Submission No. 35

Rhia Campillo

From:	Lew Rojahn [redacted]
Sent:	Friday, 3 August 2012 2:50 PM
To:	State Development Infrastructure and Industry Committee
Cc:	[redacted]
Subject:	Inquiry in to the relevance of Government Land Tenure.
Follow Up Flag:	Follow up
Flag Status:	Completed
Attachments:	ESC - Discussion Paper 1.doc

The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

Sir,

In relation to the above inquiry, I would like to submit the following comments on behalf of the Etheridge Shire Council.

Council, in response to the grazing community has undertaken to investigate the impediments to separating land titles held as grazing land and which currently restrict the flexibility of these properties expanding and diversifying their operations.

For some time now, Council has been made aware that properties can be subject to a condition (a tied condition) that ties parcels to other land. This tied condition can apply if both parcels of land are different in tenure and it is also a breach of the condition of lease if any of these parcels are disposed of independently. To assist members of our community deal with this and other issues, Council requested a review of the legislation and department policy surrounding this so that we were able to assist with the progress of applications to DNRM.

This type of restriction is now outmoded and the legislative requirement has not kept pace to recognise advances in animal and land management practices. Consequently, people are unable to split their land to acknowledge secessionist planning, borrowing additional development money because titles are held together or separating partnerships due to the legislation introduced in 1927. It is now possible to cater for greater numbers of cattle with food supplements, improved pastures, and complementary land management and grazing practices. The current legislation does not acknowledge these improvements and departmental decisions are being made on policy that is not only outmoded but totally irrelevant in its application.

Attached above is part of the response Council has received from our solicitors – Preston Law (Cairns)

Should you require additional information please contact me.

Regards

Lew Rojahn

Chief Executive Officer
Etheridge Shire Council
PO Box 12
GEORGETOWN QLD 4871

Ph: 07 40621233
Mob: [redacted]
[redacted]
www.etheridge.qld.gov.au

PASTORAL HOLDING LEASES AND ADDITIONAL AREAS

ABN 62 867 193 928

Level 1, 59 McLeod Street
Cairns QLD 4870
Australia

PO Box 707N
North Cairns 4870

tel: +61 7 4052 0700
fax: +61 7 4031 0282

www.prestonlaw.com.au

Your Instructions

Council has instructed our office to investigate the following:

- how pastoral holding leases are "tied together";
- whether pastoral holding leases can be severed or "split";
- if they can be split whether it is by application and to whom;
- if they cannot be split, is it restricted by policy or law; and
- what needs to change so these pastoral holding leases can be split.

Pastoral/Grazing Leases

Unallocated State Land ("USL") may be made available for lease by auction, tender, ballot or in priority. Leases are granted for a specific purpose, for example business, grazing, tourism, residential development and pastoral activities. In the event that a lease of USL is granted from the State for pastoral activities that lease area must only be used for grazing and agriculture purposes.

The granting of USL leases by the State is governed by the *Land Act 1994* ("the Act"). The Department of Natural Resources and Mines ("DNRM") is responsible for dealing with these leases.

Additional Areas

In most cases pastoral or grazing leases were grouped together due to activities including:

1. grants of an additional area to lessees of subsisting leases under section 269 of the *Land Act 1962* ("the Repealed Act") or similar provisions of former Acts; or
2. the restriction on separate transfer as a result of government assistance under regional revival schemes; or
3. the restriction on separate transfer as a result of an approval to subdivide a lot to facilitate build-up.

The concept of additional areas was introduced in 1927 to enable lands reverting to the State to be made available as a separate lease to build-up smaller properties. The leases were made available on the condition that they could not be sold separately from the parent property. Originally the additional area had to be contiguous but this was later replaced with the "in the neighbourhood" principle and for many years was interpreted as within 50 kilometres to an upper limit of 100 kilometres of the parent property, depending on the locality.

Ties have also been utilised as a condition of private subdivision. In instances where uneconomic blocks were derived from the private subdivision of leases the State required that the subdivided lease be amalgamated or worked in conjunction with other lands that together constituted an economic enterprise unit. A condition precluding the separate sale was added to the lease or leases.

More recently the use of lease conditions or covenants to prevent separate sale has been utilised as a requirement of regional revival schemes. The provision of financial assistance to assist with property build-up was subject to the applicant agreeing to the inclusion of the sale restriction.

The Act empowers the State to register such covenants and conditions against additional area leases.

The Act provides at section 205 that a lease may be subject to a condition that it is tied to another property. Section 205 states:

> "**205 Tied condition**
> (1) A lease may be subject to a condition (a ***tied condition***) that it is tied to other land.
> (2) Subsection (1) may apply even if both parcels of land are different tenures.
> (3) It is a breach of condition of the lease if the lease or the other land are disposed of independent of each other."

Leases may also be subject to a covenant that prevents the separate sale of the lots. Section 373A of the Act enables the State to register such covenants. Sections 373A states:

> "**373A Covenant by registration**
> (1) Non-freehold land (other than a road for which a person does not hold a road licence) may be made the subject of a covenant by the registration of the document creating the covenant in the appropriate register.
> (2) A document creating a covenant may be registered under this division only if the covenantee under the document is the State or another entity representing the State, or a local government.
> (2A) A document creating the covenant may be registered even if the covenantor under the instrument is the same entity as the covenantee.
> (3) Subject to subsection (4), a covenant to which non-freehold land is subject must be only for ensuring that the land may be transferred to a person only if there is also transferred to the person—
> (a) other non-freehold land that is also the subject of the covenant; or
> (b) a lot that, under the *Land Title Act 1994*, is the subject of the covenant; or
> (c) non-freehold land mentioned in paragraph (a) together with a lot mentioned in paragraph (b).
> (4) If non-freehold land is the subject of a lease, other than a trustee lease, or is land over which a person holds a road licence, a covenant to which the land is subject may—
> (a) relate to the use of—
> (i) the land or part of the land; or
> (ii) a building, or building proposed to be built, on the land; or
> (b) be aimed directly at preserving—
> (i) a native animal or plant; or
> (ii) a natural or physical feature of the land that is of cultural or scientific significance....."

In the circumstances where a lease was granted under the Repealed Act, the Act provides at section 521A that additional areas granted under the Repealed Act are taken to have been issued on the condition that the property is tied to the parent lease. Section 521A states:

> "**521A Lease of land under repealed Act, section 269(1)**
> (1) This section applies if—

(a) a lease (an ***additional lease***) was issued under the repealed Act, section 269(1) to a lessee of a grazing homestead perpetual lease or pastoral lease; and

(b) on the commencement of this section, the additional lease is an interest in land held under this Act.

(2) The additional lease is taken to have been issued on condition that the land the subject of the lease is tied to the land held under the grazing homestead perpetual lease or pastoral lease.

(3) The condition is a tied condition under section 205."

Where an additional area lease was granted under the Repealed Act or where a lease condition or covenant under the Act expressly prevents the separate transfer of a lease and additional area lease, the lessee must not separately transfer, sell or interfere with the additional area lease.

Covenants and Lease Conditions

Working examples of such covenants and lease conditions in the Etheridge Shire Council local government areas are:

Section 205

In the instance of Ellendale Station and Whitewater Station, the leases are tied together by lease conditions. For Ellendale Station lease condition U46 states "The lease is tied to Billgolla Holding namely Preferential Pastoral Holding 18/4912, being Lot 4912 on plan PH210 and separate transfers are not allowed."

We have **enclosed** copies of the Ellendale Station and Whitewater Station title searches at Annexure A and highlighted relevant lease condition U46 for your reference.

Sections 373A and 521A

In the instance of Carnes Station and Mistletoe Station, the leases were granted under the Repealed Act and were tied together by section 521A of the Act and later registration of a covenant under section 373A of the Act. The covenant states "In accordance with the provision of section 373A(3) of the Land Act 1994 the lots described in Item 2 are to remain in the same ownership and be transferred simultaneously".

We have **enclosed** copies of the Carnes Station and Mistletoe Station title searches and covenant dealing at Annexure B for your reference.

Separation of Pastoral/Grazing Leases

As stated above in the circumstances where leases are tied together by covenant or condition, it will be in direct breach of that covenant or condition if the lessee separates the leases.

Section 175 of the Act provides that a lease may only be subdivided, amongst other things, if the Act or condition does not prohibit subdivision and the lease is not tied by a covenant or condition. Section 175 states:

> "**175 When lease may be subdivided**
> A lease may be subdivided only if—
> (a) this Act or a condition of the lease does not prohibit its subdivision; and
> (b) the lease is not, by a registered covenant or tied condition, tied to another lease or freehold land; and
> (c) the chief executive has, on an application made under this division, approved the subdivision; and
> (d) the requirements under this division for the subdivision have been complied with."

Section 322 goes on further to provide that a lease maybe transferred only if the Minister has given written approval to the transfer and a provision of the Act or a condition of the lease does not prohibit the transfer. Section 322 states:

> "**322 Requirements for transfers**
> (1) A lease, licence or sublease may be transferred—
> (a) to a person only if the person is eligible to hold the lease, licence or sublease under this Act; and
> (b) only if the Minister has given written approval to the transfer.
> (1A) However, a lease, licence or sublease may not be transferred if a provision of this Act or a condition of the lease, licence or sublease prohibits the transfer.....
> (9) In this section—
> ***transfer***, of a lease, licence or sublease, includes, if it is held by persons as tenants in common, a transfer by 1 or more of the tenants in common of all or part of their interest in the lease, licence or sublease to someone else."

The majority of pastoral/grazing leases with additional areas, which we have researched for Council, expressly prohibit separate transfer or dealing of the leases, and if it is not expressly prohibited section 521A usually applies.

In the circumstances where the leases are tied together by lease condition, the Minister is authorised under the Act to change imposed conditions of a lease with the agreement of the lessee. Section 210 of the Act provides:

> "**210 Power to change imposed condition of lease, licence or permit by agreement**
> (1) The designated officer for a lease, licence or permit may, with the lessee's, licensees's or permittee's agreement, change an imposed condition of the lease, licence or permit.
> (2) A lessee, licensee or permittee may apply for a change under this section.
> (3) The application must be accompanied by the written consent of all persons with a registered interest in the lease land.
> (4) However, consent under subsection (3) must not be unreasonably withheld.
> (5) A change made under this section must be registered.
> (6) The change has no effect until it is registered.
> (7) Once the change is registered, the imposed condition is taken to be the condition as amended by the change.

(8) No fee is payable for registering the change.
(9) In this section—
change, an imposed condition, includes extending the period within which the condition must be complied with."

Under section 210, the lessee may also apply to the Minister to have the lease conditions changed if they are no longer appropriate and the conditions may be amended, added or deleted. To apply to change the conditions of a lease, the lessee must submit/complete the following:

- Part A Contact and the Land Details form LA00;
- Part B Application for change of purpose of a lease, and/or the conditions of a lease, licence or permit to occupy form LA13. We have **enclosed** these forms in Annexure C for your reference;
- Written consent of all persons with a registered interest in the lease (to accompany the application). However, a person with a registered interest, must not unreasonably withhold consent.
- Prescribed application fee (approximately $110.30).

The application and the above accompanying documents must be submitted to the DNRM for its consideration. When considering the lessee's application, DNRM will assess the application against the requirements of the Act and will also:

- Use relevant DNRM policies, procedures and guidelines;
- Seek the views of stakeholders (eg other state government agencies and local government authorities);
- Consider native title issues; and
- Inspect the leased property.

In the circumstances where the leases are tied together by covenant, the State as the covenantee may authorise the release of the covenant. Section 373D of the Act provides:

"**373D Releasing a covenant**
(1) A registered covenant may be wholly or partly discharged by registering a document releasing the covenant.
(2) The document must be signed by the covenantee.
(3) On lodgement of the document, the registrar may register the release to the extent shown in the document.
(4) On registration of the document, the covenant is discharged, and the land is released from the covenant, to the extent shown in the document.

The document in which the State must provide its authorisation to the release of the covenant is Land Registry Form 33, which we have **enclosed** in Annexure D for your reference. Unlike the application to amend/delete a lease condition, there is no specific application form which the lessee can complete and submit to the DNRM. We are of the view that the lessee will need to make an informal application to DNRM requesting the release of the covenant.

State Policy

Whilst the deletion/amendment of lease conditions and covenants are allowed under the Act, DNRM has implemented policy which does not look favourably upon such applications. Policy titled "Additional Area Covenants and Conditions PUX/901/529 (version 2)" ("the Policy") states that when DNRM is considering applications to break ties in pastoral/grazing lease, they should in general be refused because the tie was imposed in order to secure some concession from the State, such as an additional lease, approval to privately subdivide or an interest subsidy under a restructure scheme. DNRM has taken the view that the removal of the tie undermines the original contractual commitment or policy intent and in effect amounts to a gift of the extra value that this action adds.

The Policy goes on further to provide that the separate sale of lots will be approved only to facilitate the distribution of all lots to assist in the build up of other pastoral, agricultural or grazing properties in the locality in which the lease is located.

Conclusion

Notwithstanding the Policy, we are under an impression that DNRM will asses applications on a case by case basis and if a legitimate argument can be made as to why a lease should be split, there is no lawful reason for them to refuse such application.

DNRM's policies are implemented under the provisions of the Act and have been approved by the Minister or the Director-General administering the Act. Changes to DNRM's policies are generally made to reflect legislation or a political view.

Options for Lessees

We would recommend that lessees obtain specific legal advice in relation to their specific circumstances. This document is intended to be a discussion paper and is not specific legal advice to Council or affected lessees.

Based on the information in the discussion paper we would recommend the following actions:

1. That lessees make applications to DNRM for amendment of lease conditions or release of covenants;
2. That an application be supported by an appropriate submission in relation to the application;
3. Council and lessees engage with the Minister and DNRM officers in relation to the issue and for the purposes of amending the current policies relating to additional lease areas.

We are happy to assist lessees with the application and supporting submissions.

We are also happy to assist Council and lessees in engaging with the State on these important issues.

Our suggestion is that one or more applications be made prior to engagement with the Minister to ensure that the issue is real as opposed to hypothetical.

Dated 18 July 2012

Andrew Kerr and Penny Laws
Preston Law