Plus ça change: submission of Cape York Land Council Aboriginal Corporation to the Community Affairs Committee consideration of the *Aboriginal and Torres Strait Islander Land Holding Bill 2011* (Qld)

8 February 2011

background

1. The *Aboriginal and Torres Strait Islander Land Holding Bill 2011* (Qld) (**LHB**) was introduced on 29 November 2011 by the Minister for Finance, Natural Resources and the Arts, the Hon Rachel Nolan MP. On the same day, Parliament resolved to refer the LHB to the Community Affairs Committee (**CAC**) to report by 19 March 2011.[1] The role of the CAC is to:[2]
   (a) determine whether to recommend that the LHB be passed;
   (b) may recommend amendments to the LHB; and
   (c) consider the application of fundamental legislative principles contained in part 2 of the *Legislative Standards Act 1992* (Qld) to the LHB and compliance with part 4 of the *Legislative Standards Act 1992* (Qld) regarding explanatory notes.

legislative context

2. The *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) (**Old LHA**) was enacted on 24 April 1985 and proclaimed to commence on 15 June 1985. At the time of the *commencement* of the Old LHA, no deed of grant in trust (**DOGIT**) had been granted for any Indigenous community in Cape York – no DOGIT was granted at

[1] The referral was made in accordance with SO 131 of the Standing Orders of the Legislative Assembly.

[2] The duties of a portfolio committee in considering a bill are set out in SO 132 of the Standing Orders.

all in Queensland until late 1985. The first Cape York community to receive a DOGIT was Hope Vale in mid-1986.

3. Between its commencement, and the closure of applications from 21 November 1991,[3] numerous applications were made under the Old LHA for the grant of leases. Many applications remain outstanding. The LHB provides a mechanism for finalising the outstanding applications, despite the long passage of time since their making.[4]

4. The difficulties created by the delay in properly disposing of applications under the Old LHA is demonstrated in the judgment of Justice Dowsett in *Murgha v State of Queensland*.[5] In that case, two residents of Yarrabah – [redacted] – had applied in 1986 or 1987 for a lease under the Old LHA. That application had not been finally dealt with. The [redacted] built a house on the block of land for which they had applied but were never granted a lease. In 2002 they were advised they were entitled to a lease. Dowsett J inferred that the Yarrabah Council approved the [redacted] application in July 1988.[6] Despite the approval, it was possible that the required notice to the State was not given by council until 2007.[7] The approval of the application meant the [redacted] were entitled to a grant of a lease in perpetuity, certain irregularities in their application notwithstanding.[8] On 25 January 2008, Dowsett J made declarations of the approval of the [redacted] application and their entitlement to the grant of a lease in perpetuity.

5. The rights of applicants and lessees under the Old LHA are valuable property. CYLC supports the general aim of the LHB in properly identifying existing entitlements and granting leases accordingly. However, CYLC believes that the resolution of

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[3] Section 33A of the Old LHA was inserted by the *Aboriginal and Torres Strait Islander Land (Consequential Amendments) Act 1991* (Qld) with effect from 21 November 1991.

[4] The LHB Explanatory Notes estimates that more than 200 leases have been granted under the Old LHA and about the same number remain as outstanding applications: LHB Explanatory Notes, p.5.

[5] [2008] FCA 33.

[6] [2008] FCA 33 at [20] per Dowsett J.

[7] [2008] FCA 33 at [21] per Dowsett J.

[8] [2008] FCA 33 at [22] per Dowsett J.

outstanding applications under the Old LHA should be part of a wider land reform for the benefit of Cape York DOGIT communities.

failure of comprehensive reform

6. Although the resolution of outstanding matters under the Old LHA is supported, CYLC regrets the lost opportunity to address land reform in Cape York DOGIT communities. Years of administrative neglect by the Queensland Government have left Cape York DOGIT communities without adequate cadastral infrastructure and no functioning land market. It is incorrect to attribute this failure to the 'communal' nature of DOGIT tenure.[9] DOGIT tenure is not communal in any legal sense – rather, it is freehold tenure analogous to other local government tenure for public purposes.

7. Cadastral infrastructure (planning schemes, surveyed parcels for separate occupancy, strategic planning for future infrastructure needs, functioning property markets) is a form of public goods. Rather than merely addressing a failure of land administration (outstanding applications under the old LHA), legislation is required to fast-track cadastral infrastructure for Cape York DOGIT communities. Underpinning such reform would be the negotiation with native title holders on a strategic, rather than transactional, level – each DOGIT community in Cape York should have an ILUA to support the provision of cadastral infrastructure. State Government leadership is required to achieve this outcome.

re-inclusion in surrounding DOGIT or Aboriginal land

8. The Old LHA provides for the grant of perpetual leases for areas of 1 ha or less, and 'other appropriate leases' under the Land Act for larger areas.[10] In practice, this has be applied as an entitlement to a lease for a term of years for areas larger than 1 ha.

9. The policy of the Old LHA was to divest areas approved for lease from the DOGIT of a community council.[11] Presumably, this policy was based on the fact that the *Land*

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[9] LHB Explanatory Notes, p.6.

[10] Old LHA s.9.

[11] Old LHA s.10.

Act 1962 (Qld) (which governed the leasing of DOGIT land at the time of the enactment of the Old LHA) was inconsistent with the long-term leasing of the kind the Old LHA authorised. Divesting property did not affect the local government status of the land.[12]

10. The LHB proposes to overturn this policy and return all existing and new leases to the surrounding DOGIT.[13] The logic of re-vesting land subject to Old LHA in this manner is unclear. The LHB Explanatory Notes suggests that the divesting of land is an 'anachronism' that complicates land administration.[14] In CYLC's view, these concerns are exaggerated. Cape York DOGIT communities must be prepared for multiple land ownership regimes. At the very least, those communities must presently deal with native title holders as separate owners of land. There is no reason to believe Aboriginal Shire Councils, or other trustees of DOGIT land, are not capable of doing so.

11. Furthermore, the policy of re-vesting land impacts adversely on the existing rights of lessees under the Old LHA. Lessees from the State are entitled to apply, on certain conditions, for the conversion of term leases to perpetual leases and from perpetual leases to freehold.[15] The LHB will remove this present entitlement. It should not do so.

leasing by the State

12. The re-vesting policy of the LHB creates an additional complication for the trustees for the time being of DOGIT land. Existing Old LHA leases will be taken to be leases from the trustee.[16] However, the LHB will authorise the Minister to grant leases in satisfaction of lease entitlements despite the fact the Minister is not the owner of

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[12] Old LHA s.10(4).

[13] LHB cl.11. New leases will remain part of a DOGIT because they will be leases (or sub-leases) from the DOGIT trustee or townsite lessee: LHB cl.41.

[14] LHB Explanatory Notes, p.6.

[15] *Land Act 1994* (Qld) chapter 4 part 3.

[16] LHB cl.12(4). This is compatible with the policy of the ALA upon grant or transfer of Aboriginal land, whereby the new trustee is taken to be the lessor of existing leases: see ALA ss.45 and 132.

the relevant land. Furthermore, the Minister will retain a general discretion to determine the conditions on which the leases are held,[17] and the lessor of the lease is taken to be the relevant trustee and not the Minister.[18] This is a radical departure from the fundamental rules of property law in Queensland. No other Queensland statute permits the grant of a lease other than by an owner without compulsory acquisition.[19]

13. The LHB should be amended to create an obligation upon the trustee for the time being to grant the relevant lease to satisfy a lease entitlement.[20]

qualified person restriction

14. Under the Old LHA, an application for a lease may only be made by a 'qualified person' which is defined as follows:[21]

> **"qualified person"** means—
> (a) an Aborigine or other person who is authorised by the *Community Services (Aborigines) Act 1984* to enter upon, be in and reside in a trust area as a member of the community of Aborigines resident in the area and who, in the opinion of the Aboriginal council in which the trust area is vested or under whose control the trust area is, is a resident of that community; and
> (b) an Islander or other person who is authorised by the *Community Services (Torres Strait) Act 1984* to enter upon, be in and reside in a trust area as a member of the community of Islanders resident in the area and who, in the opinion of the Island council in which the trust area is vested or under whose control the trust area is, is a resident of that community;
> and includes a body corporate or other incorporated body comprised of qualified persons only.

15. The Old LHA provides that a lease may only be transferred to a qualified person.[22]

16. The LHB departs from this treatment of the transfer of leases.[23] Perpetual leases will be subject to a condition that they may only be transferred to an Indigenous

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[17] LHB cl.36(2)(f), 39(3)(a).

[18] LHB cl.41.

[19] For example, the *Mineral Resources Act 1989* (Qld) authorizes the grant of mining tenements over private land but the grantor (lessee) of those tenements is the State and not the private owner of land. Also, mining tenements do not create an interest in the land: see *Mineral Resources Act 1989* (Qld) s.10.

[20] Compare LHB cl.26(1) and 30(1) which authorise grants by the Minister on terms.

[21] Old LHA s.4(1), definition of 'qualified person'.

[22] Old LHA s.18(4).

person.[24] No such restriction will exist for term leases. CYLC submits that Aboriginal Shire Councils, or other trustees of DOGIT land, should have the discretion to impose a condition that a lease be transferable only to Indigenous community residents or Indigenous people generally, or not subject to any restriction at all.[25] Such a discretion will only be required until comprehensive planning and property reform of DOGIT communities, underpinned by an ILUA, is achieved.

Interests of deceased persons

17. The LHB attempts to accommodate the fact that the rights of a person to the grant of a lease under the Old LHA vest in their personal representative upon death. It is uncontroversial that applications under the Land Act, approved prior to the death of the applicant, do not abate on the death of the applicant.[26] However, the LHB proposes the use of a controversial and unconstitutional provision of the JLOM Act. Section 60 of the JLOM Act provides:

> **60 Administration of estates of Aborigines and Torres Strait Islanders**
> (1) In the absence of a testamentary instrument duly made by an Aborigine or Torres Strait Islander who has died or is to be presumed to have died and if it should prove impracticable to ascertain the person or persons entitled in law to succeed to the estate of the Aborigine or Torres Strait Islander or any part of it, the chief executive may determine which person or persons shall be entitled to so succeed or whether any person is so entitled.
> (2) The person or persons determined by the chief executive to be entitled to succeed to an estate or to any part of it shall be the only person or persons entitled in law to succeed to the estate or, as the case may be, part and, if more than 1 person is so determined, to succeed in the order and proportions determined by the chief executive.
> (3) A certificate purporting to be signed by the chief executive that the person or persons named therein is or are entitled to succeed to the estate or any part of the estate of the person named therein (being a person to whose estate subsections (1) and (2) apply), or that there is no person so entitled shall be conclusive evidence of

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[23] The definition of 'lease entitlement' in LHB cl.9, in requiring an application made under the Old LHA, means that the definition of 'qualified person' is still relevant to determining whether a valid application was made at the relevant time. The definition is not relevant to who may hold a lease entitlement: LHB cl.80.

[24] LHB cl.43(1).

[25] Compare leasing under ALA part 10.

[26] See LA s.376. Determining whether an application under legislation survives death, or abates, is a matter of statutory construction: *CAG v Public Trustee of Queensland* [2008] 2 QdR 419, *Stephenson v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290.

the matters contained therein.
(4) If, so far as can be determined, there is no person entitled to succeed to the estate or a part of the estate of an Aborigine or Torres Strait Islander who has died or is to be presumed to have died the estate or, as the case may be, part shall vest in the chief executive who shall apply the moneys or the proceeds of the sale of any property (less the expenses (if any) of such sale) for the benefit of Aborigines or Torres Strait Islanders generally as provided by section 56.

18. This provision 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.[27] The same power does not exist in respect of non-Indigenous persons. Rather, intestate estates vest in the Public Trustee.[28] The division of the estate of an intestate deceased person is determined by the intestacy rules in part 3 of the *Succession Act 1981* (Qld).[29]

19. The operation of s.10 of the *Racial Discrimination Act 1975* (Cth) is to remove the application of s.60 of the JLOM Act and establish, by operation of the Commonwealth law under s.109 of the *Commonwealth Constitution*, the same procedure for the disposition of Indigenous intestate estates as exists under the *Succession Act 1981* (Qld). To be clear, this means that the entitlements of an applicant under the Old LHA who is deceased and intestate, are presently vested in the Public Trustee unless a different personal representative has been appointed for the administration of that deceased person's estate.

20. Section 60 of the JLOM Act has no place in the Queensland Statute Book and should be repealed. References to s.60 in the LHB should be replaced with appropriate references to the *Succession Act 1981* (Qld).

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[27] JLOM Act s.60 has its origins in the 'Protection' era where coercive State legislation controlled most aspects of Indigenous peoples' lives. A cognate provision was introduced by s.26(5) of the *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld). Similar provisions were contained in s.16(3) of the *Aboriginals Preservation and Protection Act 1939* (Qld), s.31 of the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) and s.40 of the *Aborigines Act 1971* (Qld). The JLOM Act was previously entitled the *Community Services (Aborigines) Act 1984* (Qld) and repealed the *Aborigines Act 1971* (Qld).

[28] *Succession Act 1981* (Qld) s.45(1).

[29] An application for a family provision order may be made even where a distribution of a deceased's assets is made upon intestacy: see *Succession Act 1981* (Qld) ss.34(3) and 41(1).

establishing a lease entitlement

21. Where a person claims to have a lease entitlement, but it is not a lease entitlement of which the chief executive 'is aware',[30] the person must make an application to the chief executive to establish the lease entitlement.[31] An applicant must 'give the chief executive information and documents in the applicant's possession to identify details of the lease entitlement'.[32] There is no mechanism to ensure timely provision of information to potential applicants by the State and Aboriginal Shire Councils – the most likely source of documentation. There should be a statutory obligation for the State and Aboriginal Shire Councils to give any document in their custody or control relating to a potential lease entitlement to a person proposing to make an application under c.14.

hardship certificates and applications duly made but not progressed

22. Under the LHB, a lease entitlement only exists where an application under the Old LHA was approved.[33] CYLC is aware of a number of circumstances where applications were duly made but not properly considered by Aboriginal Shire Councils. In a sense, the relevant applications are still before councils for decision. The LHB does not make any adequate provision for the processing of these incomplete applications.

23. The LHB does establish a process for applicants who were advised their applications were approved when, in fact, they were not.[34] The chief executive may give a 'hardship certificate' in such circumstances'. The only effect of a hardship certificate is to reduce the price payable on a 'home ownership lease' under the ALA.[35] This

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[30] LHB cl.13(1).

[31] If the chief executive is satisfied the lease entitlement exists, the chief executive publishes a lease entitlement notice: LHB cl.14(7).

[32] LHC cl.14(2).

[33] LHB cl.9(1)(d).

[34] LHB cl.18 (hardship cases). The relevant applicant, or related person, must have 'acted in reliance on the advice of the approval': LHB cl.18(1)(c).

[35] LHB cl.123 and 194.

does not accommodate applicants for leases of more than 1 ha. Also, it does not provide any protection to applicants of duly made applications that have not proceeded. The LHB should do so.

obstacles to grant

24. The LHB distinguishes between lease entitlements for which there is no obstacle to grant, and those for which there are obstacles. Obstacles to grant include the fact that the location of a lease entitlement is uncertain or that the ownership of improvements is outstanding.[36] Another conceivable obstacle to grant is that the area is already subject to lease.

25. CYLC expects that obstacles to grant will be a common occurrence. This underlines the need for adequate funding for applicants, and those implementing the LHB, to provide ready access to surveying and other cadastral services. Also, timely action to consult under cl.34 and 35 of the LHB will be crucial to avoid the repetition of the delay associated with grants under the Old LHA.

26. The grant of a deferred lease will satisfy a lease entitlement.[37] There is no such clarity where the Land Court refuses an application for a contested deferred grant.[38] CYLC submits that a person with an interest in a lease entitlement should have a right to compensation for their unsatisfied lease entitlement.[39]

local advisory groups

27. Clause 77 of the LHB provides for the membership of local advisory groups. The role of local advisory groups under the LHB is significant – it includes the identification of obstacles to grant,[40] giving advice or making recommendations about addressing obstacles,[41] and receiving references from the Minister about old LHA lease

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[36] LHB cl.21(1).

[37] LHB cl.30(3).

[38] LHB cl.39(3)(c).

[39] Compare LHB cl.40.

[40] LHB cl.22.

[41] LHB cl.32.

boundaries.[42] The proposed membership of local advisory groups is fundamentally flawed. A representative of native title holders, or persons who may hold native title, is an essential member of any adequate local advisory group.[43]

costs of implementation

28. Adequate resourcing is key to the success of any of these reforms. Government must provide funding for administrative assistance to enable Indigenous parties to meaningfully engage in the process of lease regularisation. Government must also adequately fund the surveying of the leases and placement of the plans of allotments on the cadastre. The Explanatory Notes for the LHB are unsatisfactory in this regard.

compensation after inability to identify currently interested person

29. Clause 82 of the LHB provides compensation for persons deprived of an interest in a lease entitlement or lease where the Minister cannot identify an interested person and the lessee, or holder of the entitlement, is deceased. A Land Court order is required to effectuate this termination of entitlement.[44] Compensation claims to the Land Court must be made within 3 years or the later time approved by the Minister.[45]

30. The proposition in cl.82(3)(b) that it is the Minister who approves late applications, and not the Land Court itself, is radically inconsistent with the institutional integrity of the Land Court.[46]

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[42] LHB cl.70.

[43] The LHB proposes that a local advisory group may invite native title holders to participate, but need not: LHB cl.77(3).

[44] LHB cl.82(2).

[45] LHB cl.82(3).

[46] Compare *Land Act 1994* (Qld) s.428(5) (Land Court may extend time for appeal), *Land Valuation Act 2010* (Qld) s.158 (power of Land Court to hear late valuation appeal notice).

amendment of Land Act and the Delbessie agreement

31. The proposed amendments to the Land Act by the LHB are not supported by CYLC. The Land Act amendments will produce a sclerotic and low common denominator approach to the resolution of native title issues on pastoral leases. It provides incentives for the marginalisation of non-exclusive native title rights on pastoral lease land in Cape York.

32. The Delbessie Agreement was the product of an inadequate policy development process that did not adequately involve the traditional owners of Cape York. CYLC believes that the reconciliation of pastoral interests and native title holders in Cape York is best achieved through best practice, and locally developed, ILUAs. The proposed LHB amendments to the Land Act will stifle innovation and impede good relations between native title holders and pastoralists.

33. The proposed Land Act amendments:

    (a) may be unconstitutional, in that they dilute the entitlements of native title holders under NTA part 2 division 3 subdivision Q;

    (b) seek to constrain burial on country by traditional owners;

    (c) rigidly seek to allow nature refuge declarations in all Indigenous use and access agreements, even where native title holders do not have this aspiration;

    (d) in describing 'traditional purposes' seeks to narrowly cast the form of non-exclusive native title rights that may be exercised on pastoral land.

34. The Land Act amendments of the LHB should be withdrawn, or their application in the Cape York area excluded.

amendment of ACHA

35. CYLC generally supports the proposals to amend the ACHA. However, in accordance with submissions made previously during the review of the ACHA, CYLC submits that s.34 (Native title party for an area) should be further amended, such that the last registered native title claimant is not deemed to be the 'native title party' for the

purposes of cultural heritage, if there is no other registered claimant and no native title holder. Cultural heritage party status should be separated from the native title claim process.

concluding submission

36. The CAC should conclude that the LHB not proceed in its present form, and that it should be amended as suggested in this submission.

Table of acronyms and abbreviations

ACHA	*Aboriginal Cultural Heritage Act 2003* (Qld)
ALA	*Aboriginal Land Act 1991* (Qld)
CAC	Community Affairs Committee
CYLC	Cape York Land Council
DOGIT	deed of grant in trust
IAUA	Indigenous access and use agreement
ILUA	Indigenous land use agreement
JLOM Act	*Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld)
Land Act	*Land Act 1994* (Qld)
LHB	*Aboriginal and Torres Strait Islander Land Holding Bill 2011* (Qld)
NTA	*Native Title Act 1993* (Cth)
Old LHA	*Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld)