

# **Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014**

## **Explanatory Notes**

### **FOR**

## **Amendments to be moved during consideration in detail by the Honourable Andrew Cripps MP, Minister for Natural Resources and Mines**

### **Title of the Bill**

The short title of the Bill is the *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014*

### **Objectives of the Amendments**

The objectives of the amendments are described below.

#### *Redundant sections of the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991*

The objective of the amendment is to remove redundant section 10(2)(b) from the *Aboriginal Land Act 1991* and section 9(2)(b) from the *Torres Strait Islander Land Act 1991* given the Bill otherwise removes restrictions on the grant of leases and specifically removes all reference to leases for commercial purposes.

#### *The definition of “urban area”*

The objective of this amendment is to ensure the definition of “urban area”, the land to which the freehold option applies, operates as intended and is defined as an area intended for urban or future urban purposes.

*Land subject to an allocation notice becoming transferable land where the land does not proceed to freehold*

The objective of the amendment is to ensure that land the subject of an allocation notice under the non-interest holder process under the freehold proposal becomes transferable where the offer ceases, thereby preventing the perverse outcome of land becoming incapable of being transferred as Aboriginal or Torres Strait Islander freehold where ordinary freehold is not taken up.

*Declared beach area - Amendment of definition of “seashore”*

The objective of the amendment to the definition of “seashore” in clause 61 is to ensure the amendments to the *Land Act 1994* (Part 7 of the Bill) to enable freehold and leasehold land to be made available for public use as beach apply to the beach land within a lot which is seaward of the high water mark. In particular, a declared beach area may cover land that is below the low water mark.

*Declared beach area - Owner liability clarification*

The objective of the amendment to clause 61, is to clarify the extent of owner liability in relation to a declared beach area.

Part 7 of the Bill amends the *Land Act 1994* to enable freehold and leasehold land to be made available for public use as a beach. It is intended that in certain circumstances the public be provided with a right of conditional access to a declared beach area. The manager of a declared beach area is provided with control of the area and is responsible for maintaining the area.

The provision in the Bill would relieve the owner of a lot that includes a declared beach area of civil liability for a risk or incident on the declared beach area provided there was no negligence on the part of the owner. Subject to the actions of the landowner, where a right of access is created, the State will assume the landowner’s occupiers liability for the area over which the right of access is created.

The amendment clarifies that the owner will only be civilly liable for a direct act or omission by the owner that creates a risk and the owner was intending to create the risk or was reckless as to the creation of the risk.

*Declared beach area – Responsibility for maintaining the area*

The Bill amends the Land Act to enable freehold and leasehold land to be made available for public use as beach. Under the provisions, prior to the declaration of public access to a beach on private land, the relevant local government can elect to be the manager of the declared beach area. The manager is required to maintain the beach area.

Feedback from the Local Government Association of Queensland (LGAQ) indicated a concern over what is meant by ‘maintain’. Local governments are concerned that they may be compelled to carry out expensive erosion prevention and remediation works.

The amendment will clarify that if a local government elects to be manager of a declared beach area it will be responsible only for taking reasonable and practical measures to maintain the area in a safe condition.

*Appeal to purchase price if deed of grant is offered*

The objective of the amendment is to ensure the amendments made by the *Land and Other Legislation Amendment Act 2014* to the Land Act and Subordinate Legislation 2014 No 117 to the Land Regulation 2009 incorporate the movement of the appeals provision in relation to the purchase price if a deed of grant is offered.

*Discontinue issuance of a freeholding lease when net present value calculation is used for purchase price methodology*

The objective of the amendment is to reflect the government's intent for introducing net present value methodology to determine purchase price for rural lease conversions to freehold title. The intent is that payment for the purchase of freehold title is made in a single payment transaction rather than to continue to provide opportunities for payment of the purchase price in instalments over a period of up to 30 years under a freeholding lease arrangement.

## **Achievement of the Objectives**

*Redundant sections of the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991*

The removal of redundant section 10(2)(b) from the *Aboriginal Land Act 1991* and section 9(2)(b) of *Torres Strait Islander Land Act 1991* will remove references to leases for commercial purposes, which are no longer relevant.

*The definition of "urban area"*

The replacement of the definition of "urban area" is so that the definition is not limited to a cadastral boundary description as this is not always used in planning schemes. The new definition will ensure it appropriately captures urban and future urban areas across all planning schemes.

*Land subject to an allocation notice becoming transferable land where the land does not proceed to freehold*

These amendments will avoid the undesirable outcome of land becoming incapable of being transferred as Aboriginal freehold or Torres Strait Islander freehold where the process for the grant of ordinary freehold commences but is not concluded.

*Declared Beach Area - Amendment of definition of "seashore"*

The amendment to clause 61 of the Bill ensures that an appropriate area of land may be within a declared beach area. The beach access amendments to the *Land Act 1994* in the Bill currently provide for a declared beach area to be placed over "seashore". The definition of seashore currently does not include land below the low water mark. This definition would

exclude the area within a lot that is below the low water mark being included within a declared beach area.

A declared beach area that applied only landward of the low water mark would not relieve the owner of the land of occupiers liability where erosion has been so severe that the owner's lot extends into the water below the low water mark. Additionally, public access over the area below the low water mark would not be achieved.

The amendment ensures that land below the low water mark may be included in a declared beach area.

#### *Declared beach area - Owner liability clarification*

The amendment to clause 61 of the Bill clarifies that the owner's liability for the beach access area is transferred to the State except in relation to anything directly done by the occupier with the intention of creating a risk or being reckless as to whether a risk is created.

#### *Declared beach area – Responsibility for maintaining the area*

The concern raised by the LGAQ is addressed by an amendment confirming that the manager of a declared beach area, whilst having control of the area, is only responsible for taking reasonable and practical measures to maintain the area in a safe condition.

#### *Appeal to purchase price if deed of grant is offered*

The objective of omitting section 170(2) and the corresponding reference in Schedule 2 (Original decision) of the *Land Act 1994* is to align purchase price appeal provisions moved from the Land Act to the Land Regulation by the *Land and Other Legislation Amendment Act 2014*.

#### *Discontinue issuance of a freeholding lease when net present value calculation is used for purchase price methodology*

Amendments to sections 469, 471 and 478 of the Land Act will remove the provision providing applicants with the right to elect to pay the purchase price by instalments where those leases are grazing homestead perpetual leases, non-competitive leases and special leases used for grazing or agricultural purposes—in instances where the purchase price of the tenure is determined by the net present value (NPV) methodology.

When the NPV methodology was introduced, it was the intent of the government that rural land would transition directly to freehold land as the new purchase price recognised the state's residual interest in the land.

The removal of the option to pay the NPV purchase price by instalments under freeholding lease arrangements at conversion to freehold supports the government's policy to move rural leasehold land directly to freehold title in support of the growth and economic prosperity of rural communities. This policy is also supported by the repeal of the corporation restrictions by the *Land and Other Legislation Amendment Act 2014* which prevented corporations from holding perpetual leases issued for grazing or agriculture purposes, grazing homestead perpetual leases, grazing homestead freeholding leases and subleases of these leases.

## **Alternative Ways of Achieving Policy Objectives**

*Redundant sections of the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991*

There is no alternative way to achieve the policy objectives of the Bill.

*The definition of “urban area”*

There is no alternative way to achieve the policy objectives of the Bill.

*Land subject to an allocation notice becoming transferable land where the land does not proceed to freehold*

There is no alternative way to achieve the policy objectives of the Bill.

*Declared beach area amendments*

There is no alternative way to achieve the policy objectives of the Bill.

*Appeal to purchase price if deed of grant is offered*

There is no alternative way to achieve the objective of removing this provision other than by legislative amendment.

*Discontinue issuance of a freeholding lease when net present value calculation is used for purchase price methodology*

There is no alternative way to achieve the objective of removing the option to pay the NPV purchase price by instalments under a freeholding lease arrangement other than legislative amendment.

## **Estimated Cost for Government Implementation**

*Redundant sections of the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991*

There is no cost for government associated with this amendment.

*The definition of “urban area”*

There is no cost for government associated with this amendment.

*Land subject to an allocation notice becoming transferable land where the land does not proceed to freehold*

There is no cost for government associated with this amendment.

*Declared beach area amendments*

There is no cost for government to implement these amendments.

*Appeal to purchase price if deed of grant is offered*

There is no cost to government to implement this amendment.

*Discontinue issuance of a freeholding lease when net present value calculation is used for purchase price methodology*

There is no cost to government to implement this amendment.

## **Consistency with Fundamental Legislative Principles**

*Redundant sections of the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991*

This amendment of the Bill does not infringe fundamental legislative principles.

*The definition of “urban area”*

This amendment of the Bill does not infringe fundamental legislative principles.

*Land subject to an allocation notice becoming transferable land where the land does not proceed to freehold*

This amendment of the Bill does not infringe fundamental legislative principles.

*Declared beach area amendments*

The amendments regarding declared beach areas do not infringe fundamental legislative principles.

*Appeal to purchase price if deed of grant is offered*

The amendment is consistent with fundamental legislative principles as appeal rights against the purchase price determined by the chief executive for conversion of leasehold land to freehold is being moved to the Land Regulation in line with the amendment under the *Land and Other Legislation Amendment Act 2014* that moved the determination of the purchase price from the Land Act to the Regulation.

Rural lessees will maintain appeal provisions over the mathematical application of the NPV formula applied to the freehold conversion purchase price and the value of the commercial timber. For non-rural lessees the right to appeal will apply against the purchase price based on unimproved value and the value of the commercial timber.

*Discontinue issuance of a freeholding lease when net present value calculation is used for purchase price methodology*

The lessee's entitlement to pay the purchase price of a converted rural lease by instalment was based on a purchase price calculated by the unimproved value methodology which produced markedly higher purchase prices than the NPV methodology.

## **Consultation**

*Redundant sections of the Aboriginal Land Act 1991 and Torres Strait Islander Land Act 1991*

No consultation has been carried out on the amendment.

*The definition of "urban area"*

No consultation has been carried out on the amendment.

*Land subject to an allocation notice becoming transferable land where the land does not proceed to freehold*

No consultation has been carried out on the amendment.

*Declared Beach Area amendments*

The amendment clarifying owner liability has been developed in response to concerns expressed by the Queensland Law Society regarding the level of exposure to risk which may be faced by owners of land over which a declared beach area may lie. The proposed amendment to clause 61 of the Bill clarifies that liability is only attributable to an owner in relation to direct actions.

The LGAQ was consulted in relation to the concerns expressed regarding the responsibility to maintain a declared beach area however no additional consultation has been carried out on the amendments.

There has been no other consultation on the amendments.

*Appeal to purchase price if deed of grant is offered*

No consultation has been carried out on the amendment.

*Discontinue issuance of a freeholding lease when net present value calculation is used for purchase price methodology*

Consultation has taken place with Agforce Queensland. Agforce acknowledges the government's intent when implementing NPV was that the purchase price would be paid in one payment not by instalment under a freeholding lease arrangement.

## NOTES ON PROVISIONS

### Commencement

**Clause 1** amends Clause 2 of the Bill which states when the provisions of the Bill will commence. Clause 1 will provide that sections 60A and 61D, which are to be inserted into the Bill, will commence on a day to be fixed by proclamation.

### Amendment of s 10 (Lands that are transferable lands)

**Clause 2** amends Clause 4 of the Bill by omitting the proposed new section 10(2)(d) and 10(3) of the *Aboriginal Land Act 1991* and instead inserting new subsections 10(2) and (3). New subsections 10(2) and (3) of the *Aboriginal Land Act* provide when land ceases to be transferable land. Importantly, for the context of the Bill, the subsections operate so that land becomes transferable land once again if an allocation process commences but no grant of the land as ordinary freehold results from the allocation process.

### Insertion of new pt 2A

**Clause 3** amends Clause 5 of the Bill by omitting and inserting a new definition of “urban area” into the *Aboriginal Land Act 1991*. The new definition is such that it is not limited to a cadastral boundary description as this is not always used in planning schemes. The new definition appropriately captures urban and future urban areas across all planning schemes.

### Amendment of s 9 (Lands that are transferable lands)

**Clause 4** amends Clause 34 of the Bill by omitting the proposed new section 9(2)(d) and 9(3) of the *Torres Strait Islander Land Act 1991* and instead inserting new subsections 9(2) and (3). New subsections 9(2) and (3) of the *Torres Strait Islander Land Act* provide when land ceases to be transferable land. Importantly, for the context of the Bill, the subsections operate so that land becomes transferable land once again if an allocation process commences but no grant of the land as ordinary freehold results from the allocation process.

### Insertion of new pt 2A

**Clause 5** amends Clause 35 of the Bill by omitting and inserting a new definition of “urban area” into the *Torres Strait Islander Land Act 1991*. The new definition is such that it is not limited to a cadastral boundary description as this is not always used in planning schemes. The new definition appropriately captures urban and future urban areas across all planning schemes.

### After clause 60

**Clause 6** omits section 170(2) to align appeal provisions relating to the chief executive’s determination of purchase price when a deed of grant is offered. Amendments made by the *Land and Other Legislation Amendment Act 2014* moving the purchase price provisions from the *Land Act* to the *Land Regulation 2009* overlooked removing and transferring the appeal provisions from the *Act* to the *Land Regulation*.



### **Insertion of new ch 7, pt 3B**

**Clause 7** amends Clause 61 of the Bill so that the definition of “seashore” includes land seaward of the low water mark. This amendment will ensure that the entire beach area within a private lot may be included within a declared beach area, including land below the low water mark.

### **Insertion of new ch 7, pt 3B**

**Clause 8** amends Clause 61 of the Bill to confirm that the only measures a manager of a declared beach area will be expected to undertake are those which are reasonable and practical in the circumstances. For example, it is not expected that the local government will carry out significant erosion prevention works such as the construction and repair of costly revetment walls. Additionally, if erosion causes dangerous areas on the beach, blocking or restricting access to that area of the beach, rather than carrying out expensive restoration work, would be sufficient.

It should also be noted that the principles set out in section 35 of the *Civil Liability Act 2003* (Principles concerning resources, responsibilities etc. of public or other authorities) will apply. Those principles are that:

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

The manager’s duty to maintain the declared beach area does not extend to the construction and maintenance of structures, or works, such as a subterranean or other seawall, beach nourishment, or beach fencing.

### **Insertion of new ch 7, pt 3B**

**Clause 9** amends clause 61 of the Bill to clarify that an owner of land within a declared beach area will not be liable for actions or omissions unless they arise due to an intentional creation of risk or the risk arises due to the owner’s recklessness.

This amendment will clarify that an owner of a lot will not be liable where, for example in the scenario put forward by the Queensland Law Society, the owner:

- observes a group of people and a bonfire on the declared beach area at night and takes no steps to make the area safe following the gathering; and
- knows that the beach is frequented by families and young children during the day, and a young child sustains burns in the hot ashes of the fire of the night before.

## **After Clause 61**

**Clause 10** amends sections 469, 471 and 478 of the Land Act to exclude the application of the entitlement to pay the purchase price by instalment, and the subsequent grant of a freeholding lease for grazing homestead perpetual leases and for non-competitive leases and special leases issued for grazing or agricultural purposes. It was intended that leases using the net present value methodology for purchase price determination would transition directly to freehold title not to a freeholding lease, which would allow the purchase price to be paid by instalments over a period of up to 30 years.

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