Cape York Regional Organisations' submission to the Agriculture, Resources and Environment Committee regarding the *Aboriginal and Torres Strait Islander Land Holding Bill 2012* (Qld)

Introduction

Cape York Regional Organisations (CYRO) consists of the Cape York Institute for Policy and Leadership and Cape York Partnerships, under the direction of Noel Pearson; Balkanu Cape York Development Corporation, under the direction of Gerhardt Pearson; and the Cape York Land Council Aboriginal Corporation, under the chairmanship of Richard Ah Mat.

CYRO are concerned with promoting the interests of the Aboriginal people of Cape York, particularly through breaking the cycle of welfare dependence and enabling Aboriginal people to engage in the real economy through home ownership, employment and private enterprise. Reform of land tenure arrangements is essential to achieve these outcomes, including the resolution of issues arising from the implementation and operation of the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) and other Acts related to Aboriginal land and interests.

CYRO welcomes this opportunity to make a submission to the Agriculture, Resources and Environment Committee (AREC / the Committee) regarding the *Aboriginal and Torres Strait Islander Land Holding Bill 2012* (Qld) (the Bill) to add to the Committee's knowledge and understanding of issues related to the Bill.

CYRO would like to submit the following points for the Committee's consideration. CYRO will also attend the public hearing in Brisbane on 18 October, and we look forward to discussing these points with the Committee then.

Policy Initiative Context

CYRO has long advocated that issues arising from the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) be addressed, so we welcome reform and actions to finally identify entitlements and grant interests in land.

However, reforms must take place within the context of and as part of broader Aboriginal land reform processes. CYRO is concerned that the Bill does not adequately consider broader processes and objectives for the reform of Aboriginal land tenure, systemic tenure reform for State land and land administration systems. As such, progress of the Bill at this point in time, in its current form, is premature.

Some aspects of the Bill, particularly those concerning the identification of interest holders, location of lots, grant of entitlements and subdivision of DOGIT lots are supported, and will be necessary and useful regardless of the outcomes of broader Aboriginal land reform processes. CYRO supports that an amended Bill be prepared that continues to address these issues.

CYRO submits to the Committee that the Committee should:-

1. recommend that the Legislative Assembly **not** support the Bill in its current form;
2. request that the Bill be amended to include **only** those reforms that are appropriate at this point in time; and
3. recommend that outstanding issues be addressed through a further Bill which is developed as part of broader Aboriginal land reform processes.

Bill Content Issues

The Bill seeks to implement separate policy initiatives by amending:

1. the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld);

2. the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld); and
3. the *Land Act 1994* (Qld).

1. The *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld)

Policy initiatives to amend the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (LHA) to identify interest holders, confirm the location of lots, and the grant of entitlements in land are generally appropriate to progress now and could remain in an amended Bill. However, there are also some issues with these initiatives. CYRO key concerns are set out in **Attachment A**.

More generally speaking, CYRO submits that policy initiatives to amend the LHA to determine the type of interest held in land should be addressed within the context of broader Aboriginal land and State land tenure reform processes.

Broader processes include the Inquiry into the future and continued relevance of government land tenure across Queensland, which includes Aboriginal Deed of Grant in Trust (DOGIT), currently being conducted by the State Development, Infrastructure and Industry Committee (SDIIC). SDIIC will table an interim report with the Legislative Assembly by 30 November 2012, and a final report by 30 March 2013. Most Aboriginal villages on Cape York are located on DOGIT land, and most LHA leases exist within Aboriginal villages on State land but surrounded by DOGIT tenure.

A recommendation likely to be made by SDIIC to the Legislative Assembly, and supported by CYRO, is that land within Aboriginal villages, including DOGIT and LHA land, be converted to the tenure of fee simple freehold. However, if AREC accepts the Bill in its current form it will recommend to the Legislative Assembly on 29 October 2012 that LHA land within Aboriginal villages is re-vested as DOGIT land tenure. Concurrent Parliamentary Committees providing conflicting recommendations to the Legislative Assembly about future land tenure in Aboriginal villages is counterproductive and imposes costs on persons holding or entitled to LHA tenures. Therefore AREC should not advance proposals in the Bill and make recommendations about LHA land tenure until SDIIC has reported about future land tenure in Aboriginal villages.

In addition to SDIIC processes, senior Queensland Government representatives, including the Premier, have made statements supporting the freeholding of Aboriginal land to enhance home ownership and economic development outcomes. CYRO supports this position and is involved in discussions with senior Queensland and Australian Government representatives to identify how this outcome can be achieved.

Due to these issues CYRO submit that policy initiatives to address LHA interest holder identity, location of lots, and grant of entitlements should proceed after amendments to the Bill consistent with comments in Attachment A, but that amendments proposed in the Bill about future land tenure in Aboriginal villages should not proceed because they are inconsistent with the desired outcomes of broader Aboriginal land reform processes.

2. The *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld)

The intent of the Bill's amendments of the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) is to provide Indigenous local governments with continued access to the facilities from which they provide municipal services if the land is transferred under the *Aboriginal Land Act 1991* (Qld) or the *Torres Strait Islander Land Act 1991* (Qld) is supported.

However, once again the future land tenure and ownership of Aboriginal land within Aboriginal villages is being considered within the SDIIC Inquiry. Freeholding Aboriginal land and transferring it to appropriate parties (including Councils) is being considered by SDIIC, and being discussed by CYRO with senior Queensland Government representatives in other forums, so the Committee should recommend that amendment of the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) be delayed until after it has received advice from SDIIC and other processes.

3. The *Land Act 1994* (Qld)

Proposed amendment for subdivision of DOGIT

The provisions of the Bill which will amend the *Land Act 1994* (Qld) to allow the Trustee of DOGIT land to subdivide the DOGIT, subject to the Minister's approval, are appropriate to progress now and should remain in an amended Bill. The creation of lots through the subdivision of DOGIT will not affect decisions about the future tenure of Aboriginal land, and the creation of lots will also be necessary for and useful to any future tenure and ownership arrangements.

Proposed amendment for Indigenous agreements on State leasehold land

The provisions of the Bill which will amend the *Land Act 1994* (Qld) with regard to Indigenous agreements on State rural leasehold land are unrelated to the main subject of this Bill (which is about resolving land issues to facilitate home ownership and economic development in Indigenous villages on Indigenous land), and should not be included in this Bill.

In any regard, the proposal to set out requirements for the making, registration, notification, review, monitoring and continuity of Indigenous Access and Use Agreements (IAUAs) and Indigenous Land Use Agreements (ILUAs) is not supported and should not progress in any Bill.

Notwithstanding negotiations between the State, pastoralists and 2 of the 5 Queensland Native Title Representative Bodies (which did not include Cape York Land Council) in recent years, the proposed amendments and the related Template Pastoral Lease ILUA are not appropriate for Cape York pastoral leases. The proposed amendments and template agreement are predicated on an extremely low level of native title rights on pastoral leases, which is not the case on Cape York, and create the potential for inconsistencies between agreements and Native Title determinations. They adopt a "lowest common denominator" approach to resolution of native title issues and provide incentives for the marginalisation of non-exclusive native title rights and interests.

The provisions interfere with the freedom of contract of native title parties under the ILUA provisions of the *Native Title Act 1993* (Cth) by providing incentives that disfavour native title holders and claimants. The State should act neutrally between the interests of pastoral lessees and native title holders and claimants – the provisions of the Bill do not do so. Rather, they encourage gaming behaviour on the part of pastoral lessees that are respondents in native title claims. No consultation was undertaken by the State with CYRO concerning the provisions.

The amendments also propose to allow the Minister to fix "mandatory terms" and a "set format" for ILUAs or other Indigenous agreements. The mandatory terms and set format cannot be inconsistent with the Schedule 3 "requirements". Schedule 3:

- prevents agreement for the exercise of a native title right to bury human remains unless native title has been determined and there is prior written consent of the lessee and chief executive. This provision fails to recognise that if there is a native title right to bury, it

exists prior to the making of a determination and is not dependant on the consent of the pastoral lessee or the State;
- does not allow an agreement to either prevent or be inconsistent with a Nature Refuge or conservation covenant. The creation of such interests should only occur with the consent of the native title holders;
- requires that an agreement allows the native title holders to carry out "traditional" activities. However, this may be insufficient to cater for the full set of native title rights and interests recognised in individual cases.

It is extremely unlikely that native title claim groups in Cape York will agree to such limitations in agreements negotiated with pastoralists, and this would limit the opportunity for pastoralists to obtain the proffered rent reduction. The policy intent should be to support the negotiation of ILUAs on a case-by-case basis, and to not risk stifling innovation or damaging good relationships.

Once again, the SDIIC Inquiry is also considering the future tenure of State rural leasehold land, including how to address native title if leasehold tenures were to be upgraded. Different approaches are under consideration. It is clear from submissions made and the proceedings of the SDIIC that the State Rural Leasehold Land Strategy, or "Delbessie Agreement", is not well supported and significant changes to the future tenure of State rural leasehold land are likely to be recommended by SDIIC to the Legislative Assembly.

Within this context it is illogical for AREC to recommend to the Legislative Assembly a policy proposal that is likely to be inconsistent with concurrent SDIIC recommendations. This is another reason why proposed amendment to the *Land Act 1994* (Qld) for Indigenous agreements on State leasehold land should not proceed as part of this Bill.

Attachment A

Specific concerns in relation to the Bill's provisions in respect of the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld):

1. The Bill proposes to vest State land underlying existing and new LHA leases in the surrounding DOGIT land parcel, in direct contradiction of the policy of the LHA. The logic behind this proposal is unclear and CYRO are concerned that such a policy will impact adversely on the existing rights of LHA lessees. For example, lessees would lose the right to apply for conversion of term leases to perpetual leases, and from perpetual leases to freehold.

2. Cape York Aboriginal communities must be prepared for multiple land tenure and ownership regimes. However, vesting State land underlying LHA leases in the surrounding DOGIT will unnecessarily complicate land administration and reform. Existing leases will be taken to be a lease from the trustee of the DOGIT. However, the Minister will be authorised to grant leases in satisfaction of lease entitlements despite not being the owner of the land. The Minister would also retain a general discretion to determine the conditions on which the leases are held, although again the lessor is taken to be the trustee, not the Minister. This is a radical departure from the fundamental rules of property law in Queensland. The Bill should be amended to create an obligation on the trustee for the time being to grant the relevant lease to satisfy a lease entitlement.

3. For perpetual LHA leases, the current "qualified person" eligibility criteria with its residential requirement is to be removed, and replaced with a condition that leases can only be transferred to an Indigenous person. However the current qualified person eligibility criteria will still apply for term leases. The eligibility criteria for both lease types should be consistent but both these approaches are out-dated. The Bill should be amended to allow the trustee to have discretion over eligibility criteria and determine that a lease be transferable only to Indigenous community residents, or to Indigenous people generally, or to not impose any eligibility restriction at all. This will enable communities to adapt to changing social and economic considerations over time.

4. The Bill's provisions in respect of deceased estates are discriminatory. Section 60 of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) (JLOM Act) violates s.10 of the *Racial Discrimination Act 1975* (Cth) by providing an executive discretion to allocate the property of an intestate deceased Indigenous person. The same power does not exist in respect of non-Indigenous persons, whose intestate estates vest in the Public Trustee and the division of which is determined in accordance with the provisions of the *Succession Act 1981* (Qld) (the Succession Act). Section 60 of the JLOM Act should be repealed and reference to s.60 in the Bill should be replaced with appropriate references to the Succession Act. It is noted that a similar provision in Western Australia has received significant media coverage, and a government Bill to repeal it is before the Legislative Council (the *Aboriginal Affairs Planning Authority Amendment Bill 2012* (WA)).

5. While the proposed processes for establishing a lease entitlement and obtaining a lease generally appear to be workable, there are concerns with a number of aspects:

a. There is no provision for the State and Councils to provide information to potential applicants, without which many applicants will have difficulty meeting evidentiary requirements. There should be a statutory obligation for the State and councils to provide any document in their custody or control relating to a potential lease entitlement to a person proposing to make an application;

b. CYRO does not accept that all applications deemed to be invalid are necessarily invalid, so lease entitlements may also exist as a result of these applications. For example applications duly made by applicants but which were not duly progressed by Councils, and therefore deemed invalid, could be reconsidered. Provision should be made for the processing of these applications as another hardship category;

c. Hardship certificates only apply to leases less than 1 ha in area. Provision should be made for hardship certificates to also apply to leases more than 1ha in area;

d. Obstacles to grant are likely to be common. There is no commitment to provide adequate funding and assistance to applicants, or to those implementing the Bill, to ensure that the proposed processes are workable in practice.

6. "Community reference panels" are proposed. Since they have a significant role in providing advice and recommendations to the Minister, a representative of native title holders or persons who may hold native title should be a mandatory member.

7. The Bill includes provision for a lease holder or lease entitlement applicant who no longer wishes to retain or be granted their lease to surrender their interest to the State. This provision is inconsistent with the proposal for lease land to be vested in surrounding DOGIT. We submit that provision should instead be made for surrender to the adjoining trustee of trust land (freehold, DOGIT or Aboriginal freehold).