



# North Queensland Land Council

Native Title Representative Body Aboriginal Corporation

ICN: 1996 ABN: 19 047 713 117

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4 April 2014

Reply to: Head Office

Fax for service of legal documents only: 07 4042 7033

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

By email: [SDIIC@parliament.qld.gov.au](mailto:SDIIC@parliament.qld.gov.au)

Dear Sir

Thank you for the opportunity to provide comments on the *Land and Other Legislation Amendment Bill 2014*.

The North Queensland Land Council Native Title Representative Body Aboriginal Corporation ("NQLC") is responsible for a large representative body area in north Queensland and although the Bill does imply that when future acts are carried out, complying with the future act regime under the *Native Title Act 1993 (Cth)* ("NTA") is required, a number of concerns with the Bill remain.

An overarching concern is that the Bill, in beginning to deliver the Queensland Government's response to the final report of the "Inquiry into the future and continued relevance of government land tenure across Queensland" ("Report 25"), contains provisions that are not in keeping with the spirit of the NTA which recognises and protects native title and expressly provides in its preamble that, where appropriate, the native title should not be extinguished but should revive after a validated act ceases to have effect. Section 4 of the NTA also provides that the NTA recognises and protects native title.

A further overarching comment is that there are several Native Title Representative Bodies in Queensland who employ native title experts and it is clear from the Explanatory Memorandum to the Bill that no advice was sought in drafting the Bill from any of the Queensland Native Title Representative Bodies who would have been able to explain that native title connection to land cannot be maintained once land, which may contain native title is converted to freehold. For this reason any decision to carry



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out future acts that extinguish native title is very significant because once native title is extinguished it is extinguished for all time as it can't be revived.

The Explanatory Memorandum indicates on page 12 that the Bill reflects stakeholder aspirations but, with due respect, it may reflect the aspirations of some stakeholders, but it is unlikely to reflect the aspirations of native title holders who were not consulted on the State land tenure reforms proposed in the Bill before it was drafted.

The State government is urged to develop appropriate engagement and consulting procedures to ensure that Aboriginal people, including native title holders, are adequately engaged and represented before it proceeds further with the State land tenure reforms.

The Bill amends the *Land Act 1994* to enable conversion of certain term leases (which pursuant to a definition in Subdivision 3 of the Bill become "rolling term leases") to more secure forms of tenure such as extremely long term leases or to fee simple to ensure future viability of the pastoral and tourism industries and it encourages freeholding of unallocated state land ("USL"). In addition, the Bill includes in Clauses 23 and 24 the provision for disposal of reservations and redundant reservations by sale in the way prescribed by regulations. How the sales will occur lacks clarity because the regulations or details about the content of the regulations have not been provided.

While the above may be important government initiatives for the pastoral and tourism industries, the methods proposed to ensure viability will impact significantly on land which may contain native title, land over which native title has been determined to exist and land which is subject to registered native title applications. Achieving the stated objectives may result in long periods restricting the exercise of many native title rights and interests because there is no limit to the number of rolling terms that will be available, or it will result in extensive extinguishment of native title when there has already been a significant level of extinguishment in Queensland by previous exclusive possession acts ("PEPAs").

The NTA and associated case law provides that the traditional laws and customs must have been observed and maintained from sovereignty to the present day for a native title connection to be shown and it will become increasingly difficult for some native title groups who have not yet received their determination of native title or have not yet lodged their native title claim to maintain connection over large parts of their



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claim area if extensive extinguishment or suppression of native title occurs over long periods of time. The extensive extinguishment could occur by the conversion of term leases to perpetual lease or freehold and the suspension of some native title rights and interests could occur pursuant to the non-extinguishment principle by the rolling term extension of term leases (which ordinarily may have had a short time to run to expiry) to long term leases of up to 50 years. Extensive extinguishment may also occur by the conversion to freehold by sale of reservations and redundant reservations.

The Bill fails to address compensation issues for native title holders when extinguishment and suppression of native title occurs pursuant to the non-extinguishment principle and this is of great concern to the NQLC given that the State has not implemented adequate means of compensation in over 20 years since the enactment of the NTA. This doesn't raise confidence that it will be able to do so in respect of the impact of the Bill on native title.

Some provisions in the Bill will serve to streamline government operations such as the Bill's removal of the requirement for a pastoral purpose term lease to be converted to a perpetual lease before converting to freehold. This has no impact from a native title perspective as both tenures extinguish native title and it is a step that will provide added efficiency to State land processes.

The Explanatory Memorandum to the Bill states that the Bill has accepted Recommendation 14 of Report 25 which advocated a government program of incentives to support lessees of term leases wishing to convert to freehold.

The Bill is not clear in relation to what will be provided in the way of incentives for lessees to convert term leases to freehold. If those incentives are to include financial and other forms of assistance, Aboriginal persons who may not be term lease holders wishing to purchase native title land in freehold should also be the recipients of similar assistance. It must be kept in mind that native title is a communal title and without a significant level of monetary and other forms of compensation there would be little incentive for native title holders or prescribed native title bodies corporate, which hold native title as trustee or agent for the native title holders, to agree to the surrender of native title, pursuant to an Indigenous Land Use Agreement.

The amendments in Clause 3 of the Bill to the *Acquisition of Land Act 1967* which enable acquisition of non native title interests at the same time as native title rights and interests are compulsorily acquired, are supported as it is only when all interests in

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land are compulsorily acquired that extinguishment of native title can take place (s24MD (2)(b) NTA). It appears that non native title interests will be able to be taken without taking native title interests as the situation demands but if this is not the case then the NQLC completely opposes the proposed amendment because it would mean that native title would be taken when there is no need for this to occur.

Clause 6 of the Bill which also amends the *Acquisition of Land Act 1967* expands the purposes for which land may be compulsorily acquired to include land adjoining the seashore, estuaries and waterfront land. This is again land where native title may continue to exist and a potential further diminution of land available to be claimed by native title claimants. It is noted in the Explanatory Memorandum that only the Brisbane City Council has been consulted about this amendment which is inadequate consultation given that the interests of native title holders may potentially be compulsorily acquired over such areas and noting that waterfront land may have high valuation and the native title compensation liability may be considerable.

In relation to Clause 23 and 24 of the Bill which relate to disposal of reservations and redundant reservations by sale it is not revealed whether such land, if it becomes freehold, will still be available for use by the public if purchased by local governments. The loss of such land may be of concern in the general Queensland community. However, of particular concern is that reserves for a public purpose, even if regarded as redundant to government purposes, are areas which may still contain native title. If public reserves, the subject of non exclusive native title are sold, this will diminish the non exclusive native title land available for claim by native title claimants in the future.

Clause 31 of the Bill extends to areas where exclusive native title may still exist with the proposal that USL be converted to freehold pursuant to deeds of grant. USL may be the only land in determinations of native title where native title holders can be granted exclusive native title rights and interests and in determinations that have been made in the NQLC representative body area it is evident that there is scant USL available and, for this reason, the NQLC completely opposes the conversion of USL to freehold.

Clause 132 of the Bill amending the *Water Act 2000* contains validation provisions which operate retrospectively in relation to water licences. The NQLC opposes this provision on the basis that if the decisions were initially invalid, any native title still existing cannot be impacted upon or extinguished, by the grant of an invalid interest.



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Retrospective validating legislation has the potential to change the impact on native title and cannot be supported.

The same comments as above apply in relation to the attempt to validate decisions made regarding later work programs and later development plans under the *Petroleum and Gas (Production and Safety) Act 2004* and the *Petroleum Act 1923*. The NQLC opposes these proposed amendments.

Although not directly included in the Bill there is a point in Report 25 that needs clarification because it is relevant to the way in which native title may be addressed by the State in the conversion of the term leases to lengthy rolling terms as anticipated by the Bill.

Extending the term of term leases will require that native title is addressed in one of the ways provided by the NTA and that may be pursuant to s241C of the NTA which deals with renewals of leases. Report 25 advised the parliamentary committee that native title does not need to be addressed if the term of a term lease is proposed to be increased to 60 years, if the term was 60 years in the past and was for some reason subsequently reduced to 40 years. These lengths of term are cited only as an example of the subject issue which could occur in respect of different rolling term durations.

NQLC would raise strong objections once the Bill becomes law if the State proceeds to extend the term of a rolling term lease on the basis of the above advice and does not address native title. The term of the lease is significant if the lease has, in the past, been granted in perpetuity, as this would have extinguished native title (*Wilson v Anderson [2002] HCA 29*). Otherwise, it is necessary to consider the rights conferred by the grant of the interest, as provided in s241C(1) of the NTA and consider whether s241D(4) and s241MD(6B) apply, rather than the length of the rolling term, in determining whether a future act is involved and whether native title needs to be addressed.

As the turnaround time has been very short for comment on the Bill, the NQLC reserves the right to make further submissions to you if need be.

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Should the Research Director have any issues arising from this correspondence my staff member Ms Jennifer Sue Jude, Senior Legal Officer would be please to discuss these and can be contacted on Ph 07 40 42 7023.

Yours sincerely

Ian Kuch

**Chief Executive Officer**

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