



STATEMENT OF REASONS FOR APPROVAL OF WAIVER UNDER SECTION 157(4) 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.

Application by DERM

On 1 June 2011 DERM applied to the Office of the Information Commissioner (OIC) 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) were:

- 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 DOC and to relevant Indigenous Councils.

On 12 August 2011¹, the Privacy Commissioner, Ms Linda Matthews, gave approval that waived DERM's obligations to comply with IPPs 9–11 for the specific purpose of finalising the unsettled Lease Applications.

Application by DOC

On 9 December 2011 DOC applied to OIC under section 157(1) of the IP Act for a similar approval to waive DOC's obligations to comply with IPPs 9–11. The purpose for the waiver would be to permit DOC to compile and exchange relevant personal information with other government entities—most notably, DERM—to enable DERM to finalise the unsettled lease applications.

¹ The date of the gazette notice. Under section 157(2) of the IP Act, the approval comes into force upon gazettal. The date of approval was 29 July 2011.



This is a mirror image application to DERM's. Under section 157 of the IP Act a single agency only can apply to OIC for an approval for a waiver or modification. DERM's application sought a waiver in relation to the flow of information from DERM to, among other entities, DOC. This application deals with the return flow of personal information from DOC to DERM.

Law

Under section 157(2) of the IP Act the Information 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.²

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.³ The privacy principles set out in the 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 DOC to compile and disclose relevant personal information for the purpose of DERM realising Parliament's intent in enacting the Land Holding Act.

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.

² Section 157(4) of the IP Act.

³ Section 3 of the IP Act.



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.⁴ When considering the public interest in relation to an Act, the Act's purpose and objects are relevant.⁵

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.

DOC's role in the finalisation of the lease applications

There are more than 279 social housing dwellings located on land subject to leases or entitlements. Under section 15 of the Land Holding Act structural improvements on dwellings subject to leases do not become the property of the leaseholder until a separate purchase agreement is entered into. DOC states that many purchase agreements have yet to be finalised.

Given the 20-year intervening period, it is inevitable that:

- persons holding leases may be unaware that they hold the lease
- persons with lease entitlements may be unaware of their entitlements
- approximately 60% of original lease applicants are deceased or are no longer resident on their entitlement
- persons are renting dwellings which they have an outstanding purchase agreement or the capacity to enter into a purchase agreement
- persons are dwelling on the leasehold land who are not the original lease applicant.

⁴ OIC Guideline, *'Public interest balancing test – Section 49'* at section 2.4, available at <http://www.oic.qld.gov.au/right-information-guidelines>.

⁵ *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.



DOC is best placed to identify and provide to DERM:

- the name and contact details for tenants living in dwelling on land subject to a lease application
- the name and contact details of leaseholders and lease applicants
- the name and contact details of beneficiaries to entitlements⁶.

Decision

Having carefully considered the public interest in DOC complying with the privacy principles in the IP Act against the public interest in DOC using and disclosing the necessary information in order to enable DERM to finalise the grants of leases that were applied for over 20 years ago, the Acting Privacy Commissioner decided the balance comes down on the side of the latter.

Accordingly, on 9 January 2011 the Acting Privacy Commissioner granted DOC an approval of waiver on the following terms:

- The waiver is for the obligations in IPPs 9, 10 and 11 only.
- The waiver extends to all uses and disclosures connected with the finalisation of the lease applications.
- The waiver remains in place until the finalisation of all lease applications.

⁶ As an example of DOC's involvement with beneficiaries if an leaseholder did not leave a will then upon their death, under section 60 of *Aboriginal and Torres Strait Islanders Communities (Justice, Land and Other Matters) Act 1984* the Director-General of DOC assumed responsibility for determining the person entitled to succeed to the estate.