

## TORRES STRAIT ISLAND REGIONAL COUNCIL

Lot 12 Francis Road Hammond Island QLD 4875

Ph: (07) 4048 6009 Fax: (07) 4069 1692

All correspondence to: Chief Executive Officer

PO Box 7336 Cairns QLD 4870

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Our Ref: Mayor  
Your Ref: The Research Director

**BY EMAIL**

AREC@parliament.qld.gov.au

13 June 2014

The Research Director  
Agriculture, Resources and Environment Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

Dear Committee,

### **TORRES STRAIT ISLAND REGIONAL COUNCIL – SUBMISSION – ABORIGINAL AND TORRES STRAIT ISLANDER LAND (PROVIDING FREEHOLD) AND OTHER LEGISLATION AMENDMENT BILL 2014 (QLD)**

Reference is made to our submission made to the *'Providing Freehold in Aboriginal and Torres Strait Islander Community - Discussion Paper'*, dated 28 February 2014 (copy **enclosed**). Council also repeats and relies upon its correspondence addressed to the State dated 6 January 2014 (copy **enclosed**).

It is noted that Council's formal support for the Freehold Proposal resolved at its 18 and 19 February 2014 Ordinary Meeting and communicated in its correspondence of 28 February 2014, was qualified in some important respects, namely: -

1. *The State providing appropriate financial resources and support to enable the Trustee to:-*
  - a. *consult with its beneficiaries in accordance with the requirements of the Torres Strait Islander Land Act 1991 (Qld) ("TSILA") and Aboriginal Land Act 1991 (Qld) ("ALA"); and*
  - b. *undertake necessary Survey work, prepare Freehold Schedules and ancillary contractual documentation, navigate and negotiate the Freehold Pathway and undertake all tasks of and incidental to effecting the Freehold Proposal.*
2. *The State providing sufficient legislative flexibility in the Freehold Proposal to give the Trustee sole discretion as to its Freehold Schedule, following consultation with its beneficiaries, that is providing no preconceived statutory impediment to a Trustee declaring, for example: -*

- a. extent of land to be made available for individual freehold;
- b. categories of persons and/or entities eligible for a initial grant and/or subsequent transfer of individual freehold; or
- c. purchase price.

Council has since reviewed the *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014* (Qld) (“the Bill”) and is generally satisfied with the terms of the Bill, however makes specific submission on following aspects.

## Land Valuations

In addition to providing the option for grant of Ordinary Freehold in Indigenous Communities which has been discussed with elected leaders within those Communities, the State proposes in the Bill to also amend the *Land Valuation Act 2010* (Qld) (“LVA”) to enable Indigenous Local Government Areas to be subject to statutory valuations. This in turn shall render Trust Land under the TSILA or ALA potentially ratable land under the *Local Government Act 2009* (Qld) (“LGA”), dependent on the type of Trustee.<sup>1</sup>

Council is supportive of rendering Ordinary Freehold land ratable for the purposes of the LGA. This, and many other implications of Ordinary Freehold grant, shall however be the subject of full and frank consultations with community by Trustees upon appropriate financial support of the State. We consider that this is a matter upon which applicants must make a fully informed decision prior to applying for such grant.

The prospect of land becoming ratable prior to the grant of Ordinary Freehold however, is not supported by Council for the following reasons, namely: -

1. owners of land are responsible for the payment of general rates and charges; and
2. Trustees (whether Local Government or otherwise), are the owners of land in Indigenous Communities; and
3. Trustees do not have financial capacity to pay general rates; and
4. Trustees have limited revenue opportunities.

It is submitted that Trust Land should remain exempt from rating under the LGA, notwithstanding the applicability of statutory valuation under the LVA. Land would become ratable once Ordinary Freehold is granted.

## Interest Holders

We note ‘interest holders’ identified in the Bill as the only persons eligible for grant of Ordinary Freehold where such interests apply to said land. It is noted that Native Title interests are not recognised in this list. We understand that Native Title interests in land are not registrable interests against land title, however they are far more fundamental than any registrable interest identified in the current definition of ‘interest holders’ in the Bill. It is noted however, that General Tenancy Agreements under the *Residential Tenancies and Rooming Accommodation Act 2009* (Qld) over a social housing dwelling are also not registrable against land title, however nonetheless render the tenant an ‘interest holder’ under the Bill.

We consider that the rationale for excluding Native Title rights and interests from the ambit of ‘interest holders’ is the State’s perception that traditional ownership is not readily identifiable as

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<sup>1</sup> Section 93 of the LGA.

not recorded in writing and/or identifying clearly said eligible individuals for an Ordinary Freehold grant.

The State must be made aware of the circumstances in which the 'interest holders' given preference currently under the Bill obtained their respective interests. Availability of land in Aboriginal and Torres Strait Islander Communities is scarce. In order to ensure families are adequately housed, Common Law holders of Native Title ("Traditional Owners") have been forced to allow social houses and other public infrastructure, to be constructed on their lands. Of late, the State has further required the grant of 40 year leases by the Trustees of land back to the State in order to secure this capital investment. Traditional Owners have not been compensated sufficiently for this burden. Land has been temporarily 'gifted' by Traditional Owners for social housing purposes on the basis of necessity, absent intention to extinguish such rights.

The Bill appears to assume by rendering 'interest holders' the only eligible applicants for Ordinary Freehold interest (where such interest holders exist with respect to the said land), that Traditional Owners (where different from the said 'interest holder') shall automatically agree to extinguish their Native Title rights and interests upon such grant. Furthermore, it is assumed they will do so absent compensation claim. On the contrary, we would suggest that extinguishment would, on the whole, likely only be validated under the *Native Title Act 1993* (Cth) in instances where the Traditional Owner(s) themselves were the grantees of the Ordinary Freehold interest. We consider that this shall provide an obstacle to grant of Ordinary Freehold in instances where 'interest holders' and Traditional Owners over the same land, differ. This situation is widespread in the Torres Strait.

Registered Native Title Prescribed Bodies Corporate ("RNTBC's) exist in all Torres Strait Islander communities, except Hammond Island (within which a Native Title Claim continues). These bodies are able to readily identify the appropriate Traditional Owner(s) upon enquiry by Trustees and/or the State for the purposes of ascertaining eligibility of any said applicant as an 'interest holder'. In some instances, RNTBC's and Trustees are one the same (Mer and Badu Islands). Where RNTBC's have a statutory right of first refusal as grantees of Aboriginal or Torres Strait Islander Land under the ALA or TSILA in Communal Freehold to be held for and on behalf of the Traditional Owners, it follows that Traditional Owners should have a right of first refusal for the grant of Ordinary Freehold over the same land.

It would appear that compensation for extinguishment of Native Title is unfunded under the Freehold Proposal. To this end, we would consider that the only prospect of reasonably reducing a compensation claim by affected Traditional Owners is to ensure Traditional Owners themselves obtain the benefit of such Ordinary Freehold grant.

### **Purchase Price**

Council considers the availability and affordability of Ordinary Freehold grants which are translatable to long-term economic development and financial-sustainability outcomes, as far outweighing the imposition of prohibitive upfront costs for applicants. Council (in its capacity as Trustee of 14 Deeds of Grant in Trust under the *Land Act 1994* (Qld)), shall adopt a cost-recovery purchase price only within its Freehold Policies.

### **Consultation**

The \$75,000 pledged by the State for consultation by Trustees for 'pilot' communities, is grossly insufficient and would likely not even cover the travel and accommodation costs of Council officers to each island for a single consultation. Clearly, costs will be reduced for

island/community-based Trustees, however does not factor in engagement of advisors where not already available.

As expressed previously by Council to the State, Council does not wish to see ‘the baby thrown out with the bath water’, that is a scenario where Trustees are unable to successfully ‘sell’ good public policy, due to under-resourcing. We invite the State to meet with Council representatives to discuss consultation models for all 15 Divisions within its Local Government Area and to pledge sufficient funds to see this policy implemented to its full potential, with long-term benefits realised.

We consider that financial investment now will pay dividends in the long-term to both our constituents as well as Local Government and the State.

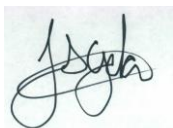
### **Submission**

**Council hereby makes the following submission to the Committee on the Bill, namely:-**

- 1. The State exempt, under the *Local Government Act 2009 (Qld)*, Trust Land as ratable land.**
- 2. The Bill include Common Law Holders of Native Title as an eligible ‘Interest Holder’ under the ALA and TSILA.**
- 3. The State prepare a fair and reasonable budget to provide sufficient funding to Trustees to consult on the Freehold Proposal, including but not limited to engagement of Probity Officers.**

Should you have any queries in relation to this submission, please do not hesitate to contact myself on (07) 4034 5700 or Mr Christopher McLaughlin, Chief Legal Officer on (07) 4048 6216.

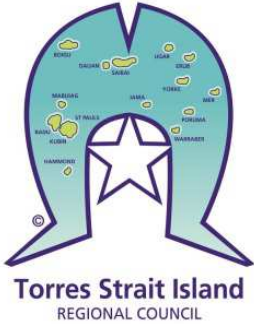
Yours faithfully



**Cr. Fred Gela**

*Mayor*

Encl(s)



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All correspondence to: Chief Executive Officer

PO Box 7336 Cairns QLD 4870

ABN 15 292 645 165

Our Ref: Mayor  
Your Ref: Director, Policy

28 February 2014

Director, Policy  
Aboriginal and Torres Strait Islander Land Services  
Department of Natural Resources and Mines  
PO Box 2424  
BRISBANE QLD 4001

Fax: (07) 3405 6899

Email: [IndigenousLandServices@dnrm.qld.gov.au](mailto:IndigenousLandServices@dnrm.qld.gov.au)

### **TORRES STRAIT ISLAND REGIONAL COUNCIL – SUBMISSION TO PROVIDING FREEHOLD IN ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITIES DISCUSSION PAPER**

Reference is made to our correspondence dated 6 January 2014 in which Council requested a three (3) month extension to make submission on the Bill, expiring 30 April 2014 to allow thorough consideration of the Freehold proposal by Trustees, the Torres Strait Regional Authority (Native Title Office) and all Torres Strait Islander stakeholders. An extension until **28 February 2014** was subsequently approved by the State.

The Trustee further repeats and relies upon those submissions made in its 6 January 2014 correspondence.

At a meeting of the Deed of Grant in Trust Trustee on 18 February and 19 February 2014, Council made the following resolution, namely:

*That the Trustee resolve to provide its 'in principle' written support to the State making available, by way of Act of Parliament, individual freehold for grant in remote Indigenous Communities in the Torres Strait ("the Freehold Proposal"), subject to: -*

1. *the State providing appropriate financial resources and support to enable the Trustee to: -*
  - a. *consult with its beneficiaries in accordance with the requirements of the Torres Strait Islander Land Act 1991 (Qld) and Aboriginal Land Act 1991 (Qld); and*

- b. *undertake necessary Survey work, prepare Freehold Schedules and ancillary contractual documentation, navigate and negotiate the Freehold Pathway and undertake all tasks of and incidental to effecting the Freehold Proposal.*
2. *the State providing sufficient legislative flexibility in the Freehold Proposal to give the Trustee sole discretion as to its Freehold Schedule, following consultation with its beneficiaries, that is providing no preconceived statutory impediment to a Trustee declaring, for example: -*
  - a. *extent of land to be made available for individual freehold;*
  - b. *categories of persons and/or entities eligible for a initial grant and/or subsequent transfer of individual freehold; or*
  - c. *purchase price.*

The Trustee is pleased to support the enactment of statutory mechanisms which shall make possible the grant of individual Freehold in indigenous communities. Trustee support is however qualified to the extent that much consultation must now be realized in community to ensure constituents understand both the pros and cons of the Freehold Proposal, to the extent possible to ensure fully informed decisions are made.

### **1. Trustee Resourcing**

Trustees must be appropriately resourced in the Freehold Pathway in order to undertake those responsibilities set out in the Freehold Proposal. Notwithstanding the State's opinion that the Freehold Proposal shall be self-funded by purchase price, it is most cost-effective that those proposed individual Freehold lots identified in the Freehold Schedule, be surveyed concurrently. This shall be an upfront cost to the Trustee. Furthermore, it is not possible for Trustees at the outset, when incurring significant expense in undertaking full and frank consultation with its beneficiaries, undertaking significant survey work, preparing and adopting Freehold Schedules, obtaining ministerial consent to the Freehold Schedule and navigating the Freehold Pathway, to properly assess purchase price, absent certainty as to ultimate take up (ie. the more applicants, the wider such costs may be spread, thereby reducing purchase price to the extent possible, rendering such option affordable in low-socio economic regions). Absent appropriate financial resources, Council has grave fears that all Trustee's will not be able to afford undertaking the Freehold Pathway prescribed and that there are real risks that the Freehold Pathway shall be frustrated and that individual Freehold shall become unavoidably cost-prohibitive for applicants.

The State is aware that the grant of individual Freehold shall be a Future Act under the *Native Title Act 1993* (Cth), requiring validation for extinguishment. The State has advised Trustees that it does not intend to provide compensation for extinguishment of Native Title to common law holders of Native Title affected by the extinguishment. To this end, Trustee's will need to negotiate on the basis of NIL compensation for extinguishment of Native Title rights and interests; an unfavorable negotiating position further propounded by imposition of a potentially high/ prohibitive purchase price. Trustees will be posed the question by applicants identical to that posed in leasing Native Title land, namely "*why should I have pay to buy back/ lease my own land*"? Council has already commenced discussions with Native Title Prescribed Bodies Corporate, the Torres Strait Regional Authority – Native Title Office and the State with respect to inclusion of a class in the Regional ILUA to validate the grant of individual Freehold and

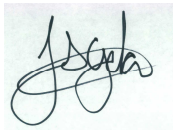
extinguishment of Native Title. We would consider the imposition of a purchase price other than nominal to likely be a 'deal breaker' for both affordability and philosophical reasons.

## 2. Trustee Discretion

Trustees must be given full discretion under the Act to develop a Freehold Schedule tailored to the wishes of that community, assessed during full and frank consultation. Council has reiterated within communities that it would not support the grant of individual Freehold unless such proposal was supported by community and compatible with continued practice of Ailan Kastom and Ailan Lore.

Should you have any queries in relation to this submission, please do not hesitate to contact myself on (07) 4034 5700 or Mr Christopher McLaughlin, Chief Legal Officer on (07) 4048 6216.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Fred Gela', is written over a light blue rectangular background.

**Cr. Fred Gela**

*Mayor*



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All correspondence to: Chief Executive Officer  
 PO Box 7336 Cairns QLD 4870  
 ABN 15 292 645 165

Our Ref: Mayor  
 Your Ref: Director, Policy

**BY POST**

**6 January 2014**

Director, Policy  
 Aboriginal and Torres Strait Islander Land  
 Services  
 Department of Natural Resources and Mines  
 PO Box 2424  
 BRISBANE QLD 4001

Dear Sir,

### **TORRES STRAIT ISLAND REGIONAL COUNCIL – SUBMISSION TO PROVIDING FREEHOLD IN ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITIES DISCUSSION PAPER**

Reference is made to the draft *Aboriginal and Torres Strait Islander Land (Providing Freehold) Amendment Bill 2013* (Qld) (“the Bill”) and explanatory material provided by email to the Torres Strait Island Regional Council (“Council”) on 6 December 2013. Reference is also made to Council’s original written submission (copy **enclosed**) made to the ‘*Providing Freehold Title in Aboriginal and Torres Strait Islander Communities*’ Discussion Paper, submitted 18 April 2013 (“written submission”).

I initially wish to thank the State for providing further opportunity for Council to provide further submission on this important, yet sensitive land issue.

#### **STRATEGY**

Council repeats and relies upon the contents of its written submission. In its written submission, Council specifically advised the State that: -

“Upon reviewing the Discussion Paper, it became evident that the freehold proposal seeks to make fundamental and philosophical changes to land tenure in Indigenous communities, regularising with mainland Australia, seeking to achieve true home-ownership aspirations and encouraging economic development. Although Council would entertain any proposal seeking to increase the standard of living and general wellbeing of its constituents, it cannot provide unqualified support to any such proposal without being satisfied in the first instance, that such proposal has the greater support of its electorate for whom it serves. To achieve community support, significant consultation must be facilitated to ensure: -

1. constituents understand: -
  - a. the effect of a grant of individual freehold on determined native title rights and interests in land (eg. extinguishment, suspension etc);



- b. the inherent characteristics of individual freehold, including its unrestricted alienability, exclusive possession and ability to be encumbered; and
  - c. the financial cost of acquiring and maintaining a grant of individual freehold, including but not limited to purchase/acquisition costs, duties and taxes, rates etc; and
  - d. land values and market.
2. the freehold model suitably empowers rather than disempowers existing and practiced traditional indigenous land use and management structures under Ailan Kastom and Ailan Lore, recognised and protected under native title determinations and the NTA; and
  3. there exists sufficient protection and support for Council's continued occupation and management of the land as Local Government under the *Local Government Act 2009* (Qld) and is not inconsistent with its Planning Scheme under the *Sustainable Planning Act 2009* (Qld), presently in development."

Council is not presently resourced to undertake these extensive consultations with community in its capacity as Trustee of Deed of Grant in Trust ("DOGIT") and/or Local Government under the *Local Government Act 2009* (Qld) as is suggested in the Discussion Paper. Furthermore, peak bodies such as Native Title Prescribed Bodies Corporate and the Torres Strait Regional Authority Native Title Office are also not funded to undertake these extensive consultations and negotiations. A collaborative approach must be achieved to satisfy Council's consultation requirements. Availability of funding will inevitably determine the Council's approach the freehold proposal, particularly in light of the continued reduction of Local Government funding of recent years by the State..."

Council, by its written submission on the Freehold Proposal, sought to communicate the importance of prior consultation with communities, *prior to developing and implementing a model*. Council suggested a process which could be utilised to this end, namely: -

#### STAGE 1 – STAKEHOLDER MEETING – TERMS OF REFERENCE

- Stakeholder meeting to ascertain target groups (eg. RNTBC's, Elder's Groups, Youth Groups etc) in each Division who must be consulted on the freehold proposal and devise a strategy for inclusion and awareness. This meeting would be attended by Executive and/or Elected members of relevant stakeholders and a Terms of Reference by division prepared and endorsed.

#### STAGE 2 – ROUND 1 CONSULTATION

- Facilitators of consultations must enter community with an open-mind and without predisposition as to modelling required;
- Consultations must be undertaken over a number of days in each community (not hours) and should be in workshop format to encourage community discussion and input rather than lecture-style; and
- Consultations should be facilitated, wherever possible, by Torres Strait Islander leaders (eg. Mayor, Councillors, TSRA Chair/ Members, RNTBC Chair/ Members etc), assisted by technical officers and stakeholder representatives.

#### STAGE 3 – FREEHOLD MODEL DEVELOPMENT

- Technical officers to collaboratively prepare a number of models to satisfy community aspirations arising out of Stage 2.

#### STAGE 4 – ROUND 2 CONSULTATION

- Facilitators and technical officers and stakeholders to undertake further consultation on proposed modelling with community to ascertain support; and
- Consultation may need to be repeated where understanding of key concepts is not evident in community.

#### STAGE 5 – ADVISORY POLL

- Following Stage 4, Council may elect to undertake Advisory Poll under the *Local Government Act 2009* (Qld) to ascertain extent of support of the electorate to the freehold proposal.

#### STAGE 6 – COUNCIL ENDORSEMENT

- Council endorsement of the Freehold Proposal at an Ordinary Meeting; and
- Correspondence forwarded to the State by the Mayor on the outcome.

As a statutory body operating within remote indigenous communities, Council understands intimately the benefits of collaborating with local stakeholders in achieving community (and State) aspirations. Those programs which succeed are of the most part, those which are developed, implemented and embraced by community, for community, rather than those externally developed and forcibly imposed. Developing and maintaining 'trust' is a major challenge in any project and entry into consultations with preconceptions or defined notions are the best ways to ensure such aspirations are not embraced. The benefits of partnership-building can be demonstrated by reference to the approach taken over the past many years in achieving negotiator's approval to the 'Regional Indigenous Land Use Agreement' in the Torres Strait region in 2013, between the State, Council and the Torres Strait Regional Authority, which will bring about procedural and financial benefits for all parties thereto.

A failure to take a partnership-approach to development and implementation of a Freehold Model, may result in its collapse and delayed re-visit, which may not be in the best interests of Aboriginal and Torres Strait Islander communities, or the State of Queensland.

#### EXTENSION OF TIME

Council shall meet in February 2014 and will table the Freehold Proposal for preliminary discussion. It is anticipated that out of that meeting, a further formal written submission will be developed and submitted in response to the Bill. Given the sensitivity surrounding matters affecting native title rights and interests in Aboriginal and Torres Strait Islander communities, I would suggest that the State Government allow **an extension of no less than three (3) months (thereby closing 30 April 2014)**, to allow thorough consideration of the Freehold Proposal by both Council, the Torres Strait Regional Authority (Native Title Office) and all stakeholders. Council cannot endorse a model which imposes significant consultation and thus resource burden upon it, without due consideration.

Should you have any queries in relation to this submission, please do not hesitate to contact myself on (07)4034 5700 or Mr Christopher McLaughlin, Chief Legal Officer on (07)4048 6216.

Yours faithfully

A handwritten signature in black ink, appearing to read "Fred Gela", written in a cursive style.

**Cr. Fred Gela**

*Mayor*