *Torres Strait Islander Land Act 1991.*

Amendment of s 3—(Definitions)

Clause 74 inserts a number of definitions and updates terminology.

Amendment of s 9—(Meaning of Torres Strait Islander land)

Clause 75 omits the term, ‘for the benefit of Torres Strait Islanders’. This amendment supports the ability to grant land to a registered native title body corporate (RNTBC). A RNTBC holds the land for the benefit of the native title holders, not for the benefit of 'Torres Strait Islanders’ or 'Torres Strait Islanders particularly concerned with the land'. Native title holders will be a subset of either 'Torres Strait Islanders’ or 'Torres Strait Islanders

particularly concerned with the land' and therefore as it is more restrictive, the more general category of beneficiaries 'for the benefit of Torres Strait islanders' was no longer appropriate.

Amendment of s 10—(Meaning of transferable and transferred land)

Clause 76 omits the term, 'for the benefit of Torres Strait Islanders'. This amendment supports the ability to grant land to a registered native title body corporate (RNTBC). A RNTBC holds the land for the benefit of the native title holders, not for the benefit of 'Torres Strait Islanders' or 'Torres Strait Islanders particularly concerned with the land'. Native title holders will be a subset of either 'Torres Strait Islanders' or 'Torres Strait Islanders particularly concerned with the land' and therefore as it is more restrictive, the more general category of beneficiaries 'for the benefit of Torres Strait islanders' was no longer appropriate.

Amendment of s 11—(Lands that are transferable lands)

Clause 77 provides that land taken by a constructing authority under the *Acquisition of Land Act 1967*, Torres Strait Islander trust land subject to a lease for more than 30 years for commercial purposes or land declared under s13A ceases to be transferable land.

Insertion of new part 2 Division 3A

Clause 78 inserts new part 2, division 3A

Division 3A Declarations about particular transferable land

New s 13A—Definition for division 3A

New s. 13A defines the term *relevant land* for the purposes of this division. 'Relevant land' means DOGIT land and Torres Strait Islander reserve land, other than land declared under a regulation for section 13.

New s 13B—Particular land may be declared to be not transferable land

New s. 13B allows the Minister to make a declaration that particular land be not transferable because the condition, nature, or use of the land would mean that it was not appropriate or practicable to grant the land in fee simple.

Section 13B(1)(a – c) provides specific situations where the Minister may, if satisfied of the facts, declare land to be not transferable. These situations are where the land is being used for, or has located on it, housing, or essential or other infrastructure; town, or road.

In addition to these specific situations the Minister may declare land to be not transferable under s. 13B(1)(d), if satisfied that the nature or use of the land means that it is not appropriate or practicable to grant the land under the *Torres Strait Islander Land Act 1991.*

In considering to make a decision under s. 13B(1)(d), s. 13B(2) provides that the Minister may have regard to the nature and use of the land.

Two examples are provided in the subsection:

(a whether the land is required for future town expansion; or

(b) whether the land is in a condition suitable to be granted.

Examples of (b) above would include safety concerns relating to the current condition of the land, for example open mine shafts, or extensive erosion.

A decision under s. 13B(1)(d) can be appealed and therefore the Minister can not make a decision under s. 13B until the period for appeals has expired, or if there have been any appeals, then until the appeal has been finalised.

New s 13C—Notice of intention to make declaration

New s.13C provides for a notification process that must be followed if the Minister intends to make a declaration under s. 13B.

If the Minister intends to make a declaration under s. 13B, then the Minister must:

(a) give notice in writing of the Minister's intention to make a declaration under s. 13B to the trustee of the land; and

(b) within 10 days of notifying the trustee, must publish a notice of the Minister's intention to declare the land not transferable in a newspaper or other publication circulating generally in the area of the land; and

(c) consider all representations made within the period set out in s. 13C(1)(3).

The notice provided by the Minister must include a description of the relevant land and state the following:

(a) the reason for the intention to declare the land not transferable; and

(b) that written responses to the intention to declare the land not transferable can be made to the Minister; and

(c) where the responses can be made;

(d) the time allowed for responses – this time must not end until at lease 28 days after the notice has been published.

New s 13D—Minister to consider representations and give notice of decision

If, after considering all responses made under s. 13C(4) the Minister decides to declare the land 'not transferable', then the Minister must notify in writing each person who provided a response, including the trustee, even if the trustee did not provide a response.

This notice must state the reason for declaring the land 'not transferable', the provision under which the declaration was made, and if the decision was made under s. 13B(1)(d), that the person may appeal the decision to the Land Court.

New s 13E—Appeal against particular decision under s 13B(1)(d)

A person who made a representation under s. 13C(4) may appeal to the Land Court the Minister's decision, if the Minister's decision was made under s. 13B(1)(d).

An appeal is commenced by filing written notice of appeal with the registrar of the Land Court.

The notice of appeal must be filed within 28 days after the person receives notice of the Minister's decision. However the Land Court may (within 28 days of the Minister notifying all persons who made representation) extend the period for making an appeal.

The appeal is a rehearing of the Minister's decision using the material that was before the Minister. The Land Court may allow further evidence.

New s 13F—Powers of the Land Court on appeal

In deciding the appeal, the Land Court has the same powers as the Minister. The Land Court may:

(a) confirm the Minister's original decision; or

(b) set aside the Minister's decision and substitute another decision; or

(c) set aside the Minister's decision and return the issue to the Minister with directions the Court considers appropriate.

If the Land Court substitutes the Minister's decision with another decision, that decision is taken to be the decision of the Minister, except that it can not be appealed under this division.

New s 13G—Notice about declarations – trustee

New s 13G provides that as soon as practicable after a declaration that land is 'not transferable' is made, the chief executive officer must give notice in writing of the declaration to the trustee of the land.

New s 13H—Notice about declarations - registrar

New s. 13H provides that soon after declaring relevant land to be not transferable land, the chief executive must give the registrar written notice of the declaration and specify what must be included in the notice. It also has requirements with regard to the keeping of records for land declared not transferable and for land subject to a declaration that is subsequently repealed.

New s 13I—Requirements about plans of subdivision relating to declarations under s. 13B

New s. 13I inserts a new section that provides for when transferable land is to be declared to not be transferable land, that a plan of subdivision can be lodged by the Minister over the transferable land without application of certain provisions in the *Land Act 1994* and *Land Titles Act 1994* that require other parties to approve the lodgement.

A plan of subdivision is required to be lodged over transferable land proposed to be declared not transferable land to enable the necessary identification of an area of land that no longer transferable. This is best achieved by lot on plan identification.

Amendment of s 25—(Deeds of grant to be prepared)

Clause 79 provides that when land is granted to a registered native title body corporate (RNTBC), the deed of grant must show that the land is held for the native title holders of the land otherwise it is for the benefit of Torres Strait Islanders particularly concerned with the land and their ancestors and descendants. Where the grantee is a RNTBC, information must be included in the deed of grant to identify the native title holders of the land.

New s 25A—Appointment of registered native title body corporate as grantee

Clause 80 permits the Minister to appoint a registered native title body corporate (RNTBC) to be grantee of land for the native title holders of the land. In appointing a RNTBC, the Minister must consider a number of matters that may be relevant to the proposed appointment.

For example, this could include the following:

- whether the proposed appointment was a matter relevant to the determination that native title existed over the land
- whether any Torres Strait Islanders particularly concerned with the land, other than native title holders may be affected by the proposed appointment.
- if Torres Strait Islanders particularly concerned with the land are likely to be affected by the proposed appointment, any action the RNTBC intends taking to address their concerns.

Amendment also provides that RNTBC appointed as grantee does not become incorporated as a land trust upon the grant of the land, reflecting that they are already an incorporated body.

Amendment of s 26—(Minister to appoint trustees)

Clause 81 inserts a new provision into this section to reflect that this section applies if the Minister does not appoint a registered native title body corporate (RNTBC) as the grantee of land under the new s 27A. Further, the wording 'subject of each deed of grant prepared under s 27' is deleted because land can now be granted to a trustee or a RNTBC.

The amendment also deletes reference to the *Trusts Act 1973* from this section, reflecting its relocation to new section 28B.

Insertion of new s 26A—Application of Trusts Act 1973

Clause 82 represents the relocation of this provision from section 28 and the insertion into the section of a reference to a RNTBC as they may become the grantee of transferable land.

Amendment of s 27—(Minister to act as soon as possible)

Clause 83 now requires that after the land becomes transferable, the Minister must make all necessary appointments under section 25A or 26. This provision previously only related to the appointment of trustees under section 26, and now includes the appointment of a registered native title body corporate under section 25A.

Amendment of s 29—(Inclusion of additional areas in deed of grant)

Clause 84 provides that an additional area of transferable land may not be included in a deed of grant for Torres Strait Islander land held by a registered native title body corporate (RNTBC). This is despite the current provision in s 29 which states that an additional area of transferable land may be included in a deed of grant if the Minister has consulted with Torres Strait Islanders particularly concerned with each area of land and there is agreement from the majority of people to the proposal. A RNTBC can, however, hold multiple parcels of land and a further deed could be granted to an existing RNTBC as grantee.

Replacement of ss 36 and 37

Clause 85 replaces ss. 36 and 37

Subdivision 1 General

New s 36—Power to deal with transferred land

New s. 36 broadens the scope of dealings that can be done on Torres Strait Islander land by the grantees.

These amendments now provide that the grantee can enter into any dealing on their land other that that which is prohibited by the Act (e.g. sell the land), and for some of those dealings that they can do, they are now restricted (e.g. conditions and restrictions on leasing). This differs as to how it currently stands in the Act, in that the grantee can only do that which is specified under s. 36 (some things are conditional), and a dealing that is not permitted under s. 36 would be void because of s. 37.

New s 37—Requirement for consultation

New s. 37 provides for the relocation of part of s. 36 from the current Act, for Torres Strait Islanders to explain proposed dealings in their land, but removes the requirement that they give one month's notice of their intention to entering into a dealing. This was considered necessary because it was considered that people had already been provided with adequate consultation in the initial stages of the consultation process. To *deal* with land is explained (now including and excluding certain dealings), and it is made clear that the *trustee* of transferred land for application of this section, does not include a registered native title body corporate (reflecting that it is incorporated under other legislation and is not a land trust).

New s 37A—Provision about Minister's consent

New s. 37A provides that the Minister's consent may be given for the grant of a particular lease or licence to a particular person or particular interest in a lease or licence, or if the Minister considers appropriate, all leases and licences granted by the trustee, and the creation of all interests created under a lease or licence.

New s 37B—Provision about particular leases

New s 37B provides that a lease for not more than 10 years or 30 years is taken to be lease for more than 10 years or more than 30 years if it includes an option to renew or extend the lease, and such extension would extend the lease for more than 10 years or 30 years.

Subdivision 2 Sale or mortgage prohibited

New s 37C—Prohibition on sale or mortgage of transferred land

New s. 37C reinserts the existing, though not explicitly stated provision in the Act, that the trustee of transferred land must not sell or mortgage the land. This relates to the original grant of the land to the trustee and not to subsequent interests created.

Subdivision 3 Grant of leases

New s 37D—Grant of lease for transferred land

Section 37D sets our broadly who can obtain a lease and the term of the lease. The maximum term of leases is 99 years.

Leases can be granted to three categories of people;

(a) a Torres Strait Islander,

(b) the State; or

(c) to another person.

The term ‘another person’ captures anyone who is not a Torres Strait Islander or the State, including joint ventures with Torres Strait Islander people.

However, a person who is not a Torres Strait Islander can be a party to a lease under (a) if the lease is for private residential purposes and the person is the spouse of a Torres Strait Islander.

Also a person who is not a Torres Strait Islander may be granted a lease under (a) for private residential purposes if they are the spouse of a Torres

Strait Islander, or the former spouse of an Torres Strait Islander, or the former spouse of a Torres Strait Islander who is deceased.

A lease to another person for not more than 10 years does not require Ministerial consent.

For a lease to another person for a commercial purpose or for a private residential purpose in support of a lease for commercial purpose for more than 10 years and not more than 30 years, the minister's consent is exempted.

New s 37E—Particular restrictions on grant of leases

New s. 37E places particular restrictions on grants of leases under s. 37D.

A lease granted to a Torres Strait Islander under s. 37D(1)(a) for more than 30 years requires Ministerial consent unless it is granted for private residential purposes

A lease granted to the State under s. 37D(1)(b) for more than 30 years requires Ministerial consent unless it is granted for a purpose under the *Housing Act 2003*; or providing public infrastructure; or providing housing for public service employees.

A lease granted to another person under s. 37D(1)(c) requires Ministerial consent unless it is granted for not more than 10 years or is a commercial lease or private residential lease supporting a commercial lease, both of which are not more than 30 years in term – see s. 37D(1)(c)(i) and s. 37D(3).

A lease may only be granted for private residential purposes to another person under s. 37D(1)(c) where that lease is to support a lease granted for a commercial purpose.

A lease for more than 30 years for commercial purposes must only be granted over an entire lot, that is, it can not be over part of a described lot.

Where the Minister's consent is required under this section the Minister is required to be satisfied that the grant of the lease will benefit the persons for whom the trustee holds the land.

In reaching this view the Minster will have regard to the nature of the lease, this includes any terms and conditions, the rent or other monies to be paid and the relative size of the lease in comparison to the balance of the land the trustee is responsible for.

New s 37F—Requirements for Minister's consent—general

New s. 37F sets out requirements for a person seeking the Minister's consent to the grant of a lease. For example, a lease for more than 30 years for commercial purposes requires the Minister be presented with a business plan, evidence to show that a reasonable return can not be achieved with a lease under 30 years, and any other information that the Minister may require. Before consent is given, the Minister must be satisfied that the trustee has explained to the Torres Strait Islanders particularly concerned with the land, the nature, purpose and effect of the dealing and that these people are in general agreement with the grant of the lease.

New s 37G—Particular requirement for Minister's consent for lease for commercial purposes

New s. 37G requires that before consenting to a lease for more than 30 years for a commercial purpose, the Minister must obtain an independent assessment (paid for by the proponent) of the business plan and the evidence given under 37F(2)(a) and (b), and the proponent's financial and managerial capabilities. It further provides for considerations that the Minister must be satisfied with in making a decision.

New s 37H—Conditions of leases—general

New s. 37H sets out a number of conditions for leases. An interest created under a lease, other than a mortgage of the lease, requires the Minister's consent if it is for more than 10 years.

The Minister's prior consent to an interest under a lease is not required if the interest:

- is to a Torres Strait Islander for not more than 99 years
- is to a Torres Strait Islander, or another person who is not a Torres Strait Islander if the person is the spouse or former spouse of a Torres Strait Islander, including where the Torres Strait Islander is deceased
- is to be created under a lease that did not require the Minister's consent for granting the lease in the first place.
- The section further provides for the use of a standard terms document and stipulates that a leaseholder must not transfer a

lease or create an interest under a lease without the written consent of the trustee.

The section further provides for the use of a standard terms document and stipulates that a leaseholder must not transfer a lease or create an interest under a lease, other than a mortgage without the written consent of the Minister or trustee. It further provides that consent cannot be unreasonably withheld.

This section does not limit the conditions that may be imposed on a lease.

New s 37I— Requirement for Minister's consent for creation of interest under a lease

New s. 37I applies where an interest under a lease is created only with the Minister's written consent and provides that the creation of the interest must be for the benefit of persons for whom the trustee holds the land. Where the interest is for more than 30 years, the interest must be consistent with the purpose for which the lease was granted or the interest would not diminish the purpose for which the lease was granted.

It further provides that a person seeking the Minister's consent must provide certain information and documents reasonably required by the Minister, e.g. showing that the interest is for the benefit of persons for whom the grantees hold the lease land.

New s 37J—Leases for private residential purposes—general conditions and requirements

This amendment sets out the general conditions relating to leases for private residential purposes.

A lease for private residential purposes may only be issued for a fixed term of 99 years.

Private residential purpose leases are to be purchased—that is an up front lump sum payment. This is an amount equal to the value of the lease land as decided by the trustee. In deciding the value, the trustee should have the valuation undertaken by a certified practising valuer using the methodology approved by the Chief Executive Officer and using the benchmark purchase price prescribed under a regulation. The annual rental is the amount of not more than $1.00 decided by the trustee. Further, the lease must not be granted unless the consideration has been paid to the trustee.

Where there is no private residential premise on the land then the leaseholder must construct a private residential premise within eight years from when the lease is granted.

Private residential purpose leases can not be subleased however, they can be rented out as a residential tenancy agreement (e.g. where the leaseholder has moved away for work purposes).

If requested, the chief executive must give a person a copy of the valuation methodology and may make the methodology available for inspection on the department's website.

New s 37K—Leases for private residential purpose—particular requirements if dwelling situated on land

New s. 37K clarifies the situation where it is proposed to issue a private residential lease and there is a dwelling situated on the land. The grantee must give notice to the CEO of the department administering the Housing Act of the trustee's intention to issue a lease where there is an existing dwelling.

After receiving the notice the housing CEO has 28 days to respond to the grantee in writing. The response must include whether the housing CEO considers that the dwelling subject of the proposed lease has been used to provide subsidised housing for residential use.

The grantee can not issue the lease before the housing CEO has responded.

If the housing CEO considers the dwelling has been used for providing subsidised housing then a range of provisions apply. These are:

- the value of the dwelling must be decided by using a valuation methodology agreed between the grantee and the housing CEO
- the consideration payable for the lease must include as a lump sum payment an amount equal to the value of the house as decided above (the consideration for the lease will also include a lump sum payment for the land—this is covered in s 37J)
- the grantee can not grant the lease without the written approval of the housing chief executive or if the value of the house has not been paid to the trustee
- after granting the lease the grantee must, within 28 days of the lease being registered, provide the housing CEO with:

- notice of the lease registration date
- the parties to the lease
- evidence showing that the lump sum payments for the land and the dwelling have been paid to the grantee.

In deciding to give an approval, the housing chief executive must have regard to whether the dwelling is required to continue to be used for providing subsidised housing for residential use.

New s 37L—Renewal of lease or sublease

New s. 37L provides that a lease or sublease of a lease may include an option to renew the lease or sublease. It further provides that the term of a renewed lease or sublease must not be longer than the initial term.

New s 37M—Transfer or amendment of lease or sublease

New s. 37M provides that a lease or sublease must not be transferred without the consent of the trustee or the Minister, if the granting of the lease or sublease was subject to approval from the trustee or Minister. It provides that the Minister may consent to the amendment if it does not significantly change the terms of the lease or sublease, and the amended lease or sublease is for the benefit of persons for whom the trustee holds the land.

To approve a lease transfer the minister must consider whether the proposed transferee can comply with the lease conditions. The exception to this is a lease for commercial purposes for more than 30 years - for these, the Minister must obtain an independent assessment of the proposed transferee's financial and managerial capabilities, and be satisfied that these capabilities are appropriate for carrying out any development under the lease. The cost of the assessment must be met by the transferee and is not refundable.

New s 37N—Lease, sublease and transfer, amendment or surrender of lease or sublease to be registered

New s. 37N provides that all leases and subleases, transfers, amendments or surrenders of leases or subleases must be registered under the Land Title Act. This section also provides that an instrument of lease must include a plan of survey.

Subdivision 4 Forfeiture of particular leases

New s 37O— Application of subdivision 4

The forfeiture provisions in this subdivision only apply to private residential purposes granted to an Torres Strait islander for 99 years under s. 37D(1)(a).

New s 37P—Grounds for forfeiture of lease

A lease may be forfeited only if a relevant condition of the lease is breached and the lessee fails to remedy the breach within 6 months after receiving written notice of the breach from the trustee, or if that lease was acquired by fraud.

A 'relevant condition' in this section means a condition of the lease mentioned in s. 37J(1)(b) or another condition if the grantees reasonably consider the breach of the condition is of such a nature that warrants forfeiture of the lease. An example of this could be where a lessee uses a residential lease to run a commercial enterprise.

New s 37Q—Application to Land Court for forfeiture

New s. 37Q provides that before a lease is forfeited, the grantees must refer the matter to the Land Court to decide if the lease may be forfeited.

At least 28 days written notice of the grantees' intention to refer the matter to the Land Court must be given to the lessee and any mortgagee of the lease. The notice must state the grounds for forfeiture.

The Land Court in making its decision must have regard to:

(a) the stated grounds for forfeiture; and

(b) if, where the lease is proposed to be forfeited for a breach of condition, whether the Court considers the breach of condition(s) is of such a serious nature that it warrants forfeiture of the lease.

The grantees must file a copy of the notice - provided under s. 40Q(2) - in the Land Court at the same time as the trustee refers the matter to the Court.

New s 37R—Grantees' options if Land Court decides lease may be forfeited

If the Land Court decides that the lease may be forfeited, the grantees may forfeit the lease, or (if the proposed forfeiture is because of a breach of a condition of the lease) decide not to forfeit the lease, but to allow the lease to continue subject to conditions agreed to between the grantee and the lessee.

New s 37S—Notice and effect of forfeiture

If the grantees forfeit the lease then the grantees must give written notice within 60 days after receiving notice of the Land Court's decision that the lease has been forfeited to the lessee of the lease, any mortgagee, and the registrar.

Section 37S provides for recording details of the forfeiture in a register and that forfeiture of the lease takes effect on the day the registrar records the forfeiture in the appropriate register.

Upon forfeiture of the lease the lease ends, the lessee is divested of any interest in the lease, and any person occupying the lease must vacate the land.

New s 37T—Payment by trustee for forfeited lease

If the lease is forfeited, the grantees must pay the person who was the lessee the value of the lease land and any lawful improvements on the day the lease is forfeited less any amounts set out in s. 37V.

Section 37T also provides methodology for calculating the value of such land and improvements and provides a means by which a decision of the trustee must be conveyed to the grantees. It further provides means by which the valuation methodology can be made available to the lessee.

A person may appeal against the amount payable to them as decided by the grantees.

New s 37U—Unclaimed amounts

In the event that the lessee cannot be located within 9 years of the forfeiture, any monies due and payable to the lessee are forfeited to the grantees.

New s 37V—Amounts owing to trustee or mortgagee to be deducted

New s. 37V provides that in the event of forfeiture the trustee may deduct certain amounts from the amount payable to the lessee, incurred in relation to forfeiture action.

New s 37W—Payment of amount to mortgagee in discharge of mortgage

New s 37W provides that where the grantees forfeit the lease and an amount is owing to a mortgagee of the lease by the lessee, then the grantees must pay the mortgagee an amount owing less costs and expenses incurred by the grantees. The includes costs incurred in forfeiting the lease, costs of rectifying damage caused to the lease land by the lessee, and any amount owing to the grantees by the lessee.

Section 37(W(2)(a) provides that the mortgagee is paid the amount owed on the mortgage (s. 37V(d)) if the amount owed is less than the maximum amount payable (s. 37T(1)) after the amounts in s. 37V(a), s. 37V(b) and s. 37V(c) have been subtracted.

Otherwise under s. 37W(2)(b) the mortgagee is paid the maximum amount payable (s. 37T(1)) less the amounts in s. 37V(a), s. 37V(b) and s. 370V(c).

If the grantees pay any amount to the mortgagee in relation to a mortgage of the lease then the mortgagee must use that amount in discharging the mortgage.

New s 37X—Appeal against decision under s. 37T

Section 37X provides the process for appealing the amount the grantees has determined under s. 37T is payable.

New s 37Y—Powers of Land Court on appeal

The Land Court has the same powers as the grantees in deciding the appeal.

The Land Court may:

(a) confirm the trustee's original decision; or

(b) set aside the grantees' decision and substitute another decision; or

(c) set aside the grantees' decision and return the issue to the trustee with directions the Court considers appropriate.

If the Land Court substitutes the grantees' decision with another decision, that decision is taken to be the decision of the grantees, except that it can not be appealed under this subdivision.

Subdivision 5 Grant of licences

New s 37Z—Grant of licence for transferred land

New s. 37Z provides that a licence may be granted to a Torres Strait Islander or the state, for not more than 30 years, and to another person for not more than 10 years. However, with the Minister's consent a licence to another person may be granted for more than 10 years but not more than 30 years. Under the current legislation it is unclear as to the term that a licence can be granted. This amendment establishes the maximum term available.

New s 37ZA—Conditions of licences

New s. 37ZA provides the restrictions that are to apply on the grant of an interest under a licence provided for under s. 37Z. This is a reinsertion from the current Act. The amendment further provides that an interest created under the licence can not be transferred.

Subdivision 6 Transfer of land held by registered native title body corporate

New s. 37ZB provides that a registered native title body corporate may transfer transferred land only with the Minister's prior written approval and to another native title body corporate that under the Commonwealth Native Title Act, has replaced the original body corporate.

Subdivision 7 other matters

New s 37ZC—Grantees to advise chief executive of change to description of land

New s. 37ZC provides that where the description of the transferred land changes through certain dealings, notice of the change must be provided to the chief executive by the grantee of the land.

New s 37ZD—Particular dealings in transferred land void

New s. 37ZD provides that the grant, transfer or other creation of an interest in transferred land in contravention of this division is void, unless the interest is registered. It also provides that this section applies despite any other Act.

Amendment of s 38—No resumption of transferred land etc

Clause 86 modifies the Act to enable the resumption of transferred land. The exception contained in s. 38 of the Act is amended to allow transferred land to be resumed, taken or otherwise compulsory acquired, sold or dealt with under an Act provided that Act expressly provides for the resumption of land and the payment of just compensation for the land.

Insertion of new pts 5A and 5B

Clause 87 inserts new s. 5A and 5B.

New Part 5A Provisions about mortgages of leases over Torres Strait Islander land

New s 80A—Application of Part 5A

New s. 80A provides that this section prevails where there is any inconsistency between a provision of this part and a particular part of the *Land Title Act 1994* or the *Property Law Act 1974* in relation to mortgaging of a lease.

New s 80B—Provisions about entering into possession of, and selling, lease

New s. 80B applies to when a mortgagee enters into possession of a lease granted over Torres Strait Islander land, and provides that the mortgage must give the trustee written notice within 28 days of entering into possession.

It also provides that the mortgagee must sell the lease within four years and if the land is not sold in that period to a person entitled to a lease under the Act, the mortgagee may negotiate with trustee for a longer period of time (2 years) to sell the property, which can be further extended for not more than 2 years at a time if the property does not sell.

One consideration the trustee may consider when deciding whether to agree, could include that the mortgagee has given due diligence towards achieving a sale (but has been unsuccessful). If an extension was not agreed upon, then the trustee would be entitled to sell the property.

This provision ensures that residential leases remain with the community and are used for home ownership, but allows the mortgagee to recoup their investment in the event of a mortgagee defaulting on the loan.

It is a requirement that the trustee must not sell the lease for less than the amount owing under the mortgage unless the trustee and mortgagee have agreed to a lesser amount.

New s 80C—How grantee deals with proceeds of sale

New s. 80C provides that where a grantee sells a mortgaged lease, the grantee must apply the proceeds of the sale under the *Property Law Act 1974* as if the lease were sold by the mortgagee and the proceeds of the sale were received by the mortgagee. It further provides for costs, charges and expenses incurred by the trustee in a sale or attempted sale to be considered in applying the proceeds of the sale.

Part 5B Leasing of Torres Strait Islander trust land

Division 1 Preliminary

New s 80D—Definitions for Part 5B

New s. 80D provides definitions for Torres Strait Islander trust land, trustee and trustee (Torres Strait Islander) lease.

New s 80E—Relationship with Land Act

New s. 80E sets out which provisions of the *Land Act 1994* do not apply to Torres Strait Islander trust land, when leased.

Division 2 Leases

New s 80F—Trustee (Torres Strait Islander) leases

New s. 80F provides that leasing over Torres Strait Islander trust land is to follow a far as practical (subject to modifications in this division) that procedure which is provided for the leasing of transferred land in the *Torres Strait Islander Land Act 1991*.

It further provides that the trustee must not grant a lease for more than 30 years unless Torres Strait Islanders particularly concerned with the land have been consulted about the purpose and effect of the proposed lease, that they have been given opportunity to express their views, and are generally in agreement with the grant of the lease.

New s 80G—Amending trustee (Torres Strait Islander) lease

New s. 80G provides that a document of amendment of a lease must not increase or decrease the area leased, add or remove a party to the lease, or be lodged after the term of the lease has expired. It further provides for a meaning of term of the lease.

New s 80H—Mortgage of trustee (Torres Strait Islander) lease

New s. 80H provides that a leaseholder of Torres Strait Islanders trust land may, under the Act, mortgage a trustee lease. It also provides that certain mortgage provisions in the *Land Act 1994* apply and that before surrender of a lease or sublease, agreement must be provided by the registered mortgagee and registered sub-leaseholder of the interest.

New s 80OI—Surrender of trustee (Torres Strait Islander) lease

New s. 80I provides that all or part of a trustee lease or sublease may be surrendered only if each registered mortgagee and registered sub-leaseholder has given written agreement to the surrender.

Division 3 Other matters

New s 80J—Trustee to advise about ending of lease for commercial purpose

New s. 80J requires that the trustee must give the registrar written notice if a lease granted by the trustee for a commercial purposes ends for the purpose of the registrar of titles noting the transferable land status of the land.

New s 80K—Recording information about land

New s. 80K provides that the registrar must record that transferable land is no longer transferable, where a trustee (Torres Strait Islander) lease for more than 30 years for commercial purposes on transferable land, is registered.

Amendment of s 81—(Crown's use of Islander land preserved)

Clause 88 provides that the state's right to use and occupy the land will cease if a lease is granted for private residential purposes. This is relevant in those situations where the Department of Housing has protected its interest to provide social housing on land transferred, but now with the application of the new leasing provisions for private residential purposes, is wishing to relinquish its interest.

Amendment of s 83—(Access to land used by Crown)

Clause 89 amends s. 83 to exclude a registered native title body corporate from the consultation process involved with grantees in determining other routes of access across Torres Strait Islander land as that provision is specific in application to land trusts. Amendment also clarifies a subsection reference in the provision.

Amendment of s 84—(Application of Mineral Resources Act)

Clause 90 provides for application of this section in relation to Torres Strait Islander land held by a registered native title body corporate.

Amendment of s 129—(Rights of access to interests preserved)

Clause 91 excludes a registered native title body corporate from the consultation process undertaken by land trusts with their beneficiaries in determining other routes of access across Torres Strait Islander land. This is because they are specific requirements that are only applicable to land trusts. Amendment also clarifies a subsection reference in the provision.

Amendment of s 13 —(Delegation by Minister)

Clause 92 inserts reference in s 131 to sections 13B, and 25A to capture that the Minister's powers under section 13B and 25A may not be delegated.

Insertion of new ss 133A and 133B

Clause 93 inserts new ss. 133A and 133B after section 133.

New s 133A—Dealing with particular trust property

New s. 133A provides that trustees (other than the state) who receive payment for dwellings where private residential leases were issued (see s. 37K) must use an amount equal to the amount received under s 37K in providing housing services for Torres Strait Islander people concerned with the land held by the trustee.

The amendment defines the 'housing services' that the consideration must be used on.

New s 133B—Application of Residential Tenancies Act 1994

New s. 133B sets out that private residential purpose leases issued under this Act are not residential tenancy agreements under the *Residential Tenancies Act 1994*.

Amendment of s 135—(Regulation-making power)

Clause 94 inserts in s. 135(2) that a regulation may be made with respect to the minimum rental amount payable by the State under a lease granted to the State under this Act.

Insertion of new Part 10, Division 2

Clause 95 inserts a new division after s. 136.

Division 2 Transitional provision for Aboriginal and Torres Strait Islander Land Amendment Act 2008

New s 137—Interests in Torres Strait Islander land continue

New s. 137 provides that an interest created under s. 36 and s. 73 of the current Act are not affected by amendments in this Bill to those sections.

Part 8 Minor and consequential amendments

Clause 96—*Acts* amended in schedule provides that the schedule amends those acts it mentions.

Schedule—Minor and consequential amendments

Aboriginal Land Act 1991

Torres Strait Islander Land Act 1991