



Environment,
Climate Change
& Water



**Draft report: review of the
*Lord Howe Island Act 1953***

Cover photo: B. Malcolm

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Department of Environment, Climate Change and Water NSW
59–61 Goulburn Street
Sydney
PO Box A290
Sydney South 1232

Phone: 131 555 (NSW only – publications and information requests)
Phone: (02) 9995 5000 (switchboard)
Fax: (02) 9995 5999
TTY: (02) 9211 4723
Email: info@environment.nsw.gov.au
Website: www.environment.nsw.gov.au

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Summary of review findings

The review found that the objectives of the Act remain valid. It is proposed, however, that the intended objectives be clarified through the inclusion of specific objective provisions, including an objective that provides that the Island's limited residential accommodation should be available for people who are committed to living permanently on the Island.

The review found that the terms of the Act are generally appropriate for securing the objectives, although some minor changes are proposed to improve the operation of the Act as follows:

Islander privilege provisions

- The Islander privilege provisions, including the definition of an Islander, the requirement for leases to be offered to Islanders before non-Islanders, the Valuer-General's determination of lease transfer prices, and the residency conditions, all work together to support a permanent and committed residential community. Requiring perpetual leaseholders to live on the land subject to the lease is an effective way of maintaining a permanent resident Island community. The Minister has the ability to declare someone to be an Islander, or suspend the condition of residence in special circumstances. These special circumstance provisions mean that unreasonable or anomalous situations can be resolved without weakening the Islander privilege provisions.

However, there is no power for the Minister to suspend the Islander privilege requirements for subleasing. The requirement for a perpetual leaseholder with a residency exemption who wants to sublease their property to offer it to an Islander before a non-Islander means that the property owner may not have discretion as to who subleases their home. This may be inappropriate and unreasonable in some circumstances. It is therefore proposed that an exemption to this rule should be provided in special circumstances, on application to the Lord Howe Island Board (the Board).

Environment protection and conservation

- The Act has strong environment protection and conservation provisions, including the dedication of the Lord Howe Island Permanent Park Preserve and the Board's charter, and only minor amendments are proposed to these provisions. These include:
 - amending section 19A to clarify that an Act of Parliament is required to revoke any part of the permanent park preserve
 - amending section 11 to provide that the Board's general functions refer to the Island's marine and terrestrial ecosystems and habitats
 - updating and clarifying the definition of 'Island' to ensure it extends seaward out to three nautical miles to encompass State waters.

It is noted that other NSW and Commonwealth laws apply to the Island and that these provide additional environment protection and conservation safeguards.

The Board

- The Board's seven-member structure is appropriate and works well. However, it is proposed that reference to the 'Island Committee' be removed from the long title of the Act because it was abolished following the Act's 1981 amendments.

The review found that the governance provisions in the Act, which were significantly strengthened in 2004, are appropriate and adequate. There are numerous opportunities to seek a review or redress for a Board decision if an Island resident is dissatisfied with the Board's conduct.

The Board's monopoly on wholesale liquor sales was also found to be appropriate. While being anti-competitive, it generates significant revenue for the Island to fund the provision of municipal and other services on the Island. However, it is proposed that a comprehensive study be undertaken to identify the most efficient and equitable funding model for the operation of the Board and provisions of services on the Island, consistent with the objectives of the Act and the Board's charter, and taking into account the recommendations of previous studies.

1. Introduction

a. The Island

Lord Howe Island is located 760 kilometres north east of Sydney in the Pacific Ocean. It is 11 kilometres long and between 0.3 and 2 kilometres wide, with a coral reef lagoon on the south west side. It is 1,455 hectares in area, of which only 398 hectares is in the lowland settled area. It is believed to be the remnant of a large shield volcano and has a diverse landscape with mountains, valleys, hills, lowland areas and sea cliffs. It lies at the same latitude as Port Macquarie and has a moderate climate.

In recognition of its outstanding biodiversity, uniqueness and international importance, it was inscribed on the World Heritage List in 1982. Known as the Lord Howe Island Group, the site consists of the main island and smaller outlying groups of islands and rocks, including the 551-metre-high pinnacle of Balls Pyramid which is 23 kilometres south of the main island.

The Island is a drawcard for scientists seeking to learn more about its endemic species and tourists wanting to experience the Island lifestyle and appreciate its spectacular beauty. Three-quarters of the Island is protected in the Lord Howe Island Permanent Park Preserve.

The Island has a small permanent residential community of about 350 people. Many of these can trace their ancestry back to the original settlers of the Island, while others who have come to the Island for work or other reasons have made the Island their home. European settlement started in 1834 and there is no evidence of earlier inhabitants.

b. The Act

The *Lord Howe Island Act 1953* (the Act) provides for the care, control and management of Lord Howe Island to protect its unique values and the interests of its residents. The Act is supported by the Lord Howe Island Regulation 2004 (the Regulation), and contains provisions that deal with the following topics:

- governance of the Island – the constitution, powers and functions of the Lord Howe Island Board (the Board) and the role of the Minister
- election and appointment of members to the Board to represent the Island community
- administration of all land on the Island, including the creation and management of leases, reserves and parks
- licensing of all businesses on the Island
- importation and use of motor vehicles on the Island
- construction and use of moorings on the Island
- importation of animals and birds to the Island and the keeping of livestock
- importation of seeds and plants to the Island
- sale and consumption of alcohol on the Island
- waste treatment and management on the Island.

Under the Act, the Lord Howe Island Board manages the Island's affairs subject to the control and direction of the Minister. The Board's custodial duties and powers are greater in some respects than those of local councils.

The Act can be accessed at www.legislation.nsw.gov.au. The Act, and information sheets on certain aspects of the Act, can be obtained from the Board on request.

The Regulation contains some of the more operational or detailed provisions made pursuant to the Act and will be subject to a different review process. The *Subordinate Legislation Act 1989* requires that regulations be reviewed and remade every five years. Regulation reviews can be postponed for 12 months at a time, for up to five years, with the Minister's approval.

The Regulation is due to be remade in September 2010. However, it is intended that the remake of the Regulation be postponed until September 2011. This will enable the review of the Regulation to take account of any issues that arise from the review of the Act, as well as any changes to the Act that may follow the review.

c. The review

The Act is administered by the Minister for Climate Change and the Environment. The Act was substantially amended in 2004 by the *Lord Howe Island Amendment Act 2004*. Amongst other things, provisions were added to the Act requiring the Minister to review the Act after five years to determine whether its objectives remained appropriate and the terms of the Act were effective in achieving those objectives.

This review recommends minor amendments to the Act to improve its operation. This draft report presents these recommendations. Once finalised, the review report, including any recommendations for legislative change, will be tabled in Parliament.

To inform the review, the Minister released a discussion paper outlining the key provisions of the Act and the review process (refer to Attachment A), and placed advertisements in the NSW media on 27 May 2009 inviting people to make submissions on the review. The Minister wrote directly to the Ministers of key portfolios and other stakeholders inviting submissions. Submissions closed on 31 July 2009 and 64 submissions were received.

The review considered issues raised in written submissions, together with personal communication with Island residents, the Board and the Board's staff.

As a second opportunity for public involvement in the review, this draft report is being publicly exhibited until Wednesday 10 March 2010.

To make a comment on the review findings, please write to:

Project Manager
Lord Howe Island Act Review
Department of Environment, Climate Change and Water
PO Box 1967
HURSTVILLE NSW 1481

or email LHI.ActReview@environment.nsw.gov.au.

The closing date for submissions is **Wednesday 10 March 2010**.

2. Objectives – are the policy objectives of the Act still valid?

Unlike some Acts, the *Lord Howe Island Act 1953* does not contain specific objectives provisions. However, the original long title to the Act sets clear objectives:

‘An Act to make provision for the care, control and management of Lord Howe Island; to constitute a Lord Howe Island Board and an Island Committee and to define their respective powers, authorities, duties and functions; to make provision relating to the tenure of land upon the said Island; to validate certain matters; and for purposes connected therewith.’

‘Care, control and management’

‘Care, control and management’ means looking after both the settlement area and the Island’s unique environment, particularly the Lord Howe Island Permanent Park Preserve. For the settlement area, it means providing the Island community with appropriate services and facilities, and supporting the wellbeing of Island residents and visitors. For the Island’s unique environment, it means protecting the permanent park preserve, the Island’s species and ecosystems and the Island’s World Heritage values; and supporting a sustainable tourism industry.

‘Constitute a Lord Howe Island Board’

To ‘constitute a Lord Howe Island Board’ means providing appropriate governance for the Island community for the care, control and management of the Island – both the community living in the settlement area, and the Island’s unique environment.

‘Make provision relating to tenure of land’

All land on the Island is vested in the Crown. To ‘make provisions relating to tenure of land’ is about having rules controlling the ownership of leases so the interests of Islanders who have made Lord Howe Island their home are accounted for.

The Board’s charter provides guidance on achieving the Act’s objectives at a more detailed operational level.

Issues raised in public submissions

- The Act does not contain explicit objectives provisions.

Review findings

- The objectives of the Act, as outlined above, remain valid. Lord Howe Island is a World Heritage site and has high conservation values. It is also home to a community of about 350 people and is a unique tourist destination. A well serviced and well governed permanent residential community that cares for the Island’s conservation values and provides services for visitors to the Island is important in ensuring the continued protection of the Island’s conservation values and supporting a sustainable tourism industry.
- It is proposed that the Act be amended to include explicit objectives provisions, which reflect the Act’s long title and the Board’s charter, to clarify the intention of the Act, including an objective that the Island’s limited residential accommodation should be available for people who are committed to living permanently on the Island.

3. Land tenure, property rights and Islander privileges

The Act vests the Island in the Crown (section 16). The Act also clearly provides that Crown lands are not to be dealt with except under and subject to the provisions of the Act (section 18).

The Act also provides for: perpetual leases for residency; special leases, generally for agriculture; and permissive occupancies for purposes such as boatsheds or communications infrastructure. The Act defines 'Islanders' and provides certain privileges regarding land tenure.

The Minister, guided by the recommendations of the Board, has ultimate discretion in approving the granting and transfer of leases, and ultimately, who occupies Crown land. Before the Act came into force in 1953, residents had permissive occupancies granted by the then Board of Control, with no security for the homes they had built on the Island.

Perpetual leases

Perpetual leases for up to two hectares of land can be granted for residential purposes. Such leases can also be used for tourism accommodation, as licensed under the Act and Regulation.

The leaseholder or subleaseholder must reside on the land. However, the Minister, on the recommendation of the Board, may suspend the condition of residency, for example, if someone is sick and cannot reasonably reside on the land, or if the leaseholder holds a second perpetual lease on the Island.

The Act also allows for subleasing and joint tenancy.

Special leases

The Minister may grant special leases for agriculture or other uses to perpetual leaseholders for up to 10 years on the recommendation of the Board. The Board must report any objections to the granting of a special lease to the Minister.

Land subject to a special lease tends to be the most suitable land for future development because it is cleared and modified. Compensation is payable to special leaseholders if the lease is required for residential housing or public purposes.

Provisions that give Islanders property rights privileges over non-Islanders are:

- Islanders, as defined by section 3(1) of the Act, have first call on perpetual lease transfers and opportunities to sublease (non-Islanders can only take up leases if no Islander is willing and able to) (section 23(4)).
- The price for perpetual lease transfers is determined by the Valuer-General. The fair market value takes account of the values of the unimproved land, the improvements on the land and, if used for commercial purposes, the value of the business (section 23(1)).
- There is a condition of residency on perpetual leases (a home 'without any other habitual residence' (section 21(7))).
- Perpetual leases can only be bequeathed, with any certainty, to any Islander, or the leaseholder's direct lineal descendants (for example, son, daughter, grandson, granddaughter) (section 23(11)).

These provisions work together to achieve the Act's objective to support a permanent residential community on the Island, by giving Islanders first choice on the limited supply of residential accommodation, capping the price of a lease to increase affordability, and requiring that leaseholders reside permanently on the land subject to the lease, except under special circumstances. This discourages speculative investment because future sales prices may be limited, and the residency requirement would require an investor to permanently reside on the property.

By protecting the Island's unique environment and the interests of Island residents, these provisions may have significant economic implications with regards to property. The review found that the benefits of these provisions outweigh any adverse economic effects that may occur, and the objectives of the Act can only be achieved by these provisions. This issue is discussed further below.

a. The definition of Islander

The Act defines an Islander as a person who has resided on the Island continuously for 10 years, or who was an Islander before the 1981 amendments commenced. In special circumstances the Minister, on the recommendation of the Board, may declare someone to have retained or acquired the status of an Islander (section 3(1)).

Islanders have privileges with regard to perpetual leases. Non-Islanders can only take up leases if no Islander is willing and able to. While there are different ways of becoming an Islander, the Act does not distinguish between different types of Islanders.

Issues raised in public submissions

- Islanders who can trace their ancestry back to the original settlers of Lord Howe Island should be recognised under the World Heritage Convention, should have their specific local identity recognised and preserved, and should have first call for perpetual leases over other Islanders and non-Islanders.
- All Islanders should be treated equally.

Review findings

- The definition of an Islander is appropriate for securing the objectives of the Act. It is a critical component of the provisions that work together to secure a permanent residential Island community.
- It is not appropriate for the Act to define different types of Islanders because it would not be appropriate to discriminate between long-term permanent Island residents based on their ancestry, and it would not further the objectives of the Act. Lord Howe Island was inscribed on the World Heritage List in 1982 for its natural scientific values, including its exceptional natural beauty and biodiversity values, but not for its cultural heritage values.
- The ability for the Minister to declare a person to be an Islander in special circumstances allows any unreasonable or anomalous situations that may arise to be addressed in a transparent manner.
- It is proposed that section 3(1)(b), which defines an Islander as someone who resided on the Island and was an Islander before the 1981 amendments to the Act, be removed because it is captured by section 3(1)(c), which defines an Islander as someone who has resided on the Island continuously for the immediately preceding 10 years.

b. Condition of residency

Perpetual leases carry a requirement of residency (section 21(7)), which is defined as ‘residing by the person referred to in the context continuously and in good faith ... as his or her usual home, without any other habitual residence’ (section 3(1)).

Issues raised in public submissions

- The residency requirement for perpetual leases is too restrictive and may not be appropriate for modern trends in work, investment and travel.
- The condition of residency is not complied with or enforced.

Review findings

- The requirement of residency for perpetual leaseholders is appropriate for securing the objectives of the Act. While it is appreciated that modern trends in work, investment and travel make it more likely for individuals to have more than one home, requiring perpetual leaseholders to live on the land subject to the lease is an effective way of maintaining a permanent resident Island community. The Board (section 21(7)), or the Minister (section 21(7A)) can suspend the condition of residency or attach conditions, reservations and provisions to the lease (section 21(8)) to deal with any special circumstances (sections 21(7)–21(8)).
- The current definitions of ‘reside and residence’ are appropriate for securing the land tenure and community objectives of the Act (section 3(1)). To clarify the definitions further and address current compliance issues, the Board could develop policy, guided by its charter, to define what is deemed to be ‘with no other habitual residence’.
- Enforcement and compliance issues are outside the scope of the review.

c. Transfer of leases at fair market price as determined by the Valuer-General

The sale price of a lease must not exceed its fair market value, as determined by the Valuer-General. The fair market value is to take account of the value of the unimproved land, the improvements on the land and, if used for commercial purposes, the value of the business (section 23(1)).

In determining fair market values, the Valuer-General’s methodology takes into account the unique Lord Howe Island market, trends in market appreciation in comparable areas, and the value of the home or business on the lease.

Issues raised in public submissions

- The Valuer-General’s determination of the transfer price may be anti-competitive and discourage certain land uses because the value of the land has been lowered.

Review findings

- The requirement that the Valuer-General determine the price of lease transfers is appropriate for securing the objectives of the Act. By keeping the price to a fair market value, and preventing speculative investment, Islanders are less likely to be priced out of the market. While these provisions might work to restrict competition, the review found that the benefits of the Islander privilege provisions, in securing the Act’s objective of supporting a permanent residential community, outweigh any costs that might result from restrictions in competition.

d. Bequeathing of property in a will

The Minister, on recommendation of the Board, has ultimate discretion in approving the transfer of leases in all circumstances, including the bequeathing of perpetual leases in a will.

A perpetual leaseholder can leave their property to anyone they choose. However, the Islander privilege provisions in the Act limit the ability to transfer bequeathed leases to non-Islanders, unless:

- the beneficiary is a direct lineal descendent of the person bequeathing the property in a will (section 23 (11))
- the Board is satisfied that no Islander is willing and able to buy the lease (section 23(4))
- the Minister declares the beneficiary to be an Islander because of special circumstances (section 3(1)(d)) or
- the Minister allows the executor or administrator of the lease to hold it until such time as the beneficiary becomes an Islander. This might suit Island residents who have resided on the Island for almost 10 years and will soon meet the definition of 'Islander'.

If the beneficiary of a will is restricted from taking up ownership of, and residence on, the perpetual lease, they will instead secure the financial benefit of the bequest. If the beneficiary is not restricted from taking up ownership and residence, they have two years to make necessary arrangements before the residency condition applies.

Issues raised in public submissions

- The limitations on the bequeathing of perpetual leases deny Islanders a basic human right and are discriminatory against Islanders without children.
- The current two-year limit for beneficiaries to take up residency (section 23(11)) should be extended to 10 years.

Review findings

- There is no legal basis for the claims that limitations on the bequeathing of perpetual leases are denying Islanders basic human rights or are discriminatory against Islanders without children.
- A perpetual leaseholder can bequeath their property to anyone they choose. The restrictions on the ability for beneficiaries of bequeathed leases to take up residence are appropriate for securing the objectives of the Act. These provisions are a key component in directing limited residential accommodation to Islanders who are committed to living permanently on the Island.
- The provisions that allow the Minister to declare someone to be an Islander (section 3(1)(d)) provide appropriate opportunities to consider special circumstances, such as widows of Islanders who do not yet meet the definition of 'Islander', but intend to continue living permanently on the Island.
- The current two-year limit for beneficiaries of bequests to take up residency is reasonable and appropriate for securing the objectives of the Act. The Act provides that the Minister may approve a longer period (section 23(11)), which provides flexibility in dealing with special circumstances that may arise, such as those where two years may not be enough to support a beneficiary moving to take up permanent residence on the Island.

e. Subleasing

Perpetual leaseholders can sublet their lease, including part of the lease or a dwelling on the lease, but only with consent from the Minister, and the Governor if the proposed sublessee is a non-Islander (section 23(2)). Subleasing is an important mechanism in providing accommodation for Island residents.

The Islander privilege provisions discussed above apply to subleasing as well as the transfer of perpetual leases: a sublease is to be made available to willing and able Islanders before non-Islanders; the residency requirement of the perpetual lease carries over to any subleasing arrangements; and only individuals can sublease and there are restrictions preventing corporate entities from subleasing. The Act is silent on the price to be paid for a sublease.

Issues raised in public submissions

- Getting Ministerial or Governor approval for all non-Islander residents to sublease land or a dwelling on the Island, is an unnecessary administrative burden.
- The requirement for a perpetual leaseholder with a residency exemption who wants to sublease their property to offer it to an Islander before a non-Islander means that the property owner does not have discretion as to who subleases their home. This may be inappropriate and unreasonable in some circumstances.

Review findings

- The Minister's role in determining who has the right to occupy Crown land, including through subleasing, is consistent with the land tenure provisions in the Act and helps to secure the objectives of the Act. However, it is proposed that the process for approving subleasing be streamlined.
- While it is an objective of the Act that the Island's limited residential accommodation should be made available to people who are committed to living permanently on the Island, in some circumstances it may not be appropriate to require a leaseholder to sublease their home to an Islander if they would not be a suitable tenant. It is proposed that an exemption to this rule should be allowed in special circumstances, on application to the Board. The objectives of the Act can be achieved through the provisions that require Ministerial approval and permanent residency, and that prevent corporate entities from subleasing property.

4. Environment protection and conservation

The Lord Howe Island Act specifies that all land on the Island belongs to the Crown. It dedicates the Lord Howe Island Permanent Park Preserve and provides guiding principles for environment protection and conservation under the Board's charter.

The Board's charter

The Board's charter provides principles and guidance for environment protection and conservation on the Island. The Board is to 'manage, protect, restore, enhance and conserve' the environment, consistent with the principles of ecologically sustainable development, and is to act in a manner that recognises the Island's World Heritage values. Importantly, the Board is 'to have regard to the long term and cumulative effects of its decisions', which apply to all the Board's activities (section 5).

Lord Howe Island Regulation

Under the Lord Howe Island Act the Governor may, but is not required to, make regulations for wide ranging matters, including environment protection on the Island. Penalty infringement notices may be issued for offences that are prescribed by the Lord Howe Island Regulation as being committed against the Act or the Regulation.

Lord Howe Island Permanent Park Preserve

The northern and southern ends of the main island, and the adjacent small islands, including Ball's Pyramid, are dedicated as the Lord Howe Island Permanent Park Preserve for the 'public purpose of preserving native flora and fauna'. A revocation of this dedication can only be made by an Act of Parliament (section 19A).

Part 5 of the *National Parks and Wildlife Act 1974* applies to the preserve, requiring the Board to prepare and adopt a plan of management as if the preserve were a national park. The current plan of management for the preserve was adopted in 1986. A draft revised plan of management is being finalised.

World Heritage

The Lord Howe Island Group, including the surrounding islands and waters, was added to the World Heritage List in 1982. World Heritage properties are matters of national environmental significance under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. An action that is likely to have a significant impact on a matter of national environmental significance must be referred to the Commonwealth Minister for the Environment, Heritage and the Arts, and may require his or her approval.

Marine parks

The Island is surrounded by NSW waters out to three nautical miles and Commonwealth waters out to 200 nautical miles.

The NSW Lord Howe Island Marine Park was created in 1999, under the *Marine Parks Act 1997*, to protect the marine environment. It comprises all Crown lands beneath tidal and coastal waters surrounding Lord Howe Island to mean high water mark, together with those waters. The marine park covers an area of some 48,000 hectares. There is a zoning plan for the park and activities in the park are regulated under the Marine Parks (Zoning) Regulation 1999 and Marine Parks Regulation 2009.

The Lord Howe Island Marine Park (Commonwealth Waters) was created in 2000 to protect the marine environment of the Commonwealth waters and is estimated to be

over 300,000 hectares in area. There is a management plan for the park and activities in this park are also regulated under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

Lord Howe Island Regional Environmental Plan

The Lord Howe Island Regional Environmental Plan (the REP) is made under the *Environmental Planning and Assessment Act 1979* and controls planning and development on the Island. All regional environmental plans under the *Environmental Planning and Assessment Act 1979* have been deemed state environmental planning policies. However, the Lord Howe Island REP is intended to become the Lord Howe Island Local Environmental Plan. Reference to the REP has been maintained in this document for ease of reference and because it is commonly known as such.

The REP is not being reviewed as part of the review of the Lord Howe Island Act. It came into force on 28 October 2005 and is a key instrument in protecting the unique values of the Island. The REP:

- allows the Board to approve only 25 new dwellings over the next 20 years. The Board must specify the number of dwellings it will approve within a given period, which has been set at twelve, five, five, then three for each five-year block
- caps the number of tourist beds at 400.

Under the Lord Howe Island Act, the Board is the consent authority for development (section 15A).

Other legislation

The conservation values of Lord Howe Island are also protected by numerous interacting mechanisms, including:

- the *National Parks and Wildlife Act 1974*, which protects native species across NSW, regardless of tenure
- the *Threatened Species Conservation Act 1995*, which requires certain actions to be taken to protect threatened species and ecosystems.

Commonwealth legislation also applies to Lord Howe Island. Under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, proposed developments that are likely to impact on the World Heritage values of the Island or on a species that is listed as threatened under that Act need to be referred to the Commonwealth Government.

Issues raised in public submissions

- The Act should require the Board to inquire into how climate change could be taken into account in a more comprehensive way in management plans and legislation.
- The environment protection and conservation provisions in the Act could be strengthened.
- The 400-tourist bed limit currently in the REP should be included in the Act.
- The definition of 'Island' (section 3(1)) should be amended to include the extent of NSW waters around Lord Howe Island and specifically include the sea bed, so State marine park ecosystems are adequately included in the Island's management.
- The general functions of the Board relating to protection and conservation (section 11(3)) should be amended to include the Island's marine and terrestrial ecosystems and habitats.

- The Board should be required to assess the environmental impact of any new use proposed for a special lease, and to refuse the application if it would degrade any of the natural or cultural heritage values of the Island.
- Regarding the purposes of the permanent park preserve (section 19A), ‘preserving’ should be replaced with ‘conserving’.
- Reference to ‘bird’ in section 38(2A) should be deleted because it is already covered by the definition of ‘animal’.
- Section 19A, which dedicates the permanent park preserve, should be amended to clarify that an Act of Parliament is required to revoke any part of the preserve.

Review findings

- The provisions of the Act are appropriate for securing the Act’s environment protection and conservation objectives. The key environment protection and conservation provisions in the Act are the Board’s charter (sections 5(1)(e) and 5(1)(f)), the general functions of the Board (section 11(3)), the dedication of the permanent park preserve (sections 15B, 19, 19A and 19B), and the power to make regulations for a wide range of environment protection and conservation purposes.
- The Act’s provisions, particularly the Board’s charter to ‘manage, protect, restore, enhance and conserve the Island’s environment’, consistent with the ‘principles of ecologically sustainable development’ (section 5(1)(e)) adequately provide for dealing with the impacts of climate change. Guidance on how to address climate change will come from other sources, such as ongoing research and modelling relating to the impacts of climate change, which will be continually improved and updated as scientific understanding is improved.
- The 400-bed limit is an important mechanism in protecting the environment and is appropriately contained in the key environmental planning instrument, the Lord Howe Island Regional Environmental Plan.
- It is proposed that the definition of Lord Howe Island be amended to update the language and include land and waters out to three nautical miles, consistent with the Lord Howe Island Marine Park.
- It is proposed that the general functions of the Board relating to protection and conservation (section 11(3)) be amended to include reference to the Island’s marine and terrestrial ecosystems and habitats.
- It is not necessary to require additional environmental assessment requirements for any new use proposed for a special lease because the existing environment protection and planning provisions in the Act, and the *Environmental Planning and Assessment Act 1979*, provide adequate protection for the natural and cultural heritage values of the Island.
- It is not appropriate to replace the word ‘preserving’ with ‘conserving’ because it would create an inconsistency with the name of the Lord Howe Island Permanent Park Preserve, which was created in 1981 and is well known as such. Further, such an amendment would not afford any greater or lesser protection.
- Reference to ‘bird’ in section 38(2A) should be maintained because it provides clarity.
- It is proposed that section 19A, which dedicates land as the permanent park preserve in perpetuity, be amended to clarify that an Act of Parliament is required to revoke any part of the permanent park preserve.

5. Sustainable tourism

Tourism is a key industry on the Island, providing valuable income for Island residents, while also allowing visitors to appreciate the Island's unique values. The Lord Howe Island Act provides for the promotion of tourism in the Board's charter, subject to environment protection and conservation principles. The Board has broad powers with regard to controlling and regulating commercial activities, including those relating to tourism.

A 40% increase in tourists visiting the Island from 2001 has benefited the Island, but also increased the impacts on the Island's environment and infrastructure and added to the costs of providing appropriate services. The Board is limited in its options for equitably raising additional revenue.

Cap on tourism accommodation

The number of tourist beds is capped at 400 in the Lord Howe Island Regional Environmental Plan. Capping the number of tourists on the Island is a key mechanism in protecting the environment and has become part of the Island's unique appeal. Under the Lord Howe Island Regulation, a commercial undertaking, including provision of public accommodation, requires a licence from the Board. Licences, including for tourist accommodation, are transferable with the consent of the Board. Under the Lord Howe Island Regional Environmental Plan, development consent cannot be granted for tourism development unless the total number of people (over the age of five) permitted in tourist accommodation across the Island will be less than 400. There is no direct link between licences and consents for tourism development, other than through the Board's administration under the two instruments.

Issues raised in public submissions

- When planning controls are reviewed, objectives relating to built form (development) and environment protection should be drawn together. Such review may be timely given the need for new investment to refresh and renew accommodation facilities.
- The granting of licences for tourism accommodation and development consents should be linked so they occur simultaneously.
- The powers of the Board to license tourism businesses (section 13) should be amended so the Board can ensure that tourist numbers, tourist activities and tourism operations on the Island are consistent with the principles of ecologically sustainable development and do not degrade the natural heritage values, including World Heritage values, of the Island.

Review findings

- An environmental planning instrument, such as the Lord Howe Island Regional Environmental Plan, is the appropriate mechanism to set a cap on tourist accommodation.
- Linking the allocation of bed licences and development consents under the Lord Howe Island Regional Environmental Plan would be inappropriate because the bed licences are already allocated and any significant re-allocation is highly unlikely. However, this may be considered as part of a review of the Lord Howe Island Regional Environmental Plan.
- Streamlining the granting of commercial licences and approvals for development is supported. However this does not require changes to the provisions in the Act.

- It is not necessary to amend the powers of the Board regarding tourists and licensing businesses (section 13) because the Board is already required to manage, protect, restore, enhance and conserve the Island's environment in a manner that is consistent with, and promotes the principles of, ecologically sustainable development under its charter (section 5).

6. Lord Howe Island Board

The Act provides for the constitution of the Lord Howe Island Board (section 4) and establishes the governance arrangements for the Island. The Board has various powers and functions, including:

- care, control and management of the Island, including its trading affairs
- protection and conservation of fisheries, flora and fauna
- fire management
- provision and maintenance of public utilities such as roads and sewage
- the receipt of rents for leases, fees for licences it grants and services it provides, and the loan of money to leaseholders to buy leases or make improvements on leased land.

The Board is guided by its charter. The charter includes principles of community leadership, ecologically sustainable development, multiculturalism, the needs of children, consistency, non-bias and the long-term and cumulative effects of its decision making.

The Lord Howe Island Act also sets out the procedures for elections. All residents on the electoral roll can vote, though only Islanders can contest elections for positions on the Board.

a. Structure of the Board

The seven-member Lord Howe Island Board consists of four elected Islanders and three members appointed by the Minister: a member to represent tourism and business; a member to represent the environment; and a member from the Department of Environment, Climate Change and Water.

The size of the Board has increased since the Act was first made: in 1981 it increased from three to five members; and in 2004, it increased from five to seven members.

This structure ensures adequate representation of Island community interests and gives the elected Islanders the majority in decision making, except when there is a conflict of interest, in which case the appointed members can ensure independence. The appointed members bring broad and relevant expertise which recognises the importance of tourism and conservation to the Island.

Issues raised in public submissions

- The Board should be reduced from seven members to five.
- If an elected member withdraws due to a conflict of interest, an appointed member should also withdraw, to maintain an Islander majority.
- The Board does not adequately protect or encourage tourism.

Review findings

- The current Board structure is appropriate and important in achieving the objectives of the Act because it maintains an Islander majority, ensuring adequate representation of Island community interests while also representing the interests of NSW and expertise in tourism and environmental management and conservation.
- Importantly, the current Board structure allows for appropriate procedures when a conflict of interest arises, while generally also maintaining an appropriate quorum

to make decisions. While a higher number of Board members increases the chance of a conflict of interest arising, it also means that when a Board member withdraws from decision making because of a conflict of interest, there are more people from the Lord Howe Island community remaining to deliberate on the decision.

- It is not appropriate to require an appointed member to withdraw from decision making to maintain an Islander majority because this would further reduce the numbers for decision making and there would be unavoidable difficulties in determining which appointed member would withdraw.
- The provisions in the Act are appropriate for supporting a sustainable tourism industry on the Island. The promotion of the Island as a tourist destination is clearly reflected in the Board's charter (section 5(1)(g)).

b. Governance

Governance in small communities such as on Lord Howe Island must be sufficiently robust to deal with conflicts of interest. The governance provisions in the Act were significantly strengthened in 2004, following concerns about governance on the Island.

For good governance, the Lord Howe Island Act provides:

- power for the Minister to remove an elected Board member from office for corrupt conduct, as defined by the Independent Commission Against Corruption
- power to make regulations for meeting procedures consistent with those for local government
- requirements for Board members to disclose pecuniary or other conflicts of interest and to not take part in Board deliberations on those matters
- power for the Minister to make a determination, following appropriate consultation, if there is no quorum at a meeting of the Board because of pecuniary or other conflicts of interest.

Issues raised in public submissions

- The governance provisions in the Act should be strengthened, including by establishing a governance committee, established by statute, to ensure the Board complies with appropriate standards.
- Islanders should be able to participate in the decision making process, particularly regarding the increase in the bed tax.
- The Board should have its powers curtailed.

Review findings

- The Act provides appropriate provisions for good governance, as outlined above. There is no need to establish a governance committee.
- Procedures for Board meetings, including a requirement to publish reasons for Board decisions, are included in clause 108 of the Lord Howe Island Regulation and would more appropriately be addressed in the review of that Regulation.
- The current level of opportunity for community involvement in decision making on Lord Howe Island is appropriate for achieving the objectives of the Act. Residents on Lord Howe Island have significant involvement in decision making through a high representation per capita of elected representatives and open board meetings.

- The Board's powers, as provided for in the Act, are commensurate with its functions and responsibilities.
- If residents are concerned about a particular issue that the Board has dealt with, there are numerous avenues for consideration or redress, if required. These include appeal to the Board, or appeal to an elected Islander representative on the Board, the NSW Ombudsman, the Independent Commission Against Corruption, and ultimately the Minister, who has the power to remove a Board member.

c. Funding

The Board has broad powers to raise revenue (section 15). The Board also carries out the functions of a local government authority. It is responsible for providing a wide range of services to the Island community and its visitors, including roads, the airport, public health and safety, regulation of building and development, recreation and convenience facilities, water supply and sewage, electricity, wharves and anchorages.

Rents

The Act provides for payment of rent by leaseholders. Rent is to be paid to the Board for perpetual leases and special leases at a rate determined every three years, subject to the Regulation. Prior to the 2004 amendments, the Act provided that the maximum perpetual lease rental was set at \$200 per hectare, could be revised only every 10 years, and could not be increased by more than \$100 per hectare.

The current regulation sets the maximum rent payable at \$150 per perpetual lease, plus \$0.215 for every square metre (\$2,150 per hectare) and \$50 per special lease, plus \$0.017 for every square metre (\$170 per hectare). The Board can review the annual rental payment every three years, or when a lease is transferred to a non-Islander. The rent is currently set at less than half the maximum allowable, at \$150 per perpetual lease, plus \$0.0103 for every square metre (\$103 per hectare) and \$50 per special lease, plus \$0.008 per square metre (\$80 per hectare). Rent payments for leases make up about 1.4% of the Board's revenue.

Rental payments will be considered in detail as part of the review of the Lord Howe Island Regulation.

Liquor

The Act provides for the Governor to make regulations for the introduction, use and sale of liquor on the Island (section 38(2)(a)(ii)). The Lord Howe Island Regulation provides that a person must not, except in accordance with the approval of the Board, sell or distribute alcohol on the Island.

The Board's liquor store is conducted as a wholesale and retail outlet. Sales are currently about \$1.5 million with a net margin of 22%, equating to about \$330,000 in revenue. The Board uses this revenue to fund environmental and social obligations, such as infrastructure maintenance, visitor facilities and environmental programs.

The Board currently employs a full-time manager, a part-time sales assistant and a few casual staff in its liquor store. There are 22 liquor licences, which cost \$327 each annually. This represents about 3.5% of the Board's revenue and is the equivalent of five permanent full-time field officer positions. This revenue burden is shared by both Island residents and visitors because visitors make up a large proportion of customers in liquor outlets licensed by the Board.

Issues raised in public submissions

- The funding model created by the current funding provisions in the Act is inefficient and inequitable, particularly regarding rents. All lease charges are the same, regardless of land use or value. This means that a perpetual lease used as a small and basic residence pays the same amount of rent to the Board as a large commercial tourist lodge.
- The provisions creating the Board's monopoly on wholesale liquor are anti-competitive.

Review findings

- Provisions for the collection of rent are appropriate. Rent amounts, which are in the Lord Howe Island Regulation, will be examined as part of the review of that Regulation. Other mechanisms are available to address land use and equity issues.
- The provisions that give the Board the power to regulate the introduction, sale and distribution of wholesale liquor on the Island are appropriate for achieving the objectives of the Act. While the Board's monopoly on liquor sales has specific industry impacts and may be considered anti-competitive under the terms of National Competition Policy, the net public benefit outweighs the potential costs:
 - The liquor provisions secure significant revenue for the Board to provide services to the community, protect the environment and conserve the Island's unique natural and cultural heritage values.
 - The Board's annual permit fee of \$327 is significantly less than mainland liquor licence fees and provides a financial advantage to Island businesses that offsets any perceived anti-competitiveness.
 - The Board's monopoly enables the ordering, transport and wholesale selling of liquor to be efficiently centralised in a small community. Smaller businesses benefit under the current arrangement by avoiding additional storage, freight and administrative costs.
 - The Board's liquor sales generate jobs for Island residents.
 - It is likely that the bulk of revenue generated from liquor sales comes from visitors to the Island. This is considered appropriate because visitors are major beneficiaries of the services provided by the Board. The effect of a tax on liquor prices is unlikely to be a deterrent for tourists.
 - Removing the Board's monopoly on liquor sales would result in the loss of significant revenue, which would need to be offset by other revenue generating measures, which would be more likely to be borne by the Lord Howe Island community.
- An efficient and equitable funding model is essential for the Board to meet the objectives of the Act and follow its charter. It is proposed that a comprehensive comparative study be undertaken to identify the most efficient and equitable funding model for the Island, taking into account the recommendations of previous studies.

7. Other review findings

Lord Howe Island Regulation making powers

- The powers for making regulations under the Act are appropriate for securing the Act's objectives.

The long title of the Act

- It is proposed that reference to the 'Island Committee' should be removed from the Act because it no longer exists following the Act's 1981 amendments.

Interaction with other legislation

- It should be clarified that the Lord Howe Island Act is the primary Act applying to the Island and its surrounding waters. To the extent of any inconsistency with other legislation, such as the Marine Parks Act and the Environmental Planning and Assessment Act, the Lord Howe Island Act should clearly prevail.

8. Issues outside the scope of the Lord Howe Island Act review

Issues raised in the submissions that are outside the scope of the LHI Act review are listed below.

Lord Howe Island Regulation

Issues

- Part 5 of the Lord Howe Island Regulation needs to include references to fauna. It currently only refers to flora.
- Board meeting procedures, including Board meeting agendas and minutes, should be required to be published on a website.
- Motor vehicles need to be managed on the Island.
- There are overlaps and inconsistencies with the Marine Parks Act and Regulation. For example, the Lord Howe Island Act and Regulation have restrictions on collecting and harming sand, shells and coral, whereas the Marine Park Act and Regulation allow for certain quantities of these to be collected.
- Board staff should be authorised to enforce regulations.

The Lord Howe Island Regulation is due to be remade in September 2010. However, it is intended that the remake of the Regulation be postponed until September 2011. Issues raised in the submissions regarding the Lord Howe Island Act review that relate to the Lord Howe Island Regulation will be considered as part of that review.

Lord Howe Island Regional Environmental Plan

Issues

- The site restriction of 15% for the building envelope, together with the minimal dwelling size, should be reviewed.

The Lord Howe Island REP is administered by the Minister for Planning under the *Environmental Planning and Assessment Act 1979*.

Administration of the Act

Issues

- The Act should be administered by the Premier or the Treasurer.

The administration of legislation is determined by the Governor, on the advice of the government of the time via the allocation of the administration of Acts.

The tourist levy

Issues

- Marketing about the tourist levy and how it is spent would enhance visitor experience and satisfaction and may serve to reinforce the connection between the environment, tourism and local economy.

This is outside the scope of the Lord Howe Island Act review and would more appropriately be dealt with as a policy initiative of the Board.

**Attachment A: Discussion paper (as released on
27 May 2009)**

Five Year Review of the Lord Howe Island Act

A discussion paper

May 2009

The purpose of this paper is to outline the matters that relate to the *Lord Howe Island Act 1953* (LHI Act) and obtain public comment on those matters.

Why are we reviewing the LHI Act?

The LHI Act is administered by the Minister for Climate Change and the Environment. The Act was substantially amended in 2004 by the *Lord Howe Island Amendment Act 2004*. Amongst other things, provisions were added to the Act requiring the Minister to review the Act after five years to see if the objectives of the Act remain appropriate and to see if the terms of the Act are right for achieving those objectives.

This review has now commenced and a report on the outcome of the review is to be tabled in Parliament before 24 March 2010.

This review will not result in a rewrite of the Act, but may make recommendations on how the Act could be improved.

Why are Acts reviewed?

Acts are often reviewed, usually five years after they have been commenced, to check that their objectives are still valid, and to ensure they are drafted to effectively deliver on those objectives.

Sometimes, reviews find ways that Acts could be improved. If this is the case, the review may recommend changes so that the terms of the Act can better meet the Act's objectives.

What does the LHI Act do?

The LHI Act provides for the care, control and management of Lord Howe Island to protect the unique values of the Island and to protect the interests of the Island's residents. The LHI Act is supported by the *Lord Howe Island Regulation 2004* (LHI Regulation), and contains wide-ranging provisions that deal with the following topics:

- governance of the Island – the constitution, powers and functions of the Lord Howe Island Board and the role of the Minister
- election of members to the Board to represent the Island community
- administration of all land on the Island, including the creation and management of leases, reserves and parks
- licensing of all businesses on the Island
- importation and use of motor vehicles on the Island
- construction and use of moorings on the Island
- importation of animals and birds to the Island and the keeping of livestock
- importation of seeds and plants to the Island
- sale and consumption of alcohol on the Island, and
- waste treatment and management on the Island.



Under the Act, the Lord Howe Island Board is required to manage the Island's affairs subject to the control and direction of the Minister responsible for the Island. The Board's custodial duties and powers are greater in some respects than those of local councils. For example, it provides services, issues development approvals, oversees lease creation and lease transfers and has wide planning powers, especially with regard to tourism.

The LHI Act can be accessed at www.legislation.nsw.gov.au. The Act is also available from the Board on request, as well as Information sheets on certain aspects of the Act.

The LHI Regulation

The LHI Regulation contains some of the more operational or detailed aspects of the LHI Act's provisions and will be subject to a different review process. The *Subordinate Legislation Act 1989* requires that regulations be reviewed and remade every five years. Regulation reviews can be postponed for 12 months at a time, for up to five years, with the Minister's approval.

The LHI Regulation is due to be remade in September 2009. However, it is intended that the remake of the Regulation be postponed until September 2011. This will enable the review of the Regulation to take account of any issues that arise from the review of the Act, as well as any changes to the Act that may follow the review.

What are the objectives of the LHI Act?

The LHI Act does not contain specific objectives provisions like some Acts do. However, the original long title to the Act sets clear objectives:

‘An Act to make provision for the care, control and management of Lord Howe Island; to constitute a Lord Howe Island Board and an Island Committee and to define their respective powers, authorities, duties and functions; to make provision relating to the tenure of land upon the said Island; to validate certain matters; and for purposes connected therewith.’

What is meant by ‘care, control and management’?

‘Care, control and management’ is about looking after both the settlement area and the Island's unique environment, particularly the Lord Howe Island Permanent Park Preserve. For the settlement area, it is about providing the Island community with appropriate services and facilities, and supporting the wellbeing of Island residents and visitors. For the Island's unique environment, it is about protecting the Permanent Park Preserve, the Island's species and ecosystems, the Island's World Heritage values and supporting a sustainable tourism industry.

What is meant by ‘constitute a Lord Howe Island Board’?

To ‘constitute a Lord Howe Island Board’ is about providing appropriate governance for the Island community for the care, control and management of the Island – both the community living in the settlement area, and the Island's unique environment.

What is meant by ‘make provision relating to tenure of land’?

All land on the Island is vested in the Crown, reflecting the value of the Island to NSW. To ‘make provisions relating to tenure of land’ is about having rules controlling the ownership of leases so that the interests of Islanders who have made Lord Howe Island their home are accounted for.

A brief outline of the history of Lord Howe Island Act is attached to this discussion paper.

What are we reviewing?

We are reviewing the objectives of the Act, and the terms of the Act to see if they are appropriate for achieving those objectives.

In considering the objectives as described in the long title of the Act, the review should consider at least:

- caring for the Lord Howe Island community and environment
- governance – the way in which care, control and management of the Island is achieved by the Board
- land tenure – a key function in protecting the unique values of the Island and protecting the interests of Island residents.

We are also reviewing the terms of the LHI Act to see if they are appropriate for achieving those objectives.

Conserving the environment and way of life

The LHI Act provides that all land on the Island belongs to the Crown. It dedicates the Lord Howe Island Permanent Park Preserve and provides guiding principles under the Board’s charter.

The environmental values of Lord Howe Island are also protected by numerous interacting mechanisms, including the:

- LHI Regulation
- Lord Howe Island Regional Environment Plan (REP), which is made under the *Environmental Planning and Assessment Act 1979* (EP&A Act)
- *National Parks and Wildlife Act 1974* (NPW Act), which protects native species across the NSW, regardless of tenure, and
- *Threatened Species Conservation Act 1995*, which requires certain action with regard to threatened species and ecosystems.

Some Commonwealth legislation also applies to Lord Howe Island. Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), proposed developments likely to impact on the World Heritage values of the Island or on a species that is listed as threatened under that Act need to be referred to the Commonwealth Government.

The Board’s Charter

The Board’s charter provides principles and guidance for environment protection and conservation on the Island. The Board is to ‘manage, protect, restore, enhance and conserve’ the environment, consistent with the principles of ecologically sustainable development, and is to act in a manner that recognises the Island’s World Heritage

values. Importantly, the Board is 'to have regard to the long term and cumulative effects of its decisions'.

Lord Howe Island Permanent Park Preserve

The northern and southern ends of the main island, and the adjacent small islands, including Ball's Pyramid, are dedicated as the Lord Howe Island Permanent Park Preserve for the 'public purpose of preserving native flora and fauna'. A revocation of this dedication can only be made by an Act of Parliament.

Part 5 of the NPW Act (Plans of management) applies to the Preserve, requiring the Board to prepare and adopt a plan of management as if the Preserve were a national park. The current plan of management for the Preserve was adopted in 1986. A draft revised plan of management is on exhibition until 29 June, available at www.environment.nsw.gov.au/parkmanagement/LordHoweIslandpomdraft.htm.

World Heritage

The Lord Howe Island Group, including the surrounding islands and waters, was added to the World Heritage List in 1982. World Heritage properties are matters of national environmental significance under the EPBC Act. An action that is likely to have a significant impact on a matter of national environment significance must be referred to the Commonwealth Minister for the Environment, Heritage and the Arts, and may require his or her approval.

Marine Parks

The Island is surrounded by NSW waters out to three nautical miles and Commonwealth waters out to 200 nautical miles.

The NSW Lord Howe Island Marine Park was created in 1999, under the *Marine Parks Act 1997*, to protect the marine environment and comprises all ocean waters and the ocean bed between the mean high water mark to three nautical miles from the territorial sea baseline of Lord Howe Island, the Admiralty Islets, Ball's Pyramid and South East Rock, covering an area of some 48,000 hectares. There is a zoning plan for the park and activities within the park are regulated under the *Marine Parks Regulation 1999*.

The Lord Howe Island Marine Park (Commonwealth Waters) was created in 2000 to protect the marine environment of the Commonwealth waters and is estimated to be over 300,000 hectares in area. There is a management plan for the park and activities within this park are also regulated under the EPBC Act.

Lord Howe Island Regulation

Under the LHI Act the Governor may, but is not required to, make regulations for wide ranging matters, including environment protection on the Island. Penalty infringement notices may be issued for offences that are prescribed by the LHI Regulation as committed against the Act or the Regulation.

Lord Howe Island Regional Environment Plan

The Lord Howe Regional Environment Plan (REP) is made under the EP&A Act and controls planning and development on the Island and is not being reviewed as part of the review of the LHI Act. The REP came into force on 28 October 2005 and is a key instrument in protecting the unique values of the Island. The REP:

- allows the Board to approve only 25 new dwellings over the next 20 years. The Board must specify the number of dwellings it will approve within a given period, which has been set at 12, five, five, then three for each five-year block, and
- caps the number of tourist beds at 400.

Under the LHI Act, the Board is the consent authority for development.

Governance

The Act constitutes the Lord Howe Island Board and establishes the governance arrangements for the Island community. The seven member Board consists of four elected Islanders and three members appointed by the Minister: a member to represent tourism and business, a member to represent the environment, and a member from the Department of Environment and Climate Change.

The Board has various powers and functions in relation to the Island, including:

- care, control and management of the Island, including its trading affairs
- protection and conservation of fisheries, flora and fauna
- fire management
- provision and maintenance of public utilities such as roads and sewerage, and
- the receipt of rents for leases, fees for licences it grants and services it provides, and the loan of money to leaseholders to buy leases or make improvements on leased land.

The Board is guided by its charter, including principles of community leadership, ecologically sustainable development, multiculturalism, the needs of children, consistency and non-bias.

The LHI Act also sets out the procedures for elections. All residents on the electoral roll can vote, though only Islanders can contest elections for positions on the Board.

Governance in small communities such as Lord Howe Island must be sufficiently robust to deal with conflicts of interest. For good governance, the LHI Act provides:

- powers for the Minister to remove an elected Board member from office for corrupt conduct, as defined by Independent Commission Against Corruption (ICAC)
- power to make regulations for meeting procedures consistent with those for local government
- requirements for Board members to disclose pecuniary or other conflicts of interest and to not take part in Board deliberations in those matters, and
- power for the Minister to make a determination, following appropriate consultation, if there is no quorum at a meeting of the Board because of pecuniary or other conflicts of interest.

Land tenure – Islander preference and the interests of NSW

The LHI Act vests the Island in the Crown, reflecting the value of the Island to NSW. The Act also provides for perpetual leases (for residency), special leases (generally for agriculture) and permissive occupancies for purposes such as boatsheds or communications infrastructure. Before the LHI Act came into force, residents on the

Island had permissive occupancies granted by the then Board of Control, with no security for the homes they had built on the Island.

The LHI Act defines an Islander as a person who has resided on the Island continuously for 10 years, or who was an Islander before the 1981 amendments commenced. In special circumstances the Minister, on the recommendation of the Board, may declare someone to have retained or acquired the status of an Islander.

Islanders have preference in the transfer of leases - non-Islanders can only take up leases if no Islander is willing and able to. The sale price of a lease must not exceed the fair market value of the lease, as determined by the Valuer General. The fair market value is to take account of the values of the unimproved land, the improvements on the land and, if used for commercial purposes, the value of the business.

Perpetual leases

Perpetual leases for land up to two hectares can be granted for residential purposes. They can also be used for tourism accommodation, as licensed under the LHI Act and Regulation.

The leaseholder or sublease holder must reside on the land. However, the Minister, on the recommendation of the Board, may suspend the condition of residence, for example, if someone is sick and cannot reasonably reside on the leasehold land, or if the leaseholder holds a second perpetual lease on the Island.

The LHI Act also allows for subleasing and joint tenancy.

Special leases

The Minister may grant special leases for agriculture or other uses to perpetual leaseholders for up to 10 years on the recommendation of the Board. The Board must report any objections to the granting of a special lease to the Minister.

Land subject to a special lease tends to be the most suitable land for future development because it is cleared and modified. Compensation is payable to special leaseholders if the lease is required for residential housing or public purposes.

Islander preference and the transfer of property

The Islander preference provisions for lease transfers and the 'fair market price' for lease transfers, as set by the Valuer General, work together to protect the interests of Islanders, making them less likely to be priced out of the market.

Willing of property

There is nothing to prevent an Islander willing their property to anyone they choose. However, the Islander preference provisions in the LHI Act limit the ability to transfer bequeathed leases to non-Islanders, unless:

- the beneficiary is a direct lineal descendent of the person willing the property
- the Board is satisfied that no Islander is willing and able to buy the lease
- the Minister declares the beneficiary to be an Islander because of special circumstances
- the Minister allows the executor or administrator of the lease to hold it until such time that the beneficiary becomes an Islander.

Other areas relevant to the objectives of the LHI Act

Trade and commercial activities

The Board is responsible for the care, control and management of the affairs and trade of the Island. It has broad powers with regard to controlling and regulating commercial activities, including the tourist trade.

Tourism is a key industry on the Island, providing valuable income for Island residents, while also allowing visitors to appreciate the Island's unique values. The LHI Act provides for the promotion of tourism in the Board's charter, subject to environment protection and conservation principles. The number of tourist beds is capped at 400 in the REP.

Trade in Kentia palms and their seed remains a key industry on the island. Leaseholders have control and ownership of Kentia palm seed on their perpetual leases. Prior to the 2004 amendments, Kentia palm seed was owned by the Board, regardless of where it was located. The 1999 National Competition Policy review of the LHI Act found that the Board's monopoly over the gathering, collection and sale of Kentia palms was anti-competitive.

Services

The Board carries out the functions of a local government authority. It is responsible for providing a wide range of services to the Island community, including roads, the airport, public health and safety, regulation of building and development, recreation and convenience facilities, water supply and sewage, electricity, wharves and anchorages.

Rental payments

The Act provides for payment of rent by leaseholders. Rent is to be paid to the Board for perpetual leases and special leases at a rate determined every three years, subject to the Regulation.

Prior to the 2004 amendments, the Act provided that the maximum perpetual lease rental was set at \$200 per hectare, could be revised only every 10 years, and could not be increased by more than \$100 per hectare.

The current regulation sets the rent at \$150 per perpetual lease, plus \$0.215 for every square metre (\$2,150 per hectare). The Board can review the annual rental payment every three years, or when a lease is transferred to a non-Islander.

How do I make a comment?

Comments are sought from the community in relation to the matters raised in this discussion paper, although comments may also be provided on any issues that the public considers to be of relevance to *Lord Howe Island Act 1953*. To make a comment on the LHI Act, please write to:

Project Manager
Lord Howe Island Act Review
Department of Environment and Climate Change
PO Box 1967
Hurstville NSW 1481

or send an email to LHI.ActReview@environment.nsw.gov.au before 31 July 2009.

What will happen if I make a comment?

All comments received will be thoroughly considered in the review of the LHI Act. All comments received will be considered to be public and may be made available on the DECC website or on request.

Where to from here?

The Department of Environment and Climate Change will be undertaking the review of the Act on behalf of the Minister for Climate Change and the Environment. Other government departments and stakeholders will be invited to make submissions. The Lord Howe Island Board has been briefed on the process for the review of the LHI Act and will also be providing input.

After consideration of the submissions and the issues raised during the review of the Act, a draft report of the review will be released for comment around September 2009 for a period of one month. The final report will be submitted to the Minister for Climate Change and the Environment before the end of 2009.

Attachment

History of the Lord Howe Island Act

From the very early days, Lord Howe Island was highly valued as a unique NSW tourist asset to be vested in the Crown and reserved from sale to private ownership. The Lord Howe Island Board of Control was formed in 1913 and was vested with a permissive occupancy of the whole Island. The Board then issued smaller permissive occupancies to Islanders.

The original *Lord Howe Island Act 1953* (LHI Act) was clear in its intentions: to maintain Crown title to the land, reflecting the value of the Island to NSW, while also giving secure title to Islanders who made the Island their home.

‘Summed up, the object of these land provisions is merely to give to Islanders security over the land on which they have erected their homes. It is not intended that the lands concerned shall become the subject of real estate investment ... There must be security for the Islander and an opportunity for all, inhabitants and visitors, to enjoy the benefits and beauties of such a place’ (Second Reading Speech, Lord Howe Island Bill, 1953).

This Act established the Lord Howe Island Board, which at the time was made up of five mainlanders who were appointed by the Governor and had powers to control the affairs of the Island. It also established an Island Committee, made up of four elected Islanders, to advise the Board.

The LHI Act defined an Islander as someone who held a permissive occupancy before the Act came into force, and automatically included their spouse, lineal descendants and their spouses. There were restrictions on the transfer of perpetual leases. Perpetual leases could only be transferred to non-Islanders if no Islanders were willing and able to take up the lease (as is currently the case). The price paid for a lease could not exceed the value of the improvements on the land, as determined by the Board.

The LHI Act was amended in 1968 to:

- clarify powers for the Minister to grant permissive occupancies, and
- provide for partial lease transfers and surrender of leases.

The LHI Act was amended in 1981 to:

- create the Lord Howe Island Permanent Park Preserve
- include three elected Islanders on the Board, creating an Islander majority on the new five member Board
- abolished the Island Committee
- change the definition of an Islander by
 - broadening it to include people who had resided on the Island for 10 years, and
 - removing the automatic inclusion of spouses and descendants.
- introduce provisions relating to the inheritance of leases
- increase the maximum price for lease transfers to be the fair market value, as determined by the Valuer General.

The LHI Act was amended in 2004 to:

- expand the LHI Board to seven members, maintaining an Islander majority
- introduce the Board’s charter;

- remove the Board's exclusive control trade in Kentia palm seed
- improve governance arrangements
- reduce the period between rent determinations from 10 years to three years and provide power to determine annual rents in the LHI Regulation
- provide for compensation to the holder of a special lease if the land is withdrawn from the lease or not renewed
- enable employment of staff to service the Board under the *Public Sector Employment and Management Act 2002*
- enable authorised officers to issue penalty infringement notices and increase the maximum penalty points in line with the penalties for similar offences under the *National Parks and Wildlife Act 1974*.

Since 1953, administration of the LHI Act has changed from the Department of Lands to:

- Premier's Department in 1983, to
- Department of Local Government in 1986, and to
- National Parks and Wildlife Service, which is now part of the Department of Environment and Climate Change, in 1988.

Published by:

Department of Environment and Climate Change NSW
 59–61 Goulburn Street
 Sydney
 PO Box A290
 Sydney South 1232

Phone: 131555 (NSW only – publication and information requests)
 (02) 9995 5000 (switchboard)

Fax: (02) 9995 5999

TTY: (02) 9211 4723

Email: info@environment.nsw.gov.au

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