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20 June 2014

**The Research Director**

Agriculture Resources and Environment Committee  
Department of Natural Resources and Mines  
PO Box 2454  
Brisbane QLD 4001

*By email: AREC@parliament.qld.gov.au*

Dear Research Director

**Re: the Kaurareg Aboriginal Land Trust submission to the *Aboriginal and Torres Strait Islander Legislation (Providing Freehold) Amendment Bill***

**Background**

The Executive Committee of the Kaurareg Aboriginal Land Trust (the Land Trust) and their Kaurareg senior Aboriginal Elders write to you on behalf of Kaurareg Aboriginal peoples, who are Land Trust members and members of the Kaurareg community, regarding the *Aboriginal and Torres Strait Islander Legislation (Providing Freehold) Amendment Bill* (the Bill).

Pursuant to our position opposing the Bill, and our interests, I would advise that the Land Trust submitted its application to Department Natural Resources and Mines in November 2012 asking the Minister to fulfil legislative obligations of returning Aboriginal land to its traditional owners, by way of appointing the Land Trust as Trustee for DOGIT (Deeds of Grant in Trust) land on Kerriri (Hammond Island).

Kaurareg's legal historical background includes that in *Kaurareg People v Queensland* [2001] FCA 657, the Federal Court of Australia recognised that the Kaurareg people hold native title over Ngurupai (Horn Island); Muralag (Prince of Wales Island); Zuna (Entrance Island); Tarilag (Packe Island); Yeta (Port Lihou Island); Damaralag (Dumuralug Islet); Mipa (Pipa Islet also known as Turtle Island) and adjoining waters.

The Kaurareg people are also widely acknowledged as the traditional owners of Kerriri (Hammond Island) which is directly impacted by the Bill. While there is yet to be a native title determination in respect of Hammond Island, the Kaurareg people have a registered native title claim over the island<sup>1</sup>. Accordingly, Kaurareg has procedural rights under the *Native Title Act 1993* (Cth) ('NTA') in respect of future land use decisions that will affect their native title rights and interests. Those native title rights

<sup>1</sup> Federal Court proceedings QUD 362/10.

and interests exist now at common law. But it is also the case that the Kaurareg people have not been adequately consulted about the Bill.

Almost all of the land on Hammond Island currently is the subject of a Deed of Grant in Trust ('DOGIT'). Although the Queensland government recognised Kerriri (Hammond Island) as traditional 'Aboriginal' land in 2010 when, under amendments to the *Aboriginal Land Act 1991* (ALA) and the *Torres Strait Islander Land Act 1991* (TSILA), Hammond Island was brought under the ALA instead of the TSILA as had previously been the case, at this point in time the registered Trustee of the DOGIT is the Torres Strait Island Regional Council.

Amendments to the ALA include provision for the transfer of DOGIT land back to Aboriginal traditional owners to be held in trust for the benefit of traditional owners. But provision for the transfer of DOGIT land back to Aboriginal traditional owners has not taken effect on Hammond Island as at this date.

## Summary

The Bill establishes a new scheme (the 'Freeholding Scheme') for granting freehold interests over certain Aboriginal communities, including Hammond Island. Grants can only be made to "qualified persons": Aboriginal or Torres Strait Islander persons, their spouses, former spouses or widows, or a registered native title body corporate. Grants of freehold title will cancel any old tenure to the extent of these grants. And once granted, the land will not be subject to any conditions regarding its use or disposal.

However, the removal of lands from the beneficial schemes of land holding under the *Aboriginal Land Act 1991* and the *Aboriginal and Torres Strait Islander Land Holding Act 2013*, and the extinguishment or surrender of native title over the area could have the effect of vastly changing the character of affected communities.

With this in mind, the Kaurareg people consider that detailed and specific consultation should be undertaken by the government as to whether this is an appropriate model for each community affected, and that a robust process for native title consent is a part of the Bill. Despite being the traditional owners of this area, the Kaurareg people have not been adequately consulted about the Bill. Consultation with the residents of Hammond Island on the presumption that traditional owners will be consulted is unrealistic, as many of the traditional owners of the Island do not reside there.

The Kaurareg people are concerned that the proposed amendments will further complicate the existing complex land tenure arrangements on their traditional lands, and are not convinced of the need to implement the Freeholding Scheme. In particular, they consider that before any further amendments to tenure arrangements on their traditional lands are contemplated by the Queensland Government that the transfer of the DOGIT to Hammond Island's traditional owners should first take effect.

The Kaurareg people are also concerned about specific elements of the Freeholding Scheme as set out in the Bill, including the interaction of the Bill with the provisions of the *Native Title Act 1993*, and the consultation requirements set out in the Bill. The recommendations we present in the following about changes to the Bill as currently drafted should not be interpreted as indicating our support for enactment of the Bill.

## Freeholding on Aboriginal Land – general concerns

The tenure system on Hammond Island and surrounding islands has been affected by policy and legal changes made by government over a long period. Land on Hammond Island is subject to native title rights and interests (with a registered native title claim

currently in place over the island). Non native-title tenure arrangements on Hammond Island, and surrounding islands, include holdings under the *Aboriginal Land Act 1991*, the *Aboriginal and Torres Strait Islander Land Holding Act 2013* and the *Land Act 1994*.

The introduction of the Freeholding Scheme in this area will further complicate the above tenure arrangements. It is not clear to the Kaurareg people why the Queensland Government considers that the Freeholding Scheme will be of benefit to the people of Hammond Island. The existing provisions of the *Aboriginal Land Act* allow for the grant of long leases (including for commercial purposes) by trustees of DOGIT areas within the terms of the trust, without extinguishment of native title, or removal of the land from the DOGIT.

The Bill provides that the initial grant of freehold must be to an Aboriginal or Torres Strait Islander person (or their spouse, former spouse or widow) or a registered native title body corporate. But after the initial grant of freehold to one of these "qualified persons" however, there is no restriction on the owner of the freehold's use or disposal of the land.

Because there would be no restrictions on use or disposal of freehold land, it is possible that the land could pass permanently from ownership by Aboriginal or Torres Strait Islander people or organisations. As well as simple sale of the land to non-Aboriginal people, land could be transferred to a bank on default of any mortgage over the land, or to non-Aboriginal persons through a property settlement associated with the end of a marriage or other domestic relationship.

The Kaurareg people are concerned about the possible consequences for their traditional lands by this lack of restriction on grant or disposal to non-Aboriginal people. The Kaurareg people's traditional lands are small islands in the Torres Strait. Unlike similar communities in mainland Queensland, the size of the Kaurareg people's land is very small. If Kaurareg people are not able to live on their traditional land, it will be impossible for them to live close by or adjacent to that land and they will effectively be denied access to it.

This is of particular concern to the traditional owners of Hammond Island given that currently the trustee of the DOGIT is the Torres Strait Island Regional Council, not the traditional owners. The Kaurareg people have repeatedly asked since the late 1990s that the DOGIT be transferred to their control. The transfer of the DOGIT in accordance with the terms of the *Aboriginal Land Act* should be finalised before the Freeholding Scheme is introduced.

Without strict control and involvement by the Kaurareg traditional owners, the character of Hammond Island could be permanently changed by the Freeholding Scheme, which would be controlled and administered by the (currently non-Kaurareg controlled) trustee of the DOGIT. It is a distinct possibility that with time, Kaurareg people could be precluded from land ownership in the habitable parts of their own traditional land on Hammond Island.

It is important that the Queensland Government consult directly with each traditional owner group relevant to an area to which the Freeholding Scheme is to apply, before enacting the Bill. Consultation should take the form of public meetings as well as targeted consultation with native title holders and claimants. Only when a traditional owner group has indicated, after being adequately informed of the consequences of the scheme highlighted above, that it is willing to consider freehold, should it be included in the Freeholding Scheme.

**Recommendation One:** the transfer of the DOGIT for Hammond Island in accordance with the terms of the *Aboriginal Land Act 1991* should be completed before the Bill is progressed.

**Recommendation Two:** the Queensland Government should undertake direct and adequate consultations with the people of Hammond Island, ensuring that they are fully informed of the implications of the Freeholding Scheme for Kaurareg ownership and control of their traditional lands before the Bill is progressed.

## Native Title Issues

### Approval for grant of available land – ss32C and 32ZL

Section 32C sets out criteria for approval by the chief executive of the grant of land in fee simple under the *Land Act*, to an eligible person. The consequence of approval and grant is the cancellation of the “old tenure” (a deed of grant in trust, a reserve under the *Land Act*, a lease granted under the *Aurukun and Morning Shire Leases Act 1978*, or a townsite lease) to the extent of the new grant.

The explanatory material accompanying the Bill states that “*in order to grant freehold native title must be extinguished or surrendered under an Indigenous Land Use Agreement*”<sup>2</sup>.

The Bill as currently drafted does not specifically require entry into an Indigenous Land Use Agreement (‘ILUA’). Subsection (3) of s32C sets out criteria for approval by the Chief Executive of a grant, which include that “*agreements or arrangements appropriate to granting the available land as freehold have been entered into or are in place, including ...in relation to ...native title*”.

The Bill does not specify that native title must be extinguished or surrendered by way of an ILUA before a grant is made. In light of the permanent and serious consequences of the grant of freehold over traditional lands, it is essential that the Bill make clear that an ILUA is the sole means by which native title may be surrendered or extinguished for the purposes of the Freeholding Scheme.

**Recommendation Three:** Section 32C(3) should be re-drafted to provide that an ILUA is a necessary precondition for the grant of freehold title under the Scheme.

## Other Issues

### Consultation Requirements – ss32L and 32G

Sections 32L and 32G of the Bill require the trustee to consult as to whether it is appropriate for “freehold option land” to be granted as freehold. The trustee is required to develop a means of consultation which requires it to consult with the “native title holders” for the freehold option land. The term “native title holders” is defined in the Bill with reference to s 224 of the *Native Title Act*. Section 224 of the *Native Title Act* defines the term as follows:

*“The expression native title holder, in relation to native title, means:*

*(a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust--the prescribed body corporate; or*

<sup>2</sup> “Aboriginal and Torres Strait Islander Land (Providing Freehold) Amendment Bill 2013: Explanatory Material for the Consultation Draft”, Qld Department of Natural Resources and Mines, p2.

*(b) in any other case--the person or persons who hold the native title."*

Use of this definition may create some uncertainty to the status of traditional owners with a registered native title claim, which has not progressed to determination.

The *Native Title Act* confers the same procedural and negotiation rights on registered native title claimants as those afforded to traditional owners with a determined native title claim, by making specific mention of registered native title claimants<sup>3</sup>. The same approach should be applied in the Bill.

**Recommendation Four:** The consultation requirements in ss32L and 32G of the Bill should be redrafted to refer to both native title holders and registered native title claimants as those terms are defined in the Native Title Act.

*Model Freehold Schedule - consultation requirements*

The adoption of a model freehold schedule (as set out in a Regulation) by a trustee limits the advertising and consultation obligations in relation to that schedule. The explanatory material accompanying the Bill states that "*(c)urrently only one model freehold schedule is proposed to be regulated. The proposed model freehold schedule only includes the town area (i.e. land identified in the relevant planning scheme as urban or future urban areas)*".

There is no provision in the Bill for consultation by the Minister regarding the development of a model freehold schedule, and it is not clear what consultation has taken place with regard to the State's intention to regulate a model freehold schedule taking in town areas only.

In relation to Hammond Island, the current planning scheme is also somewhat unclear. We are aware that a planning document known as the 'Torres Strait Sustainable Land Use Plan' ('the Plan') was commissioned by TSIRC, the Queensland Government, the Federal Government and the Torres Strait Regional Authority and was completed on 7 March 2011. We understand that the Plan was prepared between 2008-2010.

Part 2 of the Plan relates to Hammond Island. The purpose of Part 2 is said to review land uses on Hammond Island and to provide a guideline for the community to "*plan for and manage the impacts of future development*". The Plan notes that Hammond Island is "*traditionally owned by the Kaurareg people*" and that it is "*an area of significant cultural heritage value to the traditional owners*".<sup>4</sup>

The Plan notes that in achieving sustainable land use objectives, "*the native title group with rights over the land*" needs to be consulted.

The areas of Hammond Island identified for possible future development in Part 2 of the Plan were shown on maps 11 – 135 (copies of which are attached). The Plan needs to be finalised in consultation with the Kaurareg people before it is used as the basis for a model freehold schedule.

<sup>3</sup> See, for example, the procedural rights set out in s 24KA of the *Native Title Act* (in relation to future acts that can be classed as facilities for services to the public). Section 24KA(7) makes specific reference to "the native title holders **and any registered native title claimants in relation to land or waters in the area concerned**" [emphasis added].

<sup>4</sup> At p7

<sup>5</sup> At pp96 and 97

**Recommendation Five:** The Minister should consult directly with each affected community regarding any model freehold schedule, including that proposed in the material accompanying the Bill. This consultation requirement should be expressly provided for in the Bill.

**Recommendation Six:** If the Plan is to be the basis of the model freehold schedule for Hammond Island, the status of the Plan in relation to Hammond Island should be clarified, and the Plan should be finalised in consultation with the Kaurareg people.

Model Freehold Schedule - consultation regarding Freehold Policy

Where a trustee adopts a model freehold schedule, it is required to develop a Freehold Policy. The Freehold Policy is to deal with, inter alia, the eligibility criteria for allocation, the allocation process where there is no interest holder, the sale price, and the social and financial implications for the community, as these matters are not dealt with in the Bill.

There is no requirement for public consultation (or consultation with native title holders) in the development of the Freehold Policy associated with the Model Freehold Schedule. The terms of the Freehold Policy will have significant implications on the eventual grant of property, including in particular in relation to eligibility. A community may wish to further restrict initial grants of freehold to, for example, traditional owners or existing residents of the community.

This is particularly important in the case of Hammond Island. Despite section 42 of the *Aboriginal Land Act*, the trustee for the DOGIT which applies to Hammond Island is not a body controlled by the traditional owners of that Island.

**Recommendation Seven:** The consultation requirements in s32N should apply to the development of a Freehold Policy under Subdivision 2. Compliance with these consultation requirements should be a condition of Ministerial approval.

The Land Trust Executive Committee and Kaurareg senior Aboriginal Elders are concerned that full and meaningful consultations with our community have not been honoured nor do they satisfy the requirements of section 223(1)(a)(b)(c) of the *Native Title Act 1993* (Cwth) in our view.

Our community is not aware of the complexities of land holding rights and obligations now created by the proposed Bill. Our solution is to bring awareness about these matters to our community through culturally acceptable consultations delivered by Kaurareg peoples.

The Land Trust looks forward to your response to our submission and its recommendations. For further information please contact us on 0417 00 99 80 and at [cybertym@bigpond.com](mailto:cybertym@bigpond.com).

Yours faithfully



**Harry Seriat**  
Committee Secretary

Signed for, and on behalf of, the Executive Committee of the Kaurareg Aboriginal Land Trust and Kaurareg senior Aboriginal Elders