

## REASONS FOR APPROVAL

### WAIVER UNDER SECTION 157(2) OF THE INFORMATION PRIVACY ACT 2009

#### Background

In November 2009, administrative responsibility for the *Aborigines and Torres Strait Islander (Land Holding) Act 1985* (**Land Holding Act**) was transferred to the Department of Environment and Resource Management (**DERM**) from the Department of Communities (**DOC**). The intention of the Land Holding Act is “to provide for the grant of leases in perpetuity and other title in land to members of communities of Aborigines or Torres Strait Islanders and for related purposes”.

The Land Holding Act is still in force however no further lease applications could be made under it after 21 December 1991. Between 1985 and 1991 more than 600 lease applications (**Lease Applications**) were made. Of these, 446 remain unsettled.

On 1 June 2011 DERM applied to the Office of the Information Commissioner under section 157(1) of the *Information Privacy Act 2009* (**IP Act**) for an approval to waive DERM's obligations to comply with specific privacy principles for the purposes of finalising the unsettled Lease Applications. The specific Information Privacy Principles (**IPP**) are:

- IPP 9 – Use of information only for a relevant purpose
- IPP 10 – Limits on the use of personal information; and
- IPP 11 – Limits on disclosure.

DERM sought the waiver to give it flexibility of use of the personal information in the Lease Applications and to disclose the personal information to the Department of Communities (**DoC**) and to relevant Indigenous Councils.

#### Law

Under section 157(2) of the IP Act the Commissioner can, by gazette notice, give an approval that waives or modifies an agency's obligation to comply with the privacy principles. The Commissioner can give an approval if she is satisfied that the public interest in the agency's compliance with the privacy principles is outweighed by the public interest in waiving or modifying the agency's compliance.

While an approval is in force, the affected agency does not contravene the privacy principles if it acts in accordance with the approval.

#### ***Public interest in compliance with the privacy principles***

The primary objectives of the IP Act are to provide for the fair collection and handling of personal information in the Queensland public sector and to provide access and amendment rights for that personal information.<sup>1</sup> The privacy principles set out in the

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<sup>1</sup> Section 3 of the IP Act.

IP Act establish the framework for dealing with personal information so that the objectives of the Act can be met.

Accordingly, compliance with the privacy principles serves the public interest because their application contributes to the fair collection and handling of personal information in the Queensland public sector.

### ***Public interest in non-compliance with the privacy principles***

Non-compliance with the privacy principles will enable DERM to realise Parliament's intent in enacting the Land Holding Act and to fulfil its responsibilities as administrator of this legislation.

It will also maintain the integrity of government records - DERM's Automated Titling System for interests in land, records held by DoC and individual Indigenous Councils.

It is in the public interest that lease applicants, some of whom had their entitlements to lease approved over 20 years ago, be granted their leases. This will provide certainty to affected individuals in relation to their dealings with their relevant Indigenous Council, the State and the business community.

The finalisation of the Lease Applications is long overdue.

### **Public interest balancing test**

The term 'public interest' refers to considerations affecting the good order and functioning of the community and governmental affairs for the well-being of the public.<sup>2</sup> When considering the public interest in relation to an Act, the Act's purpose and objects are relevant.<sup>3</sup>

### ***Other considerations***

The Lease Application information is at least 20 years old. Since that time, the records have been held by a variety of government agencies, including the Indigenous Councils and DoC. The councils themselves have undergone amalgamation and mergers in that time.

It would also be unrealistic to expect that the Lease Application data is up-to-date, complete or even correct. It is possible that some of the original applicants are no longer living on the land or that they may be deceased.

To finalise the Lease Applications it will be necessary for DERM to cooperatively work with the Indigenous Councils, DoC and relevant internal units - for example, its Native Title Resolutions Unit.

The privacy principles, and specifically IPPs 9,10 and 11 do not, in a practicable sense, easily allow for cooperative arrangements in these circumstances.

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<sup>2</sup> OIC Guideline, 'Public interest balancing test – Section 49' at section 2.4, available at <http://www.oic.qld.gov.au/right-information-guidelines>.

<sup>3</sup> O'Sullivan v Farrer (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ at 217 citing *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 per Dixon J at page 505.