

EXPLANATORY MEMORANDUM

Aboriginal Housing Legislation Amendment Bill 2009

Part 1- Preliminary matters

Clause 1. Short Title

Provides that the name of this Bill when enacted is the *Aboriginal Housing Legislation Amendment Act 2009* (the Act).

Clause 2. Commencement

Provides that:

- (a) Part 1 of the Act comes into operation when the Act receives the Royal Assent; and
- (b) the rest of the Act comes into operation on proclamation and different provisions may come into operation on different days.

The Housing Authority (the Authority), the Aboriginal Lands Trust (ALT) and the Aboriginal Affairs Planning Authority (AAPA) will be able to exercise the powers being conferred by this Bill, e.g. to enter into a housing management agreement, before commencement but whatever is done under these powers will not take effect until commencement e.g. a housing management agreement will not operate until the relevant provisions of this Act come into operation.

Part 2 - Housing Act 1980 amended

Clause 3. Act Amended

This Part amends the *Housing Act 1980* (the Housing Act).

Clause 4. Section 4 amended

The objects of the Housing Act are amended by:

- (a) inserting new objects in new paragraph (ca). These objects effectively broaden the Authority's role to include:
 - the letting and leasing of houses which may or may not be held by the Authority (currently it may only let or lease houses held by it);

- the provision of related services e.g. maintenance and refurbishments of houses; and
 - making arrangements for third parties to provide services in relation to the letting and leasing of housing. For instance, the Authority may enter into joint ventures which provide for the construction of new houses and the letting and leasing of them by third parties; and
- (b) amending the objects in paragraph (d) to effectively acknowledge that the Authority's role also includes the participation in the development and redevelopment of land for housing and related purposes.

Clause 5. Section 5 amended

Inserts a new definition of ***Crown land*** in section (5) – self explanatory.

Clause 6. Section 12A replaced

Existing section 12A is deleted and replaced with provisions to the effect of the following:

12A. Joint ventures

Subsection (1) reflects existing subsection (1) of section 12A, except that it removes:

- the substantive restrictions on the kinds of activities or projects that may be entered into via a joint venture; and
- the existing procedural limitation which requires the Governor to recommend to the Minister to approve such arrangements.

Under subsection (1), the entering into of a joint venture by the Authority must still further the objects of the Housing Act. As the objects have been broadened, the Authority will now be able to enter into any type of joint venture, including those for the procurement and provision of rental accommodation (including the erection of houses on any Aboriginal land), the joint venture agreement for which may also arrange for the eventual letting and leasing of that rental accommodation by the other (non government) joint venture party. This will assist in increasing the supply of housing in partnership with the private and not-for-profit sectors throughout the State, including housing in Aboriginal communities.

Subsection (2) substantially reproduces the provisions in existing subsection (4) of section 12A, which are still needed to ensure the Authority may continue to be represented on boards or bodies managing a joint venture project and to receive and disburse money relating to a joint venture project.

Subsection (3) provides that all joint venture arrangements entered into by the Authority will require the Minister's approval on terms and conditions approved by the Treasurer. Although these terms and conditions have not yet been determined by the Department of Treasury and Finance, it is expected that the terms and conditions will include a requirement that adequate accounting records are maintained in relation to a joint venture arrangement and that those records are open to inspection by responsible officers of the Authority, the Treasury of the State and the Auditor General.

Clause 7. Section 13 replaced

Existing section 13 is deleted and replaced with provisions to the effect of the following:

13. Delegation: powers and duties generally

These provisions, which enable the Authority to delegate its powers to an officer of the Authority, substantially reflect those in existing section 13, except that the requirement for the consent of the Minister has been removed. It is considered that this requirement impedes the efficient exercise by the Authority of this power.

As the existing delegation provisions in section 13 are nearly 30 years old, it was considered prudent to "update" these to reflect the new delegation provisions in new section 62K. The intent of replacing existing section 13 (which is nearly 30 years old) is to avoid any suggestion that because of the difference in wording between it and new section 62K (which reflects the standard form for delegations in current legislation), they are somehow different in meaning.

Clause 8. Section 22 amended

These amendments to section 22 streamline the Authority's land development and management powers by removing the requirement to obtain the Minister's consent to exercise those powers. It is neither practical nor efficient for the Authority to obtain the Minister's consent for such day to day operational matters. In addition, these amendments broaden the Authority's powers by enabling it to develop and manage *any* land, not only land held by the Authority.

Paragraph (a) of section 22 will now enable the Authority to subdivide land other than land which it holds. The subdivision of such land will be subject to existing subdivision approval processes under the *Land Administration Act 1997* which apply where such land is Crown land. This will allow the Authority to develop and manage Aboriginal land (land over which an Aboriginal entity has power to grant a lease); this can however only occur with the agreement of the relevant Aboriginal entity.

New paragraph (ia) enables the Authority to arrange insurance necessary to insure the exercise of the Authority's land development and management powers. An example of relevant insurance which may be necessary for the Authority to arrange

is landlords' insurance, for housing being managed by the Authority pursuant to a housing management agreement under new Part VIIA.

Clause 9. Part VIIA inserted

Part VIIA – Housing on Aboriginal land

Division 1- Preliminary matters

62A. Terms used

AAPA – acronym for the Aboriginal Affairs Planning Authority.

AAPA Act – acronym for the *Aboriginal Affairs Planning Authority Act 1972*.

Aboriginal entity – Paragraphs (a) – (d) of this definition define Aboriginal entities which may enter into a housing management agreement with the Authority to enable the Authority, on behalf of that Aboriginal entity, to issue a residential tenancy agreement in respect of a nominated house on a nominated lot which is the subject of housing management agreement. Only an Aboriginal entity which has the power to grant a lease over “Aboriginal land” (see explanation of this definition below) may come within the definition. Unless an Aboriginal entity has this power, it will not be able to enter into a housing management agreement with the Authority. Prior to such an agreement being made, the Authority must under new section 62C ascertain that the agreement accords with the wish of the Aboriginal inhabitants of the land.

Paragraph (e) of the definition allows any new entities that come into existence in the future to be prescribed (as well as any existing entities that may have been overlooked in paragraphs (a) – (d)).

Aboriginal land – As defined, only an Aboriginal entity which has the power to grant a lease over what is effectively Crown land will be able to enter into a housing management agreement. This will exclude an Aboriginal entity (except the ALT and the AAPA) which owns freehold land. Other arrangements will apply to housing on such land. These arrangements will involve the Authority negotiating 40 year leases and/or joint venture arrangements to enable, where agreed with the community, the management of existing housing and/or construction of new housing.

ALT - acronym for the Aboriginal Lands Trust.

housing management agreement – self explanatory.

lease - this definition provides that a lease includes a sublease. The intent being that when this definition and the definition of “Aboriginal entity” are read with the definition of “Aboriginal land”, an Aboriginal entity will include an entity that subleases land from AAPA, ALT or another Aboriginal entity.

nominated house - self explanatory.

nominated lot – self explanatory.

residential tenancy agreement – self explanatory.

Division 2- Housing management agreements

62B. Authority may enter into housing management agreement

Subsection (1) empowers the Authority to enter into a housing management agreement with and Aboriginal entity.

The Authority will need to ensure that housing management agreements and residential tenancy agreements comply with any condition(s) that may apply to any management order made under the *Land Administration Act 1997* in relation to the Aboriginal land.

Under subsection (2), a housing management agreement enables the Authority to tenancy manage Aboriginal housing on behalf of an Aboriginal entity.

Subsection (3) makes it clear that the Authority does not have a positive obligation to enter into housing management agreements.

62C. Wish of Aboriginal inhabitants to be ascertained

Paragraph (a) requires the Authority to ascertain, to the extent that it is reasonably possible to do so, that it is the wish of the Aboriginal inhabitants of the relevant area to enter into a housing management agreement.

Paragraph (b) requires the Authority to ascertain, to the extent that it is reasonably possible to do so, that it is the wish of the Aboriginal inhabitants to:

- list in a housing management agreement a particular lot or particular house to which the agreement will apply; and
- to add or remove a particular lot or particular house from the list of nominated lots and nominated houses for a housing management agreement that has already been entered into.

The reference to a nominated lot is necessary to ensure that:

- the houses to be tenancy managed by the Authority can be accurately identified; and
- the Authority's obligations to meet an owner's responsibilities under the *Residential Tenancies Act 1987* (RT Act) should extend to providing and maintaining things up to and including the boundary line such as fences

and gates, which Aboriginal communities consider important for protecting the property.

It is necessary to refer to nominated houses on nominated lots, not just houses on nominated lots, because it may not be feasible for the Authority to manage *all* houses on a nominated lot. For instance, on certain lots there may be outbuildings or sheds which are being used as dwellings, however it would not be possible nor cost effective for the Authority to bring such buildings up to the standards required to meet an owner's responsibility for cleanliness and repairs under the RT Act section 42.

62D. Lots and houses to which housing management agreement applies

Subsection (1) enables a housing management agreement to run for the period set out in the agreement.

Subsection (2) enables the Authority to "stage", if necessary, the tenancy management of nominated houses on nominated lots listed in a housing management agreement, depending on the state of repair of each particular house. The purpose being to ensure that a nominated house is brought up to a sufficient state of repair by the time the Authority starts to tenancy manage it. For example, the agreement could specify:

- the Authority will tenancy manage say, (nominated) house No. 1 on (nominated) lot No. 14 as from say, July 2010; and
- the Authority will tenancy manage say, (nominated) house No. 2 on (nominated) lot No. 14 as from say, September 2010; etc.

Under subsection (3), a housing management agreement must allow for:

- a nominated lot or nominated house to be added or deleted from the agreement; and
- changing the period for which the agreement runs or for which the agreement applies to a nominated house on a nominated lot.

62E. Rent for nominated lots and nominated houses

These provisions allow for different rents to apply to different:

- nominated lots or houses;
- classes of nominated lots or nominated houses; or
- classes of tenants,

as well as for allowance for rebates in specific circumstances. By reflecting the rent setting provisions in existing section 30 of the Housing Act, these

provisions demonstrate that the aim is that social housing standards will apply to housing on Aboriginal land which is tenancy managed by the Authority under a housing management agreement.

62F. Other terms of housing management agreement

Section 62F sets out things for which a housing management agreement must provide:

- (a) for the Authority to generally determine the terms of a residential tenancy agreement in relation to a house or lot nominated in a housing management agreement (these provisions reflect those in existing section 29 of the Housing Act);
- (b) for the Authority to determine, taking into consideration the wishes of the Aboriginal inhabitants to the extent that it is reasonably possible to do so, who a nominated house on a nominated lot can be rented to;
- (c) for the Authority to issue a residential tenancy agreement in relation to a house and lot listed in an agreement, on behalf of the Aboriginal entity, which remains the lessor;
- (d) for the period for which the housing management agreement applies;
- (e) for the agreement to be terminated early only if both parties agree;
- (f) for the agreement to be varied with the agreement of the parties;
- (g) for the effect of any early termination or variation on a residential tenancy agreement; and
- (h) for any other things prescribed by the regulations.

62G. Application of *Residential Tenancies Act 1987*

Subsection (1) provides that both the rights and obligations of an “owner” and a “tenant” under the RT Act apply respectively to the Authority and the tenant of any nominated house on a nominated lot specified in a housing management agreement.

This provision is necessary for the following reasons:

- Firstly, under the existing Housing Act provisions, the Authority can only let or lease land held by it. This means that currently the Authority is not empowered to tenancy manage housing on Aboriginal land. A consequence of this is that the RT Act cannot currently be applied by the Authority to Aboriginal housing; this makes it difficult to bring Aboriginal housing up to social housing standards.

- Secondly, due to the existing wording of the RT Act and the fact that a number of incorporated Aboriginal entities have a corporate structure which places control of the entity in the residents of the community in question, there is doubt that the RT Act applies to a residential tenancy lease issued by an Aboriginal corporation.
- Thirdly, there are difficulties in identifying the “owner” for the purposes of the RT Act in relation to much of the Aboriginal land over which an Aboriginal entity may have the power to grant a lease. In many cases, the owner may be the Crown, however as the matter is not entirely free from doubt, it has been decided to clarify the intended position.

Subsection (2) makes clear that the Authority does not have any other rights.

62H. No interest in land created, property acquired or compensation payable

Subsections (1) and (2) make clear that a housing management agreement does not give the Authority any interest in or title over Aboriginal land.

Subsection (2) makes clear that an Aboriginal entity is not entitled to statutory compensation in relation to anything which the Authority is authorised to do under a housing management agreement. This does not override the Commonwealth *Native Title Act 1993*.

62I. No fees or charges payable in respect of housing management agreement

Provides that the Housing Authority is not able to charge an Aboriginal entity for carrying out a housing management agreement. For example, the Authority is not able to charge an Aboriginal entity commission for managing rental properties under a housing management agreement.

62J. Authority may act through agent

Subsection (1) enables the Authority to appoint a non-government organisation as agents to do the things which a housing management agreement enables the Authority’s to do.

Under subsection (2), the agent must comply with requirements set out in the housing management agreement.

Subsection (3) allows the Authority to pay a fee for the management of rental properties under an agency agreement.

62K. Delegation: powers and duties in relation to housing management agreement

Allows the Authority to delegate to an officer of the Authority any of its powers in relation to housing on Aboriginal land under this Part. This section contains standard delegation provisions. To be consistent with the new standard delegation provisions in section 13, the Minister for Housing and Works' approval is not required for this delegation.

Division 3- Miscellaneous matters

62L. Approval of Minister for Indigenous Affairs, AAPA or ALT not required

In respect of Aboriginal land which is within the ALT or AAPA estate, section 62M provides an exemption from any requirement in the AAPA Act, or the terms of the grant of any interest by the ALT or AAPA such as a lease etc to obtain the prior approval or consent of the Minister for Indigenous Affairs, the AAPA or the ALT to enter into a housing management agreement or a residential tenancy agreement issued pursuant to a housing management agreement. It would be inefficient and impractical for these bodies to have to approve or consent to every such agreement.

62M. Application of *Land Administration Act 1997*

Subsection (1) defines **reserved Aboriginal land** for this section – self explanatory.

Subsection (2) makes clear that the provisions and requirements in the *Land Administration Act 1997* apply to Crown land that is also “Aboriginal land” as defined in clause 9 of this Bill.

Subsection (3) is an ‘avoidance of doubt’ provision confirming that the issuing of residential tenancy leases over Aboriginal land has always been consistent with the reserve purpose of reserved Aboriginal land. That is, the lease is granted in accordance with the specified “permitted use” allowed by the reserve purpose of the land – “for the use and benefit of Aboriginal inhabitants” (however that purpose is defined). It is considered prudent to set the record straight to confirm that such leases accord with the reserve purpose of that land. This certainty is required to ensure that any residential tenancy lease issued by the Authority or an appointed agent under an agency agreement is not subject to any unnecessary legal argument over this matter.

Part 3 – Aboriginal Affairs Planning Authority Act 1972 amended

Clause 10. Act amended

This Part amends the AAPA Act.

Clause 11. Section 33A inserted

This new section is inserted in the AAPA Act:

33A. Power to grant leases over Part III land

New section 33A is an ‘avoidance of doubt’ provision confirming that the AAPA and the ALT have always had the power to grant a lease over Aboriginal Reserves that come under Part III of that Act. As the AAPA Act was drafted more than 30 years ago there may be potential for technical argument over these powers in respect of Part III lands, and it is considered prudent to set the record straight to confirm that the AAPA and ALT have the power to lease in relation to such land. This certainty is required simply to ensure that any housing management agreement entered into between the AAPA or ALT and the Authority in respect of Part III reserves is not subject to delay due to any unnecessary legal argument over this matter.