



# QSNTS

## STATE RURAL LEASEHOLD LAND STRATEGY

### DISCUSSION PAPER

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#### INTRODUCTION

This paper will discuss the possible legal effects of native title interests on the State Rural Leasehold Land Strategy ('SRLLS'), which was implemented under recent amendments to the *Land Act 1994* (Qld) ('*Land Act*').

The goal of the SRLLS is to provide:

a practical basis from which government can work with all stakeholders to reconcile the achievement of environmental imperatives—such as reversing declining land condition and addressing the threat of increasing climatic variability—with the need to assure the ongoing economic viability of rural communities.<sup>1</sup>

In other words, the strategy attempts to strike a balance between economic objectives for lessees of State-owned leasehold land and environmental goals. This is reflected in composition of the parties to the 'Delbessie Agreement' which spearheaded the strategy: Queensland Government, AgForce Queensland and the Australian Rainforest Conservation Society.

The authors of the Delbessie Agreement state that the SRLLS 'takes the respective aspirations of leaseholders, conservation and Indigenous groups, government agencies and rural industry into account'.<sup>2</sup> But the exclusion of an Indigenous representative from the parties to the Delbessie Agreement suggests

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<sup>1</sup> Department of Natural Resources & Water, *Delbessie Agreement (State Rural Leasehold Land Strategy)* (December 2007) 1.

<sup>2</sup> *Ibid* iii.

that the 'aspirations' of Indigenous groups may not have been adequately taken into account. Indeed, there are aspects of the strategy that appear to overlook the possible legal effect of native title interests over leasehold land.

One of the key provisions under the SRLLS is the opportunity for lessees to extend their leases for terms of up to 50 years. In return, lessees are required to fulfill certain criteria that will supposedly lead to enduring outcomes for the environment, as well as for Indigenous people. But the provisions appear to either ignore or underestimate the legal effect of native title interests on the ability to achieve these outcomes.

This paper will assert that conservation agreements made under the SRLLS may not be 'registrable' if native title interests are not properly taken into account. Consequently, 'protected areas' created under the agreements may not be capable of existing in perpetuity. Thus, in some cases, enduring conservation outcomes may not be achievable under the current statutory scheme.

It will be further asserted that entering into Indigenous Land Use Agreements ('ILUAs') is clearly preferable to private common law contracts for Indigenous access and land use. The SRLLS allows for either option, but ILUAs are the only option that can lead to both enduring conservation outcomes, as well as guarantee that the access and land use agreements will continue in perpetuity without the risk of being declared invalid.

The wide scope of Ministerial discretion in deciding whether conservation agreements are 'appropriate' and whether Indigenous access and land use agreements are required in order to obtain lease extensions is a cause for concern. It is asserted that clear ministerial guidelines are required to ensure that proper decisions are made that will fulfill the objectives of the SRLLS.

## **OVERVIEW OF STATUTORY PROVISIONS**

Normally, term leases of State rural leasehold land must not exceed 30 years from the issue date. However, the *Land Act* – as amended by the *Land and Other Legislation Act 2007* (Qld) – contains provisions for issuing leases with terms of up to 40 or 50 years depending on certain criteria being met.

Under s 155A of the *Land Act*, the Minister may grant an application to extend a lease for a term of up to 40 years if the lessee has complied with the Land Management Agreement for the lease (and any requirements under it for granting of the extension) and the lease land is in 'good condition'.<sup>3</sup>

Proposed ministerial guidelines for what constitutes 'good condition' are currently being drafted by an expertise-based advisory committee, known as the State Rural Leasehold Ministerial Advisory Committee. The committee was established under Section 394 of the *Land Act*. Under s 394A, the Minister is empowered to make the guidelines, but must first seek advice from the advisory committee about the appropriateness of the guidelines.<sup>4</sup> However, the Minister is under no legal obligation to act upon the committee's recommendations.

This allows a substantial degree of ministerial discretion without any guidance as to how it will be exercised or the criteria (if any) relied upon by the Minister. In the absence of any clear criteria or decision making process, the Minister's deliberations could be subject to intensive lobbying by stakeholders.

Section 155B of the *Land Act* provides for lease extensions of up to 50 years if all of the criteria for a 40 year extension are met and the following circumstances apply:

- the Minister considers that land that is all or part of the lease land should be the subject of a conservation agreement or conservation covenant;
- a **conservation agreement** has been entered into, or a conservation covenant exists, for the land; and
- if the Minister considers that it is appropriate for there to be an indigenous access and use agreement relating to the lease land – an **indigenous access and use agreement** relating to the land has been entered into.<sup>5</sup>

#### Definitions – Schedule 6:

<sup>3</sup> *Land Act 1994* (Qld) s 155A.

<sup>4</sup> *Land Act 1994* (Qld) s 394A (1) and (2).

<sup>5</sup> *Land Act 1994* (Qld) s 155B(1)(f)(iii).

**conservation agreement** means a conservation agreement under the *Nature Conservation Act 1992* (Qld).

**indigenous access and use agreement** means –

- an indigenous land use agreement; or
- a contractual agreement between a lessee and Aboriginal people or Torres Strait Islanders that allows an activity as follows to be carried out on the lease land for the traditional purposes of the people or islanders –
  - camping, fishing, gathering, or hunting;
  - performing rites or other ceremonies;
  - visiting sites of significance.

**indigenous land use agreement** means an indigenous land use agreement noted in the ILUA register.

## NATIVE TITLE AND CONSERVATION AGREEMENTS

Conservation agreements are made under the *Nature Conservation Act 1992* (Qld). Section 51 of that Act provides that a conservation agreement that is recorded by the registrar under section 134 in relation to land is binding on:

- (a) the successors in title to the land-holder who entered into the agreement; and
- (b) persons who have an interest in the land.<sup>6</sup>

Thus, conservation agreements present an opportunity to achieve enduring conservation outcomes by creating 'protected areas'<sup>7</sup> that exist in perpetuity. However, this is subject to the condition that the agreement be recorded by the registrar for land titles. In order for it to be recorded, it must first be 'registrable'.

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<sup>6</sup> *Nature Conservation Act 1994* (Qld) s 134.

<sup>7</sup> A protected area includes a nature refuge, coordinated conservation area or a wilderness area. See *Nature Conservation Act 1994* (Qld) s 43.

In order for the agreement to be 'registrable', all parties to the agreement must consent to its terms being binding on successors in title. Parties to a conservation agreement would normally include the State and the land-holder. For leased land, a *land-holder* includes the lessee of the land.<sup>8</sup> But where a protected area is created under a conservation agreement, the term 'land-holder' includes a person having an *interest in land*.<sup>9</sup> It is highly likely that a native title claimant would be considered to be a land-holder for the purposes of the Act. Where a determination has recognised the native title holders, they clearly hold interests in the land that is the subject of the proposed conservation agreement.

Consequently, the consent of native title claimants/holders should be secured in order for a conservation agreement to be registered. Failure to do so may render the conservation agreement 'unregistrable' and consequently, incapable of binding successors in title or forming an enduring conservation outcome.

In addition, section 44(3) of the *Nature Conservation Act* provides that the Minister must give written notice to all land-holders affected by a proposal for a protected area. Failure to give notice to native title claimants/holders may jeopardise the legal status of a conservation agreement. The agreement might be declared (partially or wholly) invalid because the native title holders were not provided an opportunity to make submissions to the Minister under s 44(4) which states that '[t]he notice must specify a day by which the land-holders may make submissions to the Minister relating to the proposal'.

If a land-holder or the State wishes to enter into a conservation agreement, both native title holders and claimants should be both consulted from the outset and made parties to the agreement.

In order to achieve an enduring conservation outcome, it is necessary that proper legal steps are taken to ensure that a conservation agreement is 'registrable' in order for it to be validly recorded in the register. Otherwise, the agreement will only bind the parties to the agreement and not successors in title.

The *Land Act* does not make it a condition that conservation agreements be recorded in the register in order to get the lease extensions. This is a loophole that lessees may potentially exploit. If not recorded on the register, a conservation agreement is arguably no different from a common law contract. It will only bind the parties to the agreement and will not lead to an enduring conservation outcome. Such a situation may not have been contemplated by the pro-conservation parties to the Delbessie Agreement.

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<sup>8</sup> *Nature Conservation Act 1994* (Qld) schedule dictionary.

<sup>9</sup> *Nature Conservation Act 1994* (Qld) s 44(6).

The apparent failure of the Delbessie amendments to the *Land Act* to take into consideration the effect of native title interests on conservation agreements is a serious oversight that ought to be rectified. If it is not practicable to make further amendment to the Act, then it may still be possible for enduring conservation outcomes to be achieved so long as native title parties are involved in the process. Queensland South Native Title Services ('QSNTS') recommends that indigenous land use agreements (ILUAs), which record the consent of the relevant claim group to the terms of the conservation agreement is the best vehicle for closing the loophole, ensuring that conservation agreements are registrable and valid.

## INDIGENOUS ACCESS AND LAND USE AGREEMENTS

Under the *Land Act*, an indigenous access and use agreement means either an ILUA, or a contractual agreement between a lessee and Aboriginal people or Torres Strait Islanders that allows certain prescribed activities to be carried out on the lease land for the traditional purposes of the people or islanders.<sup>10</sup>

The opportunity for an extended lease term of 50 years may be a significant inducement for pastoralists to enter into either ILUAs or private contractual agreements. While the choice of options offers some flexibility, for the reasons given below, it is in the interests of all parties concerned to enter into ILUAs rather than private common law contracts.

ILUAs bind all native title holders or claimants to an area regardless of whether they are parties to the agreement. It will also bind future lessees of the land, provided the ILUA remains in force and has terms by which successors in title are bound by the terms of the agreement. Once ILUAs are registered, they provide a degree of certainty for all parties concerned. Furthermore, the Native Title Tribunal can assist in the formation of the agreement and in resolving disputes. Viewed in light of the problems raised above regarding conservation agreements and native title interests, ILUAs provide a clear advantage for achieving enduring conservation and native title outcomes.

By contrast, private common law agreements only bind the parties to the agreement. This is a significant disadvantage for native title claimants because the agreement would only be enforceable by the actual parties to the agreement, not an entire claimant group. This raises the possibility of disagreements arising that threaten significant discord within the group. It is both conceivable and legally possible that private

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<sup>10</sup> *Land Act 1994* (Qld) schedule dictionary.

contracts may be entered into under the SRLLS between lessees and factions of a traditional owner group who have no authority to represent the group as a whole.

Further, the SRLLS will allow contracts to be entered into between lessees and Aboriginal people from outside of the traditional owner group for the leased land. 'Aboriginal people' means 'people of the Aboriginal race of Australia'.<sup>11</sup> This means that the criteria for the grant of a 50 year lease extension can be fulfilled where a lessee enters into a private agreement with *any* Aboriginal person in Australia, whether or not they are a member of the native title claim group for the leased land.

The nature of such a private contract means that benefits conferred to the native title claimants cannot be transferred or willed in an estate. If the parties to the agreement die or change, then the rights could be lost entirely. Common law contracts offer absolutely no guarantee of group benefits in perpetuity.

While the common law contracts may be problematic for native title claimant groups, there are reasons why they may be favoured by lessees. The process of negotiating ILUAs can be costly and time-consuming, and if the lessees' ultimate goal is to win the grant of a 50 year lease extension, a simple common law contract may seem to be a cheap and easy solution.

The perceived expediency of common law contracts is illusory as ILUAs have clear benefits for all parties concerned and can be quickly negotiated by recourse to a template agreement. Lessees in particular will benefit from a greater degree of certainty, an established dispute resolution process, the chance to build better relationships with the traditional owners of the leased land, and less risk that the agreements reached will be declared invalid leading to a possible reversal of the grant of 50 year lease extension under s 155D of the *Land Act*. Conservationists will benefit from ensuring that conservation agreements are registrable. The benefits to native title claimants are self-evident. In short, ILUAs are flexible, comprehensive and stable; they provide the best mechanism for all of the parties to negotiate outcomes that protect their interests.

## MINISTERIAL DISCRETION

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<sup>11</sup> *Acts Interpretation Act 1954* (Qld) s 36. The term 'Aboriginal people' is not defined in the *Land Act*.

Under s 155B, the Minister must use his/her discretion in considering whether: (a) land *should* be the subject of a conservation agreement; and (b) it is *appropriate* for there to be an indigenous access and use agreement relating to the lease land.

Neither the *Land Act*, nor the explanatory memoranda for its 2007 amending bill, nor the Minister's second reading speech provide any guidance on how these discretions must be exercised. While the Minister is obliged to seek the advice of the Advisory Committee in relation to guidelines for what constitutes 'good condition', there does not appear to be any obligation for the Minister to develop guidelines, or seek advice in the process of developing guidelines, on how the discretions under s 155B should be exercised.

The broad scope of the Minister's discretion should be of concern to both native title claimants, as well as conservationists. The following will highlight some problems with the scope of the discretions.

### **When is it 'appropriate' for there to be an indigenous access and land use agreement?**

There are currently no clear guidelines as to when it might be 'appropriate' for there to be an indigenous access and use agreement over leased land.

Where a registered native title claim exists over all or part of leased land, then it is clearly appropriate for the Minister to insist upon an indigenous access and land use agreement (preferably a comprehensive ILUA). But the discretion appears to be wide enough to allow the Minister to grant 50 year lease extensions with no such agreement, regardless of the existence of a registered native title claim.

Without strict guidelines, it is conceivable that the Minister might come to the conclusion that an indigenous access and land use agreement is not appropriate merely because they consider it to be too onerous for the leaseholder to achieve one. The minimum guidelines should be that an indigenous access and land use agreement is required, whenever the land is subject to a registered native title claim. Alternatively, it could be made clear that it is incumbent upon the stakeholder for whose benefit the Minister may exercise their discretion to persuade the Minister and other parties that is appropriate for them to do so. For example, if the Minister is being asked to grant a 50 yr extension with no requirement for an ILUA over leasehold land subject to a registered native title claim, the lessee must prove that the claim is defective or fundamentally flawed in such a way that would render invalid any agreement reached with the current claim group.

### When should leased land be the subject of a conservation agreement?

Similar to the discretion discussed above, there are no clear guidelines as to when leased land, or part of leased land, should be the subject of a conservation agreement.

Without clear guidelines, it is possible for the Minister to come to the conclusion that leased land should not be the subject of a conservation agreement for reasons external to considerations related to conservation. The Minister might decide that there should not be a conservation agreement merely because there is a threat that a failure to obtain consent from registered native title claimants will lead to that agreement being unable to be registered or invalid to the extent that it affects native title. Because of this possibility, guidelines for the use of this discretion should state that the Minister must only take into account factors that are directly related to conservation goals. In doing so, they must acknowledge and appreciate the different perspectives that environmental and Indigenous stakeholders have over how environmental values are understood, protected and managed. External factors such as the difficulty of registering or enforcing the agreements should not be considered as relevant considerations. This will reduce the risk that the Minister will allow extended leases without the leaseholders being required to set aside land for refuges and/or conservation protection.

### **CONCLUSION**

The SRLLS presents an opportunity for lessees, registered native title claimants and other stakeholders to work together to secure enduring environmental and cultural outcomes for leasehold land. It is QSNTS' view that these outcomes are delivered with greatest contractual certainty and legal validity for all stakeholders by ILUAs. Such agreements are more flexible and can apply to a wider range of issues than other mechanisms contemplated by recent amendments to the *Land Act* that are limited on scope.

In this way, ILUAs can address all the issues relevant to each stakeholder such as native title, cultural heritage, environmental protection and natural resource management. QSNTS would be happy to draft a template ILUA agreement for parties to use as a base or starting point in negotiations towards comprehensive agreements that achieve mutually beneficial outcomes for all.

