
What Is Happening on Keswick Island? – Spotlight on Queensland Island Governance Arrangements

Rhett Martin*

This article focuses on planning and environmental law issues arising from management of Keswick Island (Keswick), located near Mackay off the Queensland coast. At issue is the extent to which head lease obligations have been performed by the head lessee, whether environmental and planning laws and lease conditions have been properly complied with and, where compliance is deficient, whether duly enforced by the Queensland Government, and the impact this has on island residents, including sublessees. Various questions arise about the transfer of the head lease to the current head lessee on Keswick, Oasis Forest Ltd, and their governance of the island, and relationship with sublessees. These questions are relevant to Queensland, and federal environmental and planning laws, administrative decision-making on Queensland Island governance, including how head lessees on Queensland islands are chosen, and the future of Queensland Island tourism and governance.

I. INTRODUCTION

A 100-year head lease to Keswick, was acquired by Beijing backed Oasis Forest Ltd (OFL), formerly China Bloom Limited, in 2019.¹ This lease acquisition was preferred despite interest from Australian based sources. The lease allows OFL access to 20% of Keswick, with the remaining 80% a national park.² Since 2019, a number of concerns have been made by sublessees about OFL's environmental management, its compliance with head lease conditions, its levels of interaction with residents and sublessees, and its attitude to visitors to Keswick. Allegations made by Keswick residents include restrictions on private plane access for defined periods, banning boats from accessing the public ramp, and sublessees not being permitted to advertise rooms on Airbnb. These alleged restrictions have prompted a public campaign to "Reclaim Keswick Island".³ This article considers the impact of OFL and Queensland departmental discretionary decision making on Keswick Island governance and considers implications for other Queensland islands and their governance.

Failure to meet the conditions of a head lease over a Queensland Island such as Keswick could result in lease cancellation or forfeiture under the *Land Act 1994* (Qld).⁴ The relevant provisions state a lessee must perform all of the conditions of tenure failing which there may be a cancellation or forfeiture of tenure. A condition in the Keswick lease requires the island is used for tourism, residential, marine facility, marine works and aerodrome purposes.⁵ Another condition states the lessee must ensure any activities do not cause environmental harm.⁶ OFL reject allegations made against it pertaining to restrictions on

* Associate Professor, Dr Rhett Martin, University of Southern Queensland.

¹ OFL's Australian agent is Greaton Holdings, who has substantial property development projects across Australia. see: <<https://greaton.com.au/about-us/>>.

² Part of the South Cumberland Islands National Park which encompasses nine islands.

³ See George Christensen, *Reclaim Keswick Island* <<https://www.georgechristensen.com.au/reclaim-keswick-island>>.

⁴ *Land Act 1994* (Qld) s 213(1), (2).

⁵ These requirements are stipulated as condition 1 in head lease for Keswick.

⁶ Conditions E21 and E23 of the head lease.

tourism and other matters, reaffirming they are working towards increasing visitation and access to the island for both tourists and future residents. Despite this defence, many residents allege OFL are restricting access while primarily focusing on the Chinese tourism market.⁷ It is beyond the scope of this article to decide what is the true position between the parties, although it is necessary to consider Keswick governance from an environmental and planning law perspective, and how recent developments have impacted sublessees and residents as well as tourism in the region.

Part II looks at the period prior to OFL's acquisition of the head lease in 2019.

II. SOME BACKGROUND ON HEAD LEASEHOLDERS AND ISLAND DEVELOPMENT

In 1995, the Keswick Island Pastoral Company (KIPC) received development approval for an environmentally friendly Special Tourism and Marina Facility on Keswick. The timeframe for completion of the development was 13 years. The marketing material highlighted development approval for two marinas with a total of 250 berths, a 1,500 square metre commercial area, and an aerodrome serviced by regular light plane flights to and from Mackay. Between 1996 and 2002 KIPC appealed against certain conditions of the Mackay City Council (as it then was named) rezoning approval, to the Planning and Environment Court.⁸ The appeal was resolved by a consent judgment, which included the Department of Natural Resources, Minerals, and Energy (now Department of Resources) entering a deed of agreement that addressed an extension of the build time for the marina.

KIPC transferred the head lease to Keswick Island Pty Ltd (KIPL) in 2002. In 2004, KIPL began lobbying the Department of Resources to relax the conditions contained in the Keswick head lease. In 2006, the Minister for Natural Resource and Water, Henry Palaszczuk, approved the removal of various head lease conditions that included the "significant development" clause requiring a AUD150 million land development and an AUD50 million marina development. These changes proceeded without the knowledge and agreement of the sublessees. During this period, lots associated with the airstrip and boat ramp were transferred to KIPL. These transfers enabled KIPL ultimate control over safe access points to the island, and a right to set charges to anyone wishing to use these facilities.

The *Land Act* was amended in 2007 requiring all persons with a registered interest in land subject to a Queensland Government lease be consulted and provide written consent before any changes to lease conditions.⁹ A pattern emerges of sublessees on Keswick not consulted about changes to head lease conditions. In 2008, the head lease for the island was sold to Keswick Developments Pty Ltd (KDPL). During the negotiations, KDPL requested an extension to the build time on the marina. At this point, the sublessees became aware of amendments to the previous head lease, including the removal of the development clause. A deed of agreement between the Department of Resources and KDPL, amended conditions requiring the construction of a deep water boat ramp and jetty and a two-year extension to the build time on the marina. The Department of Resources approved the extension on the proviso that a deep water jetty and boat ramp be constructed as an interim measure pending completion of the marina. The deed of agreement with KDPL stipulated free public access until the marina and public jetty facility were completed. Only the boat ramp was provided, which the current head lessee, OFL closed the ramp to the public from February 2020 until February 2021.

A number of clauses in the 2008 deed of agreement between the Department of Resources and KDPL are at issue. Clause 2.1b(i) of the agreement required the construction of a deep water jetty and boat ramp by the end of 2014. A boat ramp was completed in 2012 and a temporary jetty was installed, but both were wiped out by the effects of Cyclone Debbie in 2017. Clause 2.1b(ii) required the completion

⁷ This is an allegation of a current sublessee in an interview referred to here: *Aussie Locals Squeezed Out of Island Life by Chinese Developer* <<https://9now.nine.com.au/a-current-affair/trouble-in-paradise-chinese-developers-send-aussie-island-locals-and-tourists-packing/4b00ae5f-02c6-4ffe-ba27-cff40c2a0920#:~:text=China%20Bloom%2C%20which%20now%20owns,so%20many%20roadblocks%20for%20locals>>.

⁸ The parties to the consent judgment were Transtate Developments Pty Ltd (on behalf of KIPC) and the Mackay City Council. There is no direct court reference for this consent judgement.

⁹ *Land Act 1994* (Qld) s 210(3).

of a marina, of no less than 60 berths, by the end of 2020, but this was never completed. Clause 2.1b(iii), required the lessee to pay two performance guarantee bonds totalling AUD750,000, and unconditionally guarantee to pay these bonds to the Minister as surety for obtaining approvals for the construction of the deep water jetty and boat ramp. There is ambiguity over whether the bonds were paid, and the guarantee enforced. Assuming the bonds were not paid, and the foregoing clauses were found to be breached, a question arises as to the nature of discussions between the parties and reasons why the sublessees were not properly informed about these matters.

An amendment to the deed of agreement required the lessee to construct a marina with no less than 60 berths within 10 years from the commencement of the lease. Stage 1 required a marine survey to be completed by the end of 2014. Stage 2 required the design and development application to be lodged with Mackay City Council and have all necessary approvals by the end of 2015. Stage 3 required construction to commence by the end of 2016 and completed by the end of 2020. If the lessee failed to complete construction of the marina to the satisfaction of the minister within 12 years from the commencement of the lease, (changed from the original 10 years), the lessee would be liable to a penalty equal to the annual rent paid in accordance with the *Land Act* requirements, for each subsequent year, until completed. The level of enforcement by the Queensland Government of these requirements is directly at issue.

During 2016, Keswick's head lease was actively marketed to Chinese investors by Colliers International. The head lease was transferred to OFL in May 2019. Circumstances surrounding the transfer of the head lease to OFL raise a number of questions. One question is whether potential Australian-based developers who expressed interest in purchasing the head lease were considered by a due diligence process for their suitability as a head lessee. The original asking price for the island was AUD30 million, but a question arises about the final sale price of the head lease to OFL. Calculations on the amount of stamp duty paid indicate the sale price was approximately AUD2.71 million.¹⁰ If this was the final sale price, why was the sale price reduced. If not, then what price was paid, how was it paid and when? Another question is the role of the Foreign Investment Review Board in investigating the transaction? If the land on Keswick is regarded as residential land or land where the acquirer of interest in the land is a foreign government investor, such a transaction is notifiable to the Foreign Investment Review Board.¹¹ How the funds were paid, the amount and the role of the Foreign Investment Review Board, require greater transparency than has been provided to date.

Sublessees allege OFL placed restrictions on island business owners. For example, during August 2019 the owners of three properties operating as Airbnb rentals were allegedly issued with breach notices by OFL and advised they had seven days to close their operations. A request to honour forward bookings for international and domestic bookings was allegedly refused by OFL. In May 2020, fixed-wing flights to Keswick were cancelled, leaving the only air access to the island by helicopter at AUD1300 each way on the condition that the island manager approves the flight.

Sublessees on Keswick expressed frustration over the level of communication with OFL and their Australian agent/developer, Greaton. Keswick residents and sublessees travelled to Brisbane on 12 March 2020 to meet with state government representatives about the restriction on access and lack of communication with OFL. The residents submitted a 250-page submission alleging multiple breaches of the head lease. Some of the allegations referred to obligations under the lease for the lessee to sustainably manage the leased land by conserving the "physical, biological, productive and cultural values on the island" and "must exercise all due care and take every reasonable precaution to protect all flora and fauna on the leased land".¹² The concern, in part, related to foreshore development that the resident/sublessees allege interference with known turtle nesting sites. In June 2020, members of the Department of Environment and Science visited Keswick and reported no evidence of turtle nests or permanent damage to the environment but required OFL to cease all bulldozing unless permits had been issued.

¹⁰ Stamp Duty paid has been assessed as \$136,166.00 on consideration of \$2,706,720.68: transaction no 517500195: client no 3974765.

¹¹ See Allens, *Overview of Australia's Foreign Investment Approval (FIRB) Regime* <<https://www.allens.com.au/insights-news/explore/2022/overview-of-australias-foreign-investment-approval-regime/>>.

¹² Clause 7 and E21 of the head lease with OFL.

Meanwhile, OFL issued a press release in December 2020 stating no turtles had nested on Keswick Island for 10 years and the beach had not been bulldozed.

Why have head lease conditions have not been enforced or sublessees not consulted about changes to lease conditions? On one hand the government is preferencing working with existing head lessees rather than find new head lessees. However, if this reason is correct, this does not explain the lack of consultation with sublessees on Keswick on matters that directly affect them. Sublessees should always be consulted in matters impacting the value of their leasehold interest. Questions arise about the motivations of both the Minister and the Department of Resources. Why were sublessees apparently not consulted about delays in infrastructure development because they would not agree to it? Did KDPL pay the performance guarantee bonds totalling AUD750,000 to the Minister as required? Was due diligence undertaken by the Department of Resources, including inspection of the boat ramp? Finally, did the Department of Resources sign off on compliance with all conditions of the head lease and deed of agreement before approving the transfer and sale of the head lease to OFL? Lack of communication between the Department of Resources, and Keswick sublessees has implications for governance of other Queensland islands. In particular, it is a disincentive for potential sublessees to invest in the island and places into question the viability of future tourism development. An overarching question is the regulatory framework for Queensland Island governance and how it impacts residents and sublessees.

The regulatory framework over Queensland islands is considered in Part III.

III. REGULATORY AND GOVERNANCE FRAMEWORKS

Keswick and other Queensland islands are impacted by various provisions in the *Land Act, Nature Conservation Act 1992* (Qld) if land is a protected area, *Planning Act 2016* (Qld) and relevant Plans of Development and relevant development approvals managed and approved by the Mackay Regional Council (formerly Mackay City Council) and *State Development and Public Works Organisation Act 1971* (Qld). Queensland islands may also be impacted by provisions in the *Marine Parks Act 2004* (Qld), *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Great Barrier Reef Marine Park Act 1975* (Cth). It is also important to note that all land dealings must comply with the *Native Title Act 1993* (Cth) if native title has not been extinguished. Governance arrangements on Queensland islands may also be impacted by lease conditions such as the lease under review in this article between OFL and the Queensland Government, any applicable deeds, or contracts such as the 2008 Deed of Agreement between KDPL and the Department of Resources. This regulatory framework involves all three tiers of government, and this level of government oversight is a potential problem for a lessee in navigating permissions and authorities from different entities for a particular development. For example, sublessees allege a number of non-approved development works were undertaken between December 2019 and February 2020. Multiple representations were made to various government and regulatory agencies in response to these alleged breaches, with each entity absolving themselves of governance responsibility and referring them to another agency.¹³

Understanding the regulatory framework and its attendant obligations, must be considered in light of fundamental obligations arising under the Keswick head lease. The head lease stipulates the lessee “must use the leased land for commercial/business purposes being tourism, residential, marine facility, marine works and aerodrome purposes.” and may be “forfeited if not used for the purpose stated above”.¹⁴ Another provision of the head lease states, “The lessee must, from the commencement of the lease and to the satisfaction of Mackay City Council, develop the leased land in accordance with the Plans of Development approved by the Mackay City Council”.¹⁵ Two issues require investigation in relation to these requirements: (1) the extent the obligations under these instruments are enforced against OFL, and

¹³ The following entities and frequency are noted by sublessees to the author: Mackay Regional Council (six occasions), Department of Natural Resources, Mines and Energy (at least three occasions), Department of Environment and Science (minimum of two occasions), the Great Barrier Reef Marine Park Authority (one occasion).

¹⁴ Clause A61(1) and (2) of the head lease.

¹⁵ Clause C343 of the head lease.

(2) the relationship and level of communication between OFL and stakeholders, particularly sublessees and residents on Keswick. There is also a question of how Mackay Regional Council enforce conditions and obligations in development applications.

Governance of Queensland Island resorts came under scrutiny in recent government inquiry focused on the economic and regulatory frameworks for these resorts (hereafter referred to as the “inquiry”).¹⁶ The purpose of the inquiry was to investigate why some island resorts have become degraded, and identify ways to support appropriate economic, social and cultural development to ensure the islands can be restored for tourists and residents alike. The inquiry noted that most Great Barrier Reef Island resorts were adjoining or including protected area tenures of national parks, such as on Keswick. Keswick Island, like other island resorts head leases, is subject to provisions in the *Land Act*. The development of Keswick is also regulated by Mackay Regional Council under the *Planning Act*. Keswick is subject to development approval from the Commonwealth as part of the Great Barrier Reef Marine Park. Any development in these waters is subject to approvals under the *Environment Protection and Biodiversity Conservation Act*, the *Great Barrier Reef Marine Park Act*, and the *Marine Parks Act*.

Obligations under current head lease conditions directly impact governance arrangements. Audit of leases establishes the extent of compliance with lease conditions and *Land Act* requirements, while also alerting the Department of Resources of non-compliance. The Department of Resources advised the inquiry that its priority is to work with lessees to ensure compliance before enforcement or penalty is imposed.¹⁷ Departmental representatives advised the inquiry there had been no lease revocations for non-compliance of conditions in a tourism lease on any Great Barrier Reef island.¹⁸ The Department of Resources advised the inquiry the absence of revocations primarily relates to financial and commercial implications of a forfeiture of the lease, natural justice requirements and litigation risk if forfeiture was resisted,¹⁹ and lack of departmental capacity to take over the lease in full in the event of revocation.²⁰ Evidence presented by Department of Resources to the inquiry strongly indicated it is not in the commercial interest of the Queensland Government to take over a lease and that a commercial solution was always preferred.²¹ This position fails to account for any other penalty for not complying with head lease conditions, such as enforcement of guarantees or strictly enforcing development conditions pursuant to set timeframes.

The delay in infrastructure development, particularly the marina, may have impacted the value of sublessee holdings. Keswick was the subject of specific commentary by the Inquiry.²² The inquiry looked at the main lease conditions for the construction of a marina and jetty, which were described as key infrastructure conditions of the lease, and an incentive for investors to acquire a home on Keswick. The extension to the build time for the marina in 2008, was on the proviso that a deep water jetty and boat ramp be constructed for free public access to Keswick. Currently, only the boat ramp has been built. This ramp was closed to the public by OFL from February 2020 to February 2021. The 2005 deletion from

¹⁶ Transport and Resources Committee, Parliament of Queensland, *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts* (Report No 31, 57th Parliament Transport and Resources Committee, March 2023) [//C:/Users/u1067051/OneDrive%20-%20USQ/Desktop/Inquiry%20into%20the%20economic%20regulation%20of%20Queensland%20islands.pdf](#) (*Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*).

¹⁷ Department of Resources on behalf of the Queensland Government, Submission No 52 to Transport and Resources Committee, Parliament of Queensland, *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, 19 April 2022, 13.

¹⁸ Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Brisbane, 20 February 2023, 3 in relation to the *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

¹⁹ Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Brisbane, 20 February 2023, 4 in relation to the *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

²⁰ Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Brisbane, 20 February 2023, 8 in relation to the *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

²¹ Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Yeppoon, 26 August 2022, 3 in relation to the *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

²² Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Yeppoon, 26 August 2022, 45–58 in relation to the *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

the head lease of the \$150 million infrastructure development and a \$50 million marina development occurred without the consent from Keswick sublessees, and, prima facie, appears to breach s 210(3) of the *Land Act* dealing with stakeholder consent to lease changes. Questions arise about due process in relation to the changes and why they were agreed to without consent of sublessees, how provisions of the *Land Act* are interpreted and enforced, and the consequences of non-enforcement. The *Land Act* makes clear that a lessee “must perform all of the conditions of the person’s tenure”.²³ Change in conditions were a generous concession to the head lessee given an alternate option was to issue a compliance notice stipulating an alleged breach,²⁴ which could have resulted in a penalty and court orders for compliance.²⁵

Sublessees allege OFL has engaged in actions that restrict tourist access to Keswick and impacted business trading,²⁶ resulting in tourism to the island being adversely affected. The Keswick head lease makes clear the public should have a right to access islands.²⁷ Providing points of access, such as a jetty is a capital cost to the head lessee and is governed by the terms of the lease which require a marina and jetty. The inquiry noted the marina and jetty were not yet constructed (March 2023), the lack of a jetty and boat ramp and that a lack of common use of infrastructure was described as a serious impediment to sublessees that “must be remedied immediately”.²⁸ The inquiry also noted the problem is compounded by the complexity of the approvals process which involves all three levels of government.²⁹

Resident submissions to the inquiry focused on five areas. The first alleged government inaction to uphold lease conditions. The second referred to circumstances surrounding the lease transfer to OFL. The third related to compliance with lease conditions for infrastructure development in the first 10 years of the lease. The fourth covered the system for selecting the head lessee for Great Barrier Reef island leases, and the fifth alleged environmental damage by OFL during its tenure as head lessee.³⁰ Sublessees further alleged OFL restricted access to key destinations on the island, undertook surveillance of some residents, placed signage discouraging tourism on the island, were instrumental in closure of the public barge ramp, restricted commercial and private air access, placed restrictions over residents sub-letting their residences, and failed to adequately communicate to island residents. Sublessees also argued their leasehold interests were devalued and as a result they had limited ability to deal with their land, especially trying to obtain finance for purchase or development on their lease interest. The sublessees also claimed there was a lack of appropriate dispute resolution processes within the regulatory framework to resolve disputes between them and the head lessee. Regulation discussed in this part lacks a process for dispute resolution, which supports the sublessees submission. In fairness, this gap may account for, at least some, of the communication problems between the parties.

The submissions placed some emphasis on their relationship with the head lessee, sublessee’s ability to legally deal with their interest in their land on Keswick, and the level of OFL’s compliance with lease conditions and environmental regulations and the failure of government to rigorously enforce compliance. The resident position was summarised by Mr Craig Gilberd, president of Keswick Island Progress Association (KIPA) as:

- (1) The inaction of all levels of government to uphold their own agreements.
- (2) The circumstances surrounding the transfer of the lease for Keswick Island to OFL.

²³ *Land Act 1994* (Qld) s 213.

²⁴ *Land Act 1994* (Qld) s 214.

²⁵ *Land Act 1994* (Qld) s 214J.

²⁶ List of businesses closed or negatively impacted include: KI Lot Maintenance, Keswick Underwater Adventures, Mega Force Charters, Island Air, Keswick Island Guest House, Horizon Air and Keswick Island Holiday Letting.

²⁷ Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Mackay, 24 August 2022, 5 in relation to *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, 24.

²⁸ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 30.

²⁹ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 32.

³⁰ Transport and Resources Committee, Parliament of Queensland, Public Hearing Transcript, Keswick Island, 25 August 2022, 22 in relation to *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

- (3) The removal of lease conditions pertaining to AUD150,000 million infrastructure development in the first 10 years of the lease.
- (4) The system for selection of head lessees to Great Barrier Reef islands.
- (5) Alleged environmental damage by OFL during its tenure as head lessee.³¹

The allegations included construction of a non-approved house, boat ramp, trailer parking area and road between December 2019 and February 2020. The island resident complained that “Each agency absolved themselves of any governance responsibility and referred us to another agency”.³² Island residents alleged complained of a failure by the Queensland Government to enforce lease conditions, particularly relating to infrastructure development. The residents alleged lack of enforcement of lease conditions impacted the value of sublessees’ property and negatively impacted commercial development of tourism on the island. These problems were compounded by a lack of clear criteria for lease forfeiture and a transition requirements to a new head lessee.

The inquiry noted KIPA alleged OFL had not complied with environmental regulations. KIPA alleged the construction of a non-approved house, boat ramp, trailer parking area and road between December 2000 and 19 February 2020. KIPA recommended to the inquiry that Queensland Island developments be managed by a single portfolio with the required skills and expertise. KIPA also recommended the Queensland Government enforce forfeiture of the head lease for non-fulfilment of lease conditions and appoint a caretaker group to manage the island operations while seeking a suitable candidate to take over the head lease.

In response, OFL submitted to the inquiry that as of April 2022, they were in predevelopment application stages for various development projects which includes a new boat ramp, jetty, eco-resort and marina under a masterplan. Further, pre-lodgment discussions for each aspect of development have been laid before government entities with the intention to submit formal Development Applications to Mackay Regional Council within the next one to two months from April 2022.³³ OFL submitted that Queensland Government leases were issued without consultation with all relevant government entities, something that dragged out the development process.³⁴ A representative of OFL, when asked when key island infrastructure would be delivered, responded by saying the timeframes are, “as soon as possible”, and that the boat ramp is no longer proposed because residents did not want it, and an application to remove the existing barge ramp is the only development application before the Mackay Regional Council.³⁵ The jetty, gangway and pontoon were at a stage close to submission for development approval. OFL claimed the failure to develop the marina was caused by a conflict between the Queensland Government and the Great Barrier Brief Marine Park Authority which restricted development in order to protect marine life, and that a formal development application to Mackay Regional Council was slated to be made in early 2023.³⁶ Currently, at the time of writing,³⁷ the only development permit relating to OFL on Keswick is for removal of the existing boat ramp.³⁸

The inquiry noted that the OFL representative “did not provide substantive answers to questions asked by the committee regarding the reason for the delay in development applications”.³⁹ KIPA submitted that the representations made by the OFL representative:

³¹ Transport and Resources Committee, Parliament of Queensland, Public Hearing Transcript, Keswick Island, 25 August 2022 in relation to *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

³² Keswick Island Progress Association, Submission No 16 to Transport and Resources Committee, Parliament of Queensland, *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, March 2023.

³³ Oasis Forest Limited, Submission No 35 to Transport and Resources Committee, Parliament of Queensland, *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, 5 April 2022, 1.

³⁴ Oasis Forest Limited, n 34, 3.

³⁵ Transport and Resources Committee, Parliament of Queensland, Public Hearing Transcript, Brisbane, 9 November 2022, 1–2 in relation to *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

³⁶ Nicholas Condoleon, Veris, on behalf of OFL, contained in correspondence, 6 December 2022, 2.

³⁷ March 2024.

³⁸ Development Permit, application number PTW-2022-2 (Mackay Regional Council).

³⁹ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 55.

[S]erve to strengthen our ongoing concerns and opinions, formed over many years. Namely that not only do head leaseholders feel that they can breach lease agreements and operate with impunity. ... They are emboldened by the unwillingness or incapacity for any form of investigation by any government agency and little or no response from the Department of Natural Resources or with other Local and State Government Departments responsible for ensuring compliance with the Conditions of the Head Lease, Deeds of Agreement and other Regulatory frameworks that underpins the Keswick Island development.⁴⁰

The Great Barrier Reef Marine Park Authority (Authority) advised the inquiry in December 2022 that a Marine Park permit was issued to OFL in December 2021 for the operation of marine facilities which included a jetty, pontoon, barge ramp and boat ramp, the removal of the existing boat ramp. The Authority also stated there was no existing Marine Park permit for the construction of a marina on the island.⁴¹ The Department of Resources advised the inquiry an application for the owner's consent for prescribed works for the boat ramp and jetty, pontoon and gangway was made to the Department on 4 April 2022 and finalised on 8 April 2022.⁴² At a public hearing at the inquiry on 24 February 2023, departmental representatives were asked about marine infrastructure development by OFL under the terms of the head lease. The representative confirmed that approval from the Great Barrier Reef Marine Park Authority was given and that the Department of Resources provided ministerial consent for work to go ahead, but the six-month timeframe for that consent had now lapsed.⁴³ Negotiations on timeframes for the marina development were allowed to provide OFL sufficient time to obtain approvals and construct the infrastructure. As of 24 February 2023, amendment to the milestone conditions and timeframes had not been finalised, and further discussions with the Great Barrier Reef Marine Park Authority for approval of the proposed marina are ongoing.⁴⁴

The Inquiry noted that sublessees, as residents of the island, deserve to have the level of amenity that was promised to them when they were first purchasing their interests under subleases.⁴⁵ In that respect, the inquiry felt the Queensland Civil and Administrative Tribunal should have the power to consider lease disputes in respect to island leases. The inquiry stated that marine infrastructure be provided as a matter of urgency to meet a condition of the head lease, recommending cancellation of tourism leases where lessees have been non-compliant with these conditions, subject to requirements of natural justice.⁴⁶ The inquiry noted that OFL and its agents have:

[S]ometimes been less than constructive in their dealings with various government agencies regarding the approvals they are seeking, and this correlates with evidence from Keswick Island residents about their experience of communicating and engaging with Oasis Forest and its agents. It also resonates with our own experience as a Parliamentary committee engaging with Oasis Forest. Its agent declined to appear before the committee to provide responses to some very concerning allegations made against Oasis Forest, and the written responses that we did receive, particularly the response from Mr Peter Jones as development manager for Keswick Island, were generally unhelpful. We emphasise that this type of approach to interacting with the government that owns the land on which Oasis Forest hopes to maintain its head lease status should not continue.⁴⁷

The inquiry, referring to the *Land Act*, noted:

The capacity of the Department of Resources to effectively regulate compliance of island resorts with their lease conditions is constrained by legislation that does not appear to be up to the challenge of managing the

⁴⁰ Keswick Island Progress Association, correspondence, 2 March 2023, 1.

⁴¹ Great Barrier Reef Marine Park Authority, correspondence, 22 December 2022.

⁴² Department of Resources, correspondence, 16 January 2023, 5.

⁴³ Transport and Resources Committee, Parliament of Queensland, Public Briefing Transcript, Brisbane, 20 February 2023, 2 in relation to *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

⁴⁴ Department of Resources, correspondence, 24 February 2023, 1.

⁴⁵ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 57.

⁴⁶ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 58.

⁴⁷ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 58.

commercial realities of these lease arrangements, particularly the compliance and enforcement framework to motivate head lessees to meet the terms of their lease.⁴⁸

The inquiry recommended that the Department Resources take “immediate” action to cancel tourism leases where lessees have been non-compliant with lease conditions.⁴⁹ The inquiry also recommended local government should not approve or renew development applications by lessees who are found to be non-compliant with lease conditions.⁵⁰

Part IV considers governance of Keswick in light of matters raised in this part.

IV. REGULATORY OBLIGATION AND GOVERNMENT RESPONSE

Part IV critically assesses actions of government including the level of compliance and enforcement of regulations and lease conditions. This part considers that nature of regulatory obligation and how government should respond to non-compliance. This allows for a measure of critical analysis based on the actual level of enforcement. The analysis relies on inductive reasoning to allow for conclusions based the likely cause of government inaction if found to be present.

The Mackay Regional Council is responsible for planning decisions under the Mackay Region Planning Scheme 2017 version 4.0.⁵¹ A development application for a gangway, pontoon, and jetty on Keswick Island was under assessment by the Mackay Regional Council in 2023. The application is currently in the Information Request Response phase of the Development Assessment Rules.⁵² The current development permit at the time of writing is for removal of the barge ramp.⁵³

It is important to consider the status of development application and the extent of infrastructure development in the context of Keswick head lease conditions. The head lease contains a number of conditions setting out clear obligations on the head lessee. Condition A61(7), for example, states:

The lessee has the responsibility for a duty of care, to take all reasonable and practicable measures to sustainability manage the leased land by conserving the physical, biological, productive, and cultural values, either on the leased land or in areas affected by the management of the leased land.

In addition, clause Condition 343 requires the head lessee to develop the leased land in accordance with development plans approved by the Mackay Regional Council. The head lessee must provide a Performance Guarantee Bond to the Minister as surety for rehabilitation and restoration of the relevant stage of the leased land.⁵⁴ The foregoing lease obligations clearly prioritise the development of the island and the protection of the natural environment. The focus is on developing the tourist potential of Keswick, so a reasonable inference is to questions any action that may seek to limit or otherwise restrict that outcome.

Obligations placed on the Queensland Government under the *Land Act* provide an opportunity to assess government actions in relation to Keswick. The *Land Act* provides the opportunity for an independent assessment of the financial and managerial capabilities of a lessee, as well as forfeiture of the lease where the Minister is satisfied on reasonable grounds there has been a relevant change which can reasonably be expected to detrimentally affect the ability of the lessee to meet lease obligations.⁵⁵ The government, as lessor, in granting a lease must be satisfied a lessee can meet lease conditions, including conditions relating to the development of the land. Assuming the government was satisfied a potential head lessee of Keswick Island could meet head lease conditions, a failure to meet those conditions might have

⁴⁸ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 20.

⁴⁹ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, iv.

⁵⁰ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, iv.

⁵¹ Mackay Regional Council, *Mackay Region Planning Scheme: One Region, One Vision* (Scheme 2017 Version 4.0) <https://www.mackay.qld.gov.au/data/assets/pdf_file/0003/291513/1_MRPS_full_document_-_version_4.0.pdf>.

⁵² This phase is required under *Planning Act 2016* (Qld) s 68.

⁵³ Application Number: PTW-2022-2. Time of writing March 2024.

⁵⁴ Condition 159 of the head lease.

⁵⁵ *Land Act 1994* (Qld) s 130A.

resulted in some form of enforcement activity within a reasonable period. Since the start of Keswick Island tourism development in the 1990s, all head lease holders have had some level of delay or sought to change development timeframes. It is reasonable to assume that a failure to meet lease conditions might have warranted an investigation of a lessee's capacity to do so. Failure to do so means the government has not met the spirit and possibly the letter of an object of the Act, being, "when land is made available, allocation to persons who will facilitate its most appropriate use that supports economic, social and physical wellbeing of the people of Queensland."⁵⁶

The removal of two critical infrastructure and development conditions from the head lease in 2004 came after lobbying from the head lessee at that time. Obligations requiring a AUD150 million land infrastructure investment and a AUD50 million marina development were deleted from the head lease. No sublessee was consulted about these changes. Prima facie this appears to be a potential breach of the *Land Act*. While the relevant section allows for a change to lease conditions, it clearly states such application, "must be accompanied by the written consent of all persons with a registered interest in the leased land."⁵⁷ It is not unreasonable to ask under what circumstances this change was agreed to, given the affect this removal had on the value of sublessees interest, many of whom invested on the strength of these proposed developments. The obligation placed on those seeking the change, is to ensure they obtain stakeholder consent. These consents were not obtained, and a reasonable inference is that the government was aware such consents would probably have not been given.

The *Land Act* also stipulates a lessee must perform all conditions under a lease to the satisfaction of the designated officer of the government according to type of tenure, and non-compliance may result in cancellation or forfeiture of the lease.⁵⁸ The government has a duty to ensure prospective leaseholders of significant developments have sufficient financial and managerial capabilities prior to granting the lease.⁵⁹ Presumably, had such a financial and managerial investigation occurred, this arguably resulted in either forfeiture of the lease or a requirement to meet the lease conditions. While the *Land Act* has limited enforcement provisions, other than the right of forfeiture, they do have a right as lessor to require lease conditions be met. It is open for the Minister to give the lessee an improvement notice that could require removal of or repair of a structure.⁶⁰ In deciding whether to offer a new lease to an existing lessee compliance with conditions of the lease is a factor to consider.⁶¹ In the recent history of Keswick non-compliance with lease conditions from the prior head lessee has not prompted a rigorous compliance obligation to later head lessees. The Minister does have the power to give a remedial action notice in circumstances where the lessee is not fulfilling the duty of care for the land, or in a way that is likely to cause land degradation.⁶² Queensland Government representative acknowledged a willingness to "work with the lessee – the head lessee – in delivering on their obligations as opposed to taking compliance action."⁶³

Of the potential non-compliances that could arise the failure to obtain sublessee consents on changes to lease conditions arguably is the most serious. The removal of infrastructure and development conditions in 2004 were made, according to KIPA, without the knowledge or written approval of all sub-lessees.⁶⁴ In 2008 the new head lessee, KDPL, requested an extension to the build time of the marina, which was approved on condition that a deep water jetty and boat ramp be constructed to provide free public access

⁵⁶ *Land Act 1994* (Qld) s 4.

⁵⁷ *Land Act 1994* (Qld) s 130(3).

⁵⁸ *Land Act 1994* (Qld) ss 213, 234.

⁵⁹ *Land Act 1994* (Qld) ss 129, 130.

⁶⁰ *Land Act 1994* (Qld) s 156A.

⁶¹ *Land Act 1994* (Qld) s 159.

⁶² *Land Act 1994* (Qld) s 214.

⁶³ Keswick Island Progress Association, n 32, 2.

⁶⁴ Keswick Island Progress Association, n 32, 3, which is a potential breach of *Land Act 1994* (Qld) s 210(3).

until such time as the marina was developed, with only the boat ramp built. These changes were not approved by sublessees.

Given the stated purposes of the *Land Act* emphasise the economic, environmental, and social values of the land, it seems reasonable to require meeting lease conditions, especially since meeting lease conditions are mandatory under the Act.⁶⁵ On the one hand it is open to argue the *Land Act* has insufficient criteria and other regulatory mechanisms to force the government to ensure compliance from island head lessees. The government in suggesting it prefers to work with lessees to meet objectives, fails to explain what follow up is undertaken when those objectives are not met. It is open to argue the existing regulatory framework fails to provide adequate governance mechanisms to meet tourism and other development objectives. Further that successive Queensland governments have not been rigorous in enforcing reasonable requirements on head lessees to meet the terms of head leases they knowingly and voluntarily enter into.

The foregoing issues raise questions about the current regulatory framework and governance arrangements for Queensland islands, and what could improve governance performance. Part V considers these questions in more detail.

V. A NEW GOVERNANCE MODEL FOR GREAT BARRIER REEF ISLANDS?

A number of governance improvements are recommended to address compliance enforcement from the lessor/government perspective, and operational compliance from the lessee's perspective. Matters raised in this article are allegations only and are not taken as factual determinations. The recommendations herein are therefore designed to improve governance efficacy to boost tourism development on Queensland islands.

Improvements to governance systems over the islands in the Great Barrier Reef Marine Park, including Keswick, require a methodology for resolution of conflicts between different levels of government. OFL maintains that competing obligations at a federal and state level has effectively brought the marina development to a halt.⁶⁶ OFL had to navigate federal and state entities to address proposed development works on Keswick. Inquiries to the Great Barrier Reef Marine Park Authority confirmed that a marine park permit was issued to OFL in December 2021 for the operation of marine facilities and removal of a boat ramp, although there is no existing marine park permit for the construction of the marina.⁶⁷ Consent was provided by the Queensland Department of Resources for marine works to proceed. The Department of Resources did investigate the activities of OFL for alleged environmental breaches but officially found no evidence of breach and the Department confirmed that no penalties had been issued to OFL. Despite approvals and relevant consents being granted, the delay in the development of marine infrastructure, allowing regular maritime transport to and from the island, remains a key item of contention for the sublessees. While the Inquiry recommended that the Department of Resources "take immediate action to cancel tourism leases where lessees have been determined by departmental audit to be non-compliant with lease conditions",⁶⁸ this must take account of administrative delay from state and federal authorities impacting compliance obligation.

It is incumbent on the government to audit lease compliance and insist on receiving appropriate explanation for matters that are not explainable by administrative delay. An audit of the head lease on Keswick could determine the precise extent of compliance with lease conditions and legislation and where appropriate enforcement should take place. Where there has been substantive non-compliance with lease conditions, government has a right under legislation to take appropriate action including local government who are in a position to review development applications subject to explanation and/or rectification of previous non-compliance.

⁶⁵ See in particular *Land Act 1994* (Qld) s 213(1).

⁶⁶ Transport and Resources Committee, Parliament of Queensland, Public Hearing Transcript, Brisbane, 9 November 2022, 1–2 in relation to *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*.

⁶⁷ Great Barrier Reef Marine Park, correspondence, 22 December 2022 and telephone conference, 6 October 2023.

⁶⁸ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 58.

The *Land Act* requires amendment to ascertain when enforcement is initiated for substantive breach, and the timing and type of enforcement for less substantive breach. While the *Land Act* places an obligation on lessees to perform all of the conditions,⁶⁹ when conditions are not met there is no clear prescription for determining when forfeiture is warranted. The current regulatory framework allows a wide discretion over how to respond to substantive breach. While a collaborative approach to work with head lessees is appropriate in some instances for minor breaches, especially when finding alternate head lessees is at issue, this is not appropriate for substantive breach, especially where potential breaches may impact the value of sublessees' holdings.

The inquiry recommended the Queensland Civil and Administrative Tribunal address lease disputes impacting Queensland Island leases, similar to how it currently handles commercial lease disputes.⁷⁰ The author strongly endorses this recommendation. The absence of a dispute resolution procedure under the *Land Act* is a regulatory gap that needs to be filled quickly to ensure interests of lessees and sublessees are expeditiously dealt with.

The regulatory framework for Queensland Island resorts require guidelines for the management of common-use infrastructure, such as access and egress points for islands and related transport links. Residents and sublessees of these island should be able to access infrastructure impacted by a head lessee's development conditions under a lease. Matters arising from the use of common infrastructure, including maintenance costs, should be subject to minimum obligations and standards under a code of conduct or management agreement.⁷¹ A mandatory code or requirement for a management agreement covering use of common infrastructure, should address dispute resolution procedures.

In relation to planning controls exercised by local council's conditions could be placed on development application approval based on compliance with lease conditions.⁷² Where there has been a history of delay or noticeable changes to development obligations in a lease, it should be a pre-condition of a grant or renewal of a development application that lease conditions be complied with in a timely manner. Approval of development applications should always include express requirements covering ecological protection compliance with state and federal environmental regulations and sustainable development principles.

The inquiry recommended legislative reform that included bonds from head lessees to ensure that development occurs in a timely manner and have due regard to commercial interests of sublessees.⁷³ The author supports this recommendation, which should be instituted promptly in light of continued development delays on Keswick.

VI. CONCLUSION

The regulatory framework for Queensland Island resorts currently delivers a defective governance model. The inquiry contained many recommendations for the sustainable development of Queensland Island resorts, and the author supports calls by local members of Parliament for the inquiry recommendations be adopted in full.⁷⁴ This includes Recommendation 1 calling for cancellation of tourism leases where departmental audit has determined non-compliance with lease conditions, subject to the requirements of natural justice. The absence of lease management protocols and guidelines, codes of conduct for head lessees and procedures to enforce lease conditions, including the enforcement of the forfeiture of lease power, represent a regulatory gap that require immediate rectification. Regular independent audit of the performance of head lessees for island tourism leases is necessary. An independent audit of Keswick

⁶⁹ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, 58.

⁷⁰ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, Recommendations 8 and 12.

⁷¹ This is in line with recommendation 13 for the *Inquiry into the Economic and Regulatory Frameworks for Queensland Islands*.

⁷² *Planning Act 2016* (Qld) s 60.

⁷³ *Inquiry into the Economic and Regulatory Frameworks for Queensland Island Resorts*, n 16, Recommendation 16.

⁷⁴ See Amanda Camm, *Member for Whitsunday Welcomes Island Report* <<https://www.amandacamm.com.au/news/member-for-whitsunday-welcomes-island-report>>.

head lease could address any restrictions placed on sublessees concerning the right of access and use of common infrastructure, island access and egress points and the right of access to the island's national park. The requirements of natural justice should be accorded to all stakeholders impacted by decisions surrounding Queensland Island tourism leases, including lessees and sublessees. Inaction by government potentially impacts natural justice rights of stakeholders on Queensland islands. Hopefully, this level of inaction is changed by the adoption of recommendations from the inquiry and this article.