

<b>Board Meeting:</b> March 2019	<b>Agenda Number:</b> 10 (i)	<b>Record No:</b> ED19/2108
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# LORD HOWE ISLAND BOARD

## Business Paper

### OPEN SESSION

#### ITEM

Lord Howe Island Land Allocation Review - Implementation Update

#### RECOMMENDATION

It is recommended that the Board note progress to date on implementation of the *Lord Howe Island Land Allocation Review*.

#### BACKGROUND

In February 2014 the Honourable Justice Handley AO was engaged by the NSW Department of Premier and Cabinet to review the land allocation and tenure systems on the Island and provide advice to the Minister for the Environment.

The purpose of the review was to identify options for different land allocation methods and forms of tenure which would maintain and protect the unique environmental and cultural values of the Island. The forms of tenure and allocation methods were to be transparent, fair, financially sustainable and recognise the needs of current and future generations of Islanders.

The Terms of Reference identified four key areas for consideration:

1. Forms of tenure
2. Land allocation methods
3. Strategies to increase land and housing supply
4. Economic sustainability.

The Terms of Reference are attached at "A".

Mr Handley visited the Island in March 2014 to undertake targeted consultation with a range of stakeholders including Board members, staff of the Board and residents. Fifteen individual meetings were held on the Island and Mr Handley also attended a number of meetings in Sydney with stakeholders.

A Discussion Paper was prepared and released for public comment in August 2014. The Discussion Paper outlined 15 options for reform in the areas identified in the Terms of Reference. Mr Handley made a second visit to the Island in August 2014. The options were outlined at a public meeting and Mr Handley later met individuals privately to receive their feedback.

Fifty-nine submissions were received, both written and verbal from individuals or families and four were received from groups or institutions. The majority of the submissions were from Island residents.

Mr Handley completed the review and reported his findings to the Government in November 2014. A government response to the review was considered by Cabinet in August 2016. The review report and the draft government response were released to the LHI community with an opportunity to comment in November 2016. The final Government response to the review was released in April 2017.

### **CURRENT POSITION**

An implementation plan was developed and was presented to the Board in March 2018. An implementation update has been prepared and is attached at "B".

### **RECOMMENDATION**

It is recommended that the Board note progress to date on implementation of the *Lord Howe Island Land Allocation Review*.

**Prepared:** Justin Sauvage, Manager Environment & Community Services

**Endorsed:** Peter Adams, Chief Executive Officer

**Attachments:**

Attachment A: Terms of Reference

Attachment B: Implementation Update Table – March 2019

## Appendix 1: Terms of Reference

### Background

All land on Lord Howe Island is owned by the Crown, with ownership and transfer of land controlled by the *Lord Howe Island Act 1953* (the Act). Perpetual leases are granted for residential purposes and special leases are granted for other purposes including agricultural production. To encourage a permanent residential community on the island, priority for leases is given to individuals with 'Islander' status. This status is defined as anyone who has resided continuously on the island for a period of 10 years.

Land is subject to strict controls and provisions under the Act and the Lord Howe Island Local Environmental Plan 2010 (LEP). Given the limited supply of residential land, the increasing population and increasing demand for land on the island, the Lord Howe Island (LHI) Board has adopted a policy to guide the allocation of the limited number of dwellings that are able to be approved (the Allocation and Granting of Dwelling Entitlements Policy).

The Gleeson review of Lord Howe Island Governance Arrangements (completed in June 2012) flagged land allocation and tenure as issues requiring further investigation. Consequently, the ballot process for the allocation of land has been put on hold and a comprehensive review of land allocation and tenure arrangements is now required.

### The Review

The Hon. Ken Handley AO QC has been appointed by the NSW Government to undertake a comprehensive review of the current arrangements for land allocation and tenure on Lord Howe Island.

The objective of the review is to provide advice to the Minister for the Environment and Heritage on options for new land allocation and forms of tenure, including options for increasing supply of land and improving economic sustainability. In addition, the review will consider the intergenerational issues which arise from current restrictions on land access.

In particular the review will:

- Examine the current arrangements for land allocation and tenure on LHI. This includes existing policies and legislative frameworks.
- Identify future options for land allocation and tenure and assess the relative merits of the options.
- Make recommendations to the Government on the future options for land allocation and tenure.
- Provide advice to the Government on the legislative and/or regulatory impacts of future options.

In undertaking this Review, consultation will be undertaken with key stakeholders and Lord Howe Island residents in order to identify the risks and challenges with the current arrangements and to seek feedback on future options.

The review will not seek to open the definition of Islanders that is used for the purpose of identifying who should have access to land.

### **Project Governance**

The review will be managed by the NSW Department of Premier and Cabinet. A project reference group will be established to advise on matters related to the project and to ensure that the project is being undertaken according to plan.

Key to Colour coding:

<b>Status of Progress: Colour of the cell represents the implementation status of the recommendation and the organisation responsible.</b>
Recommendation In place, no further action required.
Responsibility of the Lord Howe Island Board – Implementation in progress.
Responsibility of the State Government – not yet implemented.
Not supported by State Government – will not be implemented

Recommendation	Lead organisation	Progress
1. Retain the present system of land tenure, with most Crown land outside the Permanent Park Reserve held under perpetual or special lease	N/A	In place. No further action required.
2. Properly police and enforce the residency condition in perpetual leases, with forfeiture as a last resort.	Lord Howe Island Board	- Guidelines in place for assessing applications for suspension in residency conditions. - A review of compliance with the residency condition on existing lease has been undertaken and reported to Board. - Letters and replies sent/received. Status in CEO's report. - Actions and recommendations to come to Board in individual reports as actions and applications made and assessed. Firm guidelines for such monitoring and future reviews to be developed.
3. Special leases are due to expire in 2015, without any legal right of renewal, although the lease holders expect to obtain renewals. The new leases should be granted for 20 year terms with strong covenants to encourage new investment and ensure that the land is fully and properly used.	Office of Local Government	Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.
4. Permissive occupancies for business purposes, principally as boat sheds, which are currently revocable at will, should be granted for fixed terms of 5 years, to increase security of tenure and encourage investment.	Not applicable	Recommendation not supported by Government.
5. Restrictions on the enforcement of mortgages of leases should be relaxed to make leases more acceptable to lenders as security and mortgages to corporations should not require the Minister's consent.	Office of Local Government	Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet

Recommendation	Lead organisation	Progress
		following Caretaker Period.- Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.
6. The restrictions on who can occupy a dual occupancy dwelling should be relaxed	Lord Howe Island Board	- To be included in the major review of the Lord Howe Island Local Environmental Plan. Incorporated into the Stage 1 LEP review.
7. Subject to pending applications for approval of a Category A dwelling the remaining quota for new dwellings under the LEP should be reserved for dual occupancy dwellings.	Not applicable	Recommendation not supported by Government.
8. The LEP should be amended to make it easier to subdivide perpetual leases with 2 existing detached dwellings erected before 28 October 2005 to increase the saleable housing stock without further building development, or use of the quota.	Lord Howe Island Board	- To be included in the major review of the Lord Howe Island Local Environmental Plan. This review is not proposed to be undertaken until completion of the Community Strategic Plan.
9. There should be no more Category B allotments, and the 3 existing ones should revert to special lease land where substantial restitution by both parties is practicable and the former leaseholder agrees. Where restitution is not practicable or the former leaseholder does not agree, the allotment or allotments should be allocated by a revised ballot process open to Islanders deemed eligible.	Lord Howe Island Board	- Mediation process completed. Board Staff implementing next steps.
10. The provisions in the Act dealing with the succession to perpetual leases on death should be rationalised, clarified and extended to surviving spouses and de facto partners	Office of Local Government	Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.
11. The existing exemption from land tax for all leases on the island should be removed to allow the Land Tax Management Act to operate on the island in the normal way. The Chief Commissioner and the Board should be permitted to exchange information to ensure that leaseholders only claim one principal or usual place of residence.	Office of Local Government	Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.
12. The Board should comply with its statutory duty under s 301(1) of the Duties Act by requiring grants, transfers and mortgages of leases to be stamped or marked exempt before they are registered by the Board.	Lord Howe Island Board	Implemented. Applicants advised of this requirement via the notification of acceptance for form 5.

Recommendation	Lead organisation	Progress
<p>13. In the interest of transparency and accountability, should recommendations 11 and 12 be adopted, provision should be made for the additional taxation revenue, raised from the island in these ways, to be returned to the island by being credited to the Lord Howe Island Account (s 34).</p>	<p>Not applicable</p>	<p>Recommendation not supported by Government.</p>
<p>14. The legal framework under which the Board and the Minister consider applications for consent to the transfer of perpetual leases should be strengthened to prevent vendors evading the maximum price provision by requiring purchasers to purchase their furniture and other chattels at prices above their fair market value, and to prevent vendors withdrawing their lease from sale when an Islander is willing to purchase the lease.</p>	<p>Office of Local Government</p>	<p>- Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.</p>
<p>15. In the interests of transparency and accountability, the Board should maintain and publish in its Annual Report to Parliament (s36A) separate accounts for its functions as custodian and manager of the Permanent Park Reserve, and its functions as the local council for the Settlement. The island community cannot reasonably be expected to pay for the upkeep of the Park out of its own resources.</p>	<p>Office of Local Government</p>	<p>Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.</p>
<p>16. Miscellaneous recommendations by way of statute law revision which are not thought to raise any question of principle.</p> <p><i>Miscellaneous recommendations are as follows:</i></p> <p>i) Section 12 (1)(g) gives the Board power to ‘provide...shops, offices and other buildings for lease to the public’. There is some doubt about the Board’s power to lease land associated with such buildings. The matter should be put beyond doubt by adding to subsection (1)(g) the power to include in such a lease the land associated with or surrounding such buildings.</p> <p>ii) Section 21(2) enables perpetual leases to be granted to two or more Islanders as joint tenants or tenants in common, but subsections (7A) and (7B) only refer to joint tenants. They should be amended to include tenants in common.</p> <p>iii) Section 21, which only deals with perpetual leases provides in subsection (7A): ‘The Minister may...suspend the condition of residence on a lease held or owned... by...an Islander who already...holds or owns...or subleases not more than one other lease.’</p>	<p>Office of Local Government</p>	<p>Required legislative changes are being pursued. - Initial draft amendments received from Parliamentary Counsel and to be reviewed before submission to Cabinet following Caretaker Period.</p>

In its context the expression 'not more than one other lease' may refer to a perpetual lease only, and not to a special lease or one granted under section 12(1)(g), but the subsection should be amended to make this clear. This provision is used, and properly used, to allow a holder to operate tourist lodge on one perpetual lease and have his or her home on another.

iv) Section 22(3) provides that a special lease may only be granted to the holder of a perpetual lease, but there is no expressed requirement for the perpetual leaseholder to remain the holder of the special lease. In *Lance Wilson v The Minister for the Environment* (No 2294 of 1992) the Equity Division of the Supreme Court held that there was no implied requirement for the holder to remain the holder of both leases. The plaintiff, who retained his special lease after he had transferred his perpetual lease, succeeded in having the forfeiture of his special lease set aside. Given the evident policy behind section 22(3), that special leases should be held by Islanders who have their usual home on the Island, to prevent them being held by non-residents and non-Islanders, the result appears anomalous. Section 22(3) should be strengthened by the addition of words such as 'and must continue to be held by such holder but may be transferred with such lease or to an Islander who holds a perpetual lease but does not already hold a special lease' or words to that effect.

v) Section 27(1) dealing with forfeiture provides:

'Every lease...shall be liable to be forfeited if any rent be not paid...or upon breach of any condition annexed to the lease...or if it should appear to the satisfaction of the Minister after report by the Board that the land comprised in the lease is not used and occupied bona fide for the purpose for which the lease was granted, or where in pursuance of any other provision of this Act the lease becomes liable to forfeiture.'

Every forfeiture must be declared by the Minister by notification in the Gazette (section 27(2)), but there is no express requirement in subsection (1) for the Board to report to the Minister in cases of forfeiture for non-payment of rent or breach of any condition other than that relating to the purpose for which the lease was granted. Subsection (1) should be amended to require a report from the Board in every case where forfeiture is sought.