



NATIONAL NATIVE  
TITLE TRIBUNAL



Cape York Land Council

In association with  
Aboriginal Environments Research Centre (AERC)  
University of Queensland

# Holding Title and Managing Land in Cape York

INDIGENOUS LAND MANAGEMENT  
AND NATIVE TITLE

DR PAUL MEMMOTT AND SCOTT McDOUGALL



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# EXECUTIVE SUMMARY

## Background to the Research Project

One of the ways in which the *Native Title Act 1993* (NTA) seeks to ‘recognise and protect’ native title is by requiring successful native title claimants to establish a Prescribed Body Corporate (PBC) which, upon registration, becomes a Registered Native Title Body Corporate (RNTBC). The National Native Title Tribunal (NNTT) has commissioned two major projects to examine the legal and social implications of this requirement for native title holders. The first of these resulted in two publications by Christos Mantziaris and David Martin (1999, 2000). For the second, the NNTT has engaged the Cape York Land Council (CYLC) to carry out a study of native title land use and management in Cape York Peninsula. This project focuses on the use of PBCs as a means of protection of native title in Cape York in terms of land and sea management, and the relationship between PBC operations, and those of other indigenous land owners and managers (e.g. land trusts and pastoral lease holders) and non-Indigenous land management bodies under state and Commonwealth programs and legislation.

There were some 22 or more native title claims in Cape York Peninsula at the time of writing. A number were close to determination, whilst many others were in active mediation. Indigenous people may also obtain rights or forms of tenure in land in Queensland under a range of additional processes apart from native title. These include, for example, land trusts set up under the land claim and land transfer provisions of the Queensland *Aboriginal Land Act (ALA) 1991*, Deed-of-Grant-in-Trust (DOGIT), Indigenous Land Corporation acquisitions, land from Natural Heritage Trust negotiations. The CYLC is concerned about achieving a coordinated approach to these various organisations and processes and wants to ensure that PBCs, as the bodies responsible for the management of native title lands, play an integrated role within broader Cape York land management strategies.

A broad project aim is to assist existing or future PBCs to operate effectively in relation to land and sea management, in order to protect and maintain native title rights and interests within a complex pattern of Indigenous interests, types of land tenure, and co-existing stakeholder groups. Cape York is an appropriate example as there is a proliferation of indigenous land titles and rights occurring or imminent in a patchwork pattern across the landscape. There is an emerging problem that the impact of this uncoordinated proliferation on land management might be negative. It has been suggested by some that land trusts and PBCs may be set up to fail due to the unforeseen and

unplanned responsibilities which might emanate without the guaranteed resources to fulfil such responsibilities. The current project takes a proactive approach to addressing this issue both in terms of immediate strategies that can be undertaken by Indigenous land interest groups and PBCs, and longer-term goals for the refinement and reform of legislation.

Specific aims of the project were to analyse and address the following topics:

- (a) the relationship between PBCs and ALA land trusts, for example whether ALA land trusts could work as PBCs;
- (b) the options, practical recommendations and regulatory and statutory changes, state and Federal, required to establish and maintain effective PBCs/RNTBCs;
- (c) recommendations of practical options for achieving a coordinated approach to land management in the case study areas;
- (d) draft rules (complying with the relevant legislation but if necessary identifying areas where changes to legislation would be beneficial) for a PBC/RNTBC in relation to at least one of the areas covered by the case studies.

Both of the terms ‘native title holder’ and ‘traditional owner’ are used throughout the report. While to some extent they are interchangeable, they also apply to the different contexts of Aboriginal land ownership discussed in the report. Thus, ‘native title holder’ is appropriate to contexts covered by the NTA, such as claim applicants, members of PBCs, makers of native title decisions, as well as to common law native title holders; ‘traditional owner’, on the other hand, is more appropriate to describe claimants, grantees and trustees under the ALA, as well as in the more general contexts of referring to Aboriginal traditional land ownership and cultural heritage rights.

## The Cape York Peninsula Region

The Cape York Peninsula Region which forms the NTRB service area of the Cape York Land Council, covers approximately 150,000 square kilometres of outback Far North Queensland. The Aboriginal and Torres Strait Islander population comprises at least 60% of the region’s population, with over 10,000 Aboriginal people out of a total population of approximately 18,000. The Aboriginal people living in Cape York are statistically presented by the Australian Bureau of Statistics as one of the most disadvantaged groups in Australia. There are more than 50 named traditional land owning groups in the region.

The research study was carried out through two case studies in Cape York. The case studies were selected on the basis of variation in the complexity of local land tenure and co-existing land/sea management regimes. Another criterion for selection of case studies was that they be existing CYLC sub-regions. The two case studies selected were:

- (i) Coen sub-region (five native title claims, a pastoral lease purchased by the Indigenous Land Corporation, some eleven existing, pending or proposed ALA land trusts, and a number of blocks of conventional freehold held by Indigenous groups); and
- (ii) Wik sub-region (two native title claims made by a cultural bloc, one Aboriginal shire lease, two indigenous pastoral properties, two land trusts proposed/pending, two DOGIT councils).

### The Report Structure

Chapter 1 sets out the aims, background and methodology of the project.

Chapter 2 provides an outline of the legislative environment of PBCs. The major constraints and opportunities created by the native title legislative framework are identified and analyzed for their implications concerning the establishment and operation of PBCs. Other existing forms of indigenous land tenure and management in Queensland are also examined to identify opportunities for harmonising the administration of the land title and management regimes on Cape York Peninsula.

Chapter 3 introduces external planning groups in Cape York with whom traditional owners and native title holders are most likely to interact and the types of relationships these various organisations are likely to have with PBCs. An overview is provided of eleven government and three indigenous agencies which have broad planning roles across Cape York in relation to land and sea management and/or specifically to indigenous land. Three regional strategies and alliances are also described.

Chapters 4 and 5 detail the two case study sub-regions, Coen and Wik, respectively. Both chapters include an outline of the constituent areas of land in each sub-region and an overview of the different tenure arrangements; an overview of the various Aboriginal groups and land tenure systems; an analysis of the existing native title claims; an overview of the local planning environment; outstation developments; and other land and sea management issues relevant to the specific sub-region. In these two chapters, it is shown that the functions and activities of such agencies as the Coen Regional Aboriginal Corporation (CRAC), Lockhart Aboriginal Community Council and Aurukun Shire Council Land and Sea Management (LSM) Agencies impinge on or fundamentally relate to a range

of the native title rights and interests being claimed in the region; viz with respect to (i) general use of country, (ii) occupation and erection of residences and other infrastructure, (iii) hunting, fishing and collecting resources, (iv) management, conservation and care for the land and places of importance, and (v) the right to prohibit unauthorised use of the land. Once PBCs are established as outcomes of successful native title claims, formal and complex relationships need to be established between such PBCs and these indigenous agencies.

Chapter 6 considers some of the issues relevant to the design of PBCs and provides some analysis of the draft Wik rules (which are contained in full in Appendix 1). PBC design is restricted by the existing state of the law as set out in the regulations of the *Native Title Act 1993* (NTA), and the *Aboriginal Councils and Associations Act 1976* (ACAA). PBCs must be designed in order that they are accountable to, and respected by native title holders, flexible to change, and relatively simple, efficient and low cost. The outline of PBC design options includes a consideration of 'passive' and 'active' types in terms of native title decision-making. Key determinants for PBC design include the availability of funding for administration and the extent to which external relationships are anticipated for the PBC.

Chapter 7 contains designs of hypothetical operational environments for land and sea management in the Coen and Wik sub-regions. For each of these sub-regions, a proposal is presented covering the relation of PBCs and land trusts to indigenous land and sea management functions, taking into account native title holder rights and decision-making processes, administration needs and the economic sustainability of the proposals. These preliminary models demonstrate a range of design problems and issues, as well as generating two diverse sub-regional solutions to local indigenous planning needs.

In the concluding Chapter 8, the authors have attempted to summarise the issues and the emergent principles about designing and sustaining PBCs, in the expectation that they may be applicable elsewhere in Australia, as well as in Cape York. A summary of these is outlined below.

### Regional Planning

There is a focus in this study on the external environment of the PBC, and the practical aspects of the functioning of PBCs in their operational environment. It has been proposed from the outset to rationalise land-related activity within a set of sub-regions for Cape York, in line with the vision of the NTRB's strategic planning proposal for the same. It is considered important to identify the variety of government and industry agencies that have interests and/or strategies for regional development. A coordinated and transparent approach will maximise

the outcomes of the individual planning strategies. Accordingly, local indigenous strategies that have a specific focus (e.g. land and sea management, land or sea-based enterprises, cultural heritage programs) will be greatly benefited by increased communication with those government and other non-Indigenous agencies managing regional strategic plans, and by recognition (where possible) of the goals of those plans.

The indigenous regional agencies in Cape York (such as the CYLC, Balkanu and ATSIC) need to continue to consolidate the sub-regional structures, guide their implementation, and coordinate them at the regional level. In turn, there is potential for the collective of land and sea management agencies from each sub-region, insofar as they are representative of traditional owners and native title holders, to become the formal constituents of such regional organisations as the CYLC and Balkanu.

### **PBC Design—the Internal Environment of the PBC**

PBCs need to have a clear structure, defined functions and transparent processes so as not to be an administrative and political burden in themselves. There are many issues that need to be considered in their internal design. For example:

- maintaining the integrity of traditional decision-making processes whilst responding to the legal and administrative requirements of the PBC regime;
- pressures of dealing with timeframes imposed by external parties;
- the demography of the membership of the PBC;
- levels of politicisation within the native title group; and
- the logistical demands of maintaining traditional decision-making processes.

Major determinants for the design of PBCs are:

- the desires of the native title holders as to what sort of role they want their PBC to play;
- the nature of the native title group and desired decision-making processes;
- the legal and policy constraints of the PBC regime;
- the availability of resources to support the PBC's administration and other operations; and
- potential external relations of the PBC.

The relative attributes of what the study identifies as passive and active PBC types need to be carefully considered and compared in the design development of a PBC.

The *passive* PBC is designed to be a minimalist structure with little administrative and political 'baggage'. It is best suited to the agency PBC type since it will not hold the native title interests, which will remain with the native title holding group. The passive PBC structure is similar to the tripartite structure of the Land Trust,

Land Council, Traditional Owner structure of the Northern Territory land rights model (established under the *Aboriginal Land Rights (Northern Territory) Act 1976*). The passive PBC adopts a similar role to the Northern Territory Land Trust by deferring decision-making to the native title holders. Therefore due to the limited role of the PBC as an agent of the native title holders, its membership could be limited to that necessary to meet the minimal requirements of the *Aboriginal Councils and Associations Act 1976 (ACAA)* and would therefore be 'representative' only of the native title group. In contrast a participatory model of corporate governance aims to include as many as possible of the native title holders as PBC members. The passive PBC will have limited demands for resources but will be heavily reliant on the support of either the NTRB or any regional land and sea management agency, in the same way in which land trusts in the Northern Territory are reliant on the support of their land councils.

In contrast to the passive model, the *active* PBC assumes a greater responsibility for the making of decisions within the determination area. The trustee PBC type is better suited to an active role, because it 'holds' the native title on behalf of the native title holders and is empowered to deal with it, subject to the consultation and consent provisions which require native title decisions to be made in accordance with traditional decision-making processes. Active PBCs could adopt representative or participatory membership structures.

The choice between passive and active PBCs reflects the spectrum of opportunities available in apportioning decision-making responsibilities between the PBC and the native title holders. At one end of the spectrum, all decisions (including 'native title decisions') could be made by an active PBC with a representative structure. Such a PBC could operate if it were possible to replicate traditional decision-making within the PBC governance structure itself. The obvious dangers of creating such a purely representative PBC structure include the lack of accountability to other native title holders, who as non-PBC members would be forced to rely on their status as beneficiaries to redress any concerns about the management of the PBC. At the other end of the spectrum, a purely passive PBC would have no role other than to 'rubber stamp' decisions (including non-native title decisions) made by the native title holders.

In order to ensure that the consultation and decision-making functions of the PBC are transparent, regular and equitable on behalf of the native title holders, it is recommended that PBCs establish a register recording all native title decisions, associated consultation processes, and compensation acts.

Overwhelmingly, the key choices and decisions on PBC design need to be made by native title holders on a case-by-case basis. Rigidly applying models, such as the

passive and active PBC types, will not necessarily be successful, as the circumstances confronting the formation and operation of each PBC will vary markedly. Indeed, as in the case of the Wik PBC (in general terms a passive, agent, participatory type of PBC), it is likely that many native title holders will prefer a hybrid of the models to meet their particular requirements.

Some of the main choices for the design of PBCs therefore include:

- (i) *Active or Passive PBC?* This decision may reflect the level of trust within the group for those who would sit on the governing committee of the PBC. Many other considerations will also be relevant, such as the nature of land use within the determination area, the capacity of the group to operate a PBC actively engaged in activities such as the management of its land, the availability of resources, the nature of traditional decision-making and the demography of the group.
- (ii) *Agent or Trustee PBC?* This decision may be best determined once the initial choice between an active or passive PBC is made. On the face of it, the agent PBC may be better suited to the passive PBC role, however there are complex legal issues involved in this choice which require careful case-by-case analysis.
- (iii) *Participatory (full membership) or representative (limited membership) PBC?* By limiting membership of the PBC, the scope for ‘interference’ in traditional decision-making by ACAA corporate governance issues will be reduced. On the other hand membership rights created by the ACAA may become an important means of maintaining accountability to the native title group. For example, one option would be for an ‘active trustee participatory’ PBC model. Here the aim would be to secure PBC membership for the entire native title group. All of the native title holders also hold membership rights including, for example, the right to call for special general meetings of the PBC and to remove and/or appoint members of the governing committee. The potential danger of this model lies in the impact of such corporate governance machinations to the traditional decision-making of the group.
- (iv) *Separated or merged traditional decision-making?* Should the governing committee be structured to replicate and/or perform traditional decision-making or should it be left to the native title group?

One of the key determinants for PBC design is the availability of funding for administration. Unless and until adequate funding is allocated toward the establishment and maintenance of PBCs, these entities are likely to suffer the same fate as that of land trusts established in Queensland under the ALA, where compliance with minimum standards is at very low

levels. Poor funding is also likely to lead to poor levels of consultation with the native title holders and substandard decision-making. This in turn increases the likelihood for dispute amongst native title holders. A small number of PBCs may be fortunate enough to have resource agreements in place providing a ready source of funding for their administration. Such organisations will have greater flexibility in designing decision-making structures that protect the interests of the native title holders and yet are able to be implemented effectively.

Whilst it is expected that future legislative reviews will lead to a more user friendly PBC regime, such outcomes may be many years away. In the meantime PBCs must be designed in order that they are:

- accountable to, and respected by, native title holders as legitimate vehicles of native title management;
- able to meet the requirements of the Registrar of Aboriginal Corporations;
- flexible enough to respond to future reforms; and
- efficient enough to survive in an environment of negligible funding.

### **Structural Options for PBCs in relation to ALA Land Trusts and other Indigenous Land Holding Entities**

There is a significant level of confusion and frustration about the respective operations of land trusts and PBCs in parts of Cape York, particularly where they are comprised of similar membership and hold functions with respect to the same areas of land. Given the importance of both the native title and ALA regimes to the traditional owners of Cape York Peninsula, it is imperative that a solution be found to reconcile the practical day-to-day operations of the land holding and managing entities. This in turn will reduce parallel confusion and frustration being experienced by external parties trying to engage in negotiations, communications and contracts with the traditional owners. Here the issues are how to promote the sub-regional rationalisation of land-holding entities, to cross the administration boundaries between indigenous tenure types within the sub-region, and to harmonise the title management and land management systems. It is expected that similar situations occur in Australian states other than Queensland where there is a state land rights act.

The integration of PBCs and land trusts into single corporate entities for suitable large-scale socio-geographic units (e.g. language-based tribes in the case of the Coen sub-region) would not only simplify arrangements and reduce confusion but also reduce as much as possible administration costs through a more effective (larger) scale of economy. However, it should be noted that there will still remain the need for funds

for effective grass-roots consultation on decision-making with traditional owners and native title holders.

There would appear to be three options for co-ordinating the operations of land trusts and PBCs. These are:

1. Determination of a land trust as a PBC;
2. Appointment of a PBC as a grantee/trustee of a land trust; or
3. Coordination between PBC and land trust by agreement only.

The first of these options is unavailable without amendments to the PBC Regulations and possibly ALA, but it would deliver the best outcome by limiting the resultant structure to a singular corporate entity. The second option relies on the Queensland Government to appoint a PBC as the trustee of a land trust. This option does not appear to be constrained by existing legislation and is therefore a matter of policy for the Queensland Government. The third option may have to be given priority in the event that the other options are unable to be implemented within reasonable timeframes, although it would appear to be the least efficient and provide the greatest scope for fragmentation of Indigenous interests. Following options 1 and 2, the current report contains a number of recommendations to amend or reform the Commonwealth's native title legislation and Queensland's land rights legislation in order to harmonise the amalgamation of tenures and land holding entities (Recommendations 20-28).

### **PBC Design—the External Environment**

From an understanding of the planning environments in the two case study regions, successful native title and ALA land claims are likely to lead to:

- Negotiating over land and sea uses with the private sector e.g. mining companies, pastoral holdings, tourism operators, telecommunication providers and others.
- The structuring or re-structuring of service agreements with indigenous land and sea management (LSM) agencies and the NTRB to be formally linked to and directed through PBCs.
- Negotiating co-operative relations between PBCs (representing native title holders) and community councils e.g. ILUAs for future acts within council areas;
- Negotiating co-operative relations between PBCs (representing native title holders) and relevant state and federal government authorities e.g. for a joint role in regulating by-laws and rules governing environmental usage (e.g. fisheries inspectors, park rangers, quarantine inspection, fire regulations) and joint management of national parks between traditional owners and native title holders and the Queensland Parks and Wildlife Services.

PBCs need to have strong institutional links through service agreements, contracts, memoranda of agreement and or ILUAs with these various external entities as well as to their Aboriginal polity. Emphasis needs to be placed on the following external arrangements:

- Ensuring properly resourced consent and consultation of native title holders by or on behalf of the PBC;
- Negotiating satisfactory service contracts between the sub-regional LSM agency and the indigenous title-holding entities;
- Developing satisfactory consultation and communication devices between the LSM agency and native title holders and the title-holding entities;
- Developing a constructive and supportive relationship between the PBC and the NTRB.
- Land holding/native title group (unincorporated group of individuals);
- Land holding entity (either PBC or ALA land trust or both);
- Sub-region LSM agency;
- Land holders' corporation for enterprises and contracts (optional);
- Native title representative body.

It is recommended that PBCs have contracts that engage:

- (i) a secretariat service to maintain its basic legal functions (meetings, correspondence, etc); and
- (ii) a land and sea management service to which the PBC might outsource some of its functions, e.g. the management of certain areas of native title land.

To enhance the simplicity of arrangements, the secretariat services could be provided from within the LSM agency. The extent of the service contracts will depend on whether an active or passive PBC model is adopted. For example, the use of a passive model for a PBC suggests externally-procured part-time secretarial services (including receiving, preparing and dispatching mail, organising meetings of the PBC and when necessary, of the native title holders).

In the model of PBC design proposed above, an agreement is required between the LSM agency and the native title holders (via the PBC), whereby the native title holders might agree to consent to the LSM agency to perform certain acts or classes of activity. This would enable day-to-day transactions to take place within the LSM agency without its staff having to continually consult with the native title holders such as, for example, a policy where the LSM staff can approve permits for certain scales of tourist activity, camping, fishing etc, without having to worry the PBC membership.

The proposed LSM service function also allows income derived from compensation or other benefits, negotiated

under ILUAs to be channelled through the PBC to the LSM agency which can engage practically in a range of land-based operations, drawing upon any available infrastructure, Community Development Employment Programme (CDEP) workers, rangers, or consultants, on behalf of the native title holders. In all cases there needs to be a close coincidence between the membership, and to some extent the structure, of the land-holding entities in the sub-region and that of the LSM agency to prevent conflicts of interest, although it would be possible to incorporate spouses, and those with historical interests in land in the membership of the latter where that is not possible for a PBC.

Two diverse outcomes of implementing such a planning model in the Coen and Wik sub-regions are outlined in the report. Whereas the Wik leaders have (so far) opted for a single PBC and have not chosen to formally incorporate each of their eight sub-groups for local land management purposes, but rather to work through existing organisations (such as the Aurukun Shire Council), the traditional owners in the Coen sub-region wish to formalise their four language-named tribal grouping into four corporations to carry out land and sea management contracts, outstation development, and enterprises. In the interests of rationalising the multiplicity of 18 or more titles in this latter region, a method has been proposed to amalgamate these entities in the case of each tribe, through a process that results in all of a tribe's land and sea areas having a single PBC as a Trustee of any ALA Land Trust.

The use of a central service provider in each planning region (or sub-region) for administrative service to the various PBCs and other Indigenous land-holding entities is common to both sub-region case studies and is a key emergent design principle. However, administrative and consultative complexities are identified that are likely to be encountered at and near sub-regional boundaries where groups may choose to seek LSM services from two sub-region centres in adjoining sub-regions, and where land tenures on indigenous land use agreements (ILUAs) straddle across sub-regions.

### **The Social Planning of PBCs and Land Trusts**

Within the CYLC there is a significant amount of expertise in social planning by in-house and consultant anthropologists. There are also numerous studies and technical reports on classical and post-classical land tenure and social organisation. This represents an invaluable set of resources for understanding alternate group structures and dynamics for improved PBC design. Understanding the differentiation of rights and interests between sub-groups and individuals of a group in the design of cultural heritage management process is another important and related planning issue.

Unfortunately the structure of the PBC is often the last element to be considered in the native title claim process. Perhaps the outcomes of a native title claim including the modus operandi of the PBC should be discussed and workshopped from the outset (including with anthropologists as facilitators). This is because, as the claimants pursue their claim, important dynamic aspects of their political processes and social structuring are likely to be revealed and may well hold the clues as to how the PBC should/might operate in reality. A key principle is to inform the PBC design process with an understanding of the social structure and decision-making dynamics of the claim process (Recommendation 10).

Another related issue for social planning is the promotion of PBC design and operation as a component of effective community government. One of the objectives of the ATSIC Regional Plan is to develop culturally appropriate ways for Indigenous people to exercise increased autonomy in local and regional government. A complementary goal of the Queensland Department of Aboriginal and Torres Strait Islander Policy (DATSIP) is that of improving local community well-being by encouraging appropriate ways for governing within communities. It would seem important for both ATSIC and DATSIP to take account of the requirements for the development of effective PBC structures to ensure congruency and compatibility with their planning frameworks in relation to indigenous governance of land and sea. Other specific governance aims would be to minimise unreasonable, unnecessary friction and obstruction with respect to indigenous settlement planning and development processes, through ILUAs between native title holders and Aboriginal community councils.

Further social planning issues to consider when designing and establishing the PBC are as follows:

- (i) Understanding the internal structure, political processes and authority structure of the relevant native title holding 'community' in relation to future PBC operations;
- (ii) Ensuring that customary decision-making is well understood by all those concerned and not compromised;
- (iii) Establishing the correct facilitation process to assist traditional owners in holding decision-making meetings at appropriate locations in traditional country;
- (iv) Considering alternative designs for the internal structure of PBCs to ensure the representation of different sub-groups; and
- (v) Identifying appropriate traditional owners with customary environmental knowledge to guide land and sea management activities.

A topic of social concern amongst elders in one of the case study sub-regions was the impact of cash disbursements from mining ILUAs given the already

high incidence of alcohol abuse and family violence on Cape York. (Recommendation 11 deals with this.)

### **The Economic Planning of PBCs**

There is only limited funding available from government for the establishment and operation of PBCs and land trusts. In the short term at least, these entities are likely to be faced with their own economic planning and fund-raising to ensure their survival, although there are a range of government departments and agencies that may be able to assist in certain ways.

A key problem for Indigenous land-holding groups is to develop a capacity to raise capital so as to sustain the infrastructure for engaging with the outside world and sustaining the legal status of the land-holding entities. Financial support both for operational as well as infrastructure costs for PBCs will be required immediately after (if not before) title handover. At the very least, a minimum income is required for a base secretarial and administration service to fulfil the legislative duties of land trusts and PBCs (including meeting organisation and travel costs).

Potential sources of funding and resources for PBCs would appear to be:

- ATSIC regional council grants;
- Utilisation of existing resources within regional and sub-regional Indigenous organisations, for example use of NTRB, land trust infrastructure, indigenous community councils and local governments;
- Involvement of CDEP labour and infrastructure;
- Indigenous enterprises on native title or Aboriginal land (seed funding through ATSIC and Balkanu);
- Compensation and/or benefits under resource exploitation ILUAs;
- State and commonwealth government grants and contracts for land and sea management;
- The securing of bank loans against a guaranteed annual income over a fixed period of years from one or more ILUAs;
- Securing loans by a charge over buildings or other improvements on native title land; and
- Utilisation of a percentage of any compensation paid to title-holding entities.

Apart from PBC administration, funding may also be sought for the following categories of PBC related operations:

- LSM agency recurrent costs;
- LSM projects and functions for traditional owners;
- Seeding land-based and sea-based enterprises for traditional owners;
- Purchase of cattle stations or other lease and freehold land for traditional owners;
- Preparing land and sea management plans and enterprise plans, including for cattle stations and other acquired land.

Note that in respect of obtaining funding for land management initiatives, it is likely to be far easier for an LSM agency to attract funding for land management initiatives than for the recurrent operational costs of a PBC/land trust. It may be possible to build PBC consultation costs into land management grants rather than having to constantly rely on scarce title-holding entity resources from official government sources.

There is a need to explore the types of financial structures that can be set up for the receipt of funds from land enterprises which best fit with Indigenous interests (e.g. the role of Family Trusts, Land Agencies, CDEP). It is also recommended that NTRBs have a compensation unit monitoring future acts within determination areas and pursuing payments of compensation on behalf of native title holders (Recommendation 13).

Clear rules of agreement will have to be established amongst traditional owners (including native title holders) as to how income into the LSM agency will be distributed, to complement those set down for PBC income (if any). This is particularly the case where a sub-group of native title holders has an established income stream from an ILUA or other agreement but the other sub-groups in the PBC do not. There is thus a need for an economic plan that allows, on the one hand, Aboriginal income into the region to be equitably spread to groups across the region for basic LSM functions but which at the same time recognises local native title rights in compensation outcomes or acknowledges local enterprise initiatives by individual groups.

However the relative ease with which such funding sources are accessible to different PBCs will be variable. Obviously those with lucrative ILUAs may be in an advantageous position to invest and accrue funds, whilst those without ILUAs or enterprise backing may remain poor and suffer perpetual problems in even performing at a legally acceptable threshold. This reinforces the idea that some basic level of administration funding should be provided by the Commonwealth Government for all PBCs. The Commonwealth's responsibility of meeting the base administration costs of PBCs should not be displaced, given its role as architect of the Native Title Act and its Regulations.

The issue of the desirability and capacity of PBCs to participate in the economic development of native title land has not been fully canvassed in this report. The authors consider it should be the subject of further research.

### **Environmental Planning**

Any region in any state of Australia undoubtedly will have a complex range of government and indigenous agencies, departments and authorities involved in land (and sea) management and the current study region is no exception.

A premise of the current study has been the need to administer land and sea management for an entire sub-region through one agency to achieve economies of scale on behalf of the traditional owners and native title holders incorporated into land trusts and PBCs. It is clear from the case study findings that such an LSM Agency will have many external entities to deal with about environmental matters. There will also be a need to engage and transact with other Indigenous land holding/managing organisations in adjoining sub-regions. There is a priority need here for some sort of GIS system in which LSM agencies, subject to the wishes of the native title holders, can store and maintain local indigenous place and site data including that collated by anthropologists.

The State of Queensland's political failure to identify a clear position on the involvement of Indigenous people in national park and conservation area management continues to have a detrimental impact on the rationalisation of indigenous management structures for land and sea at the regional and local levels. There is nevertheless considerable scope, via a range of existing and/or potential legislative and administrative mechanisms, for a PBC to be meaningfully involved in the management of nature conservation areas. It would be possible for the board of management of a conservation area to be comprised of the PBC governing committee or be nominated by the PBC under an agreement with the Minister (perhaps through an ILUA). It would also be possible to create a PBC which was then appointed as grantee of ALA inalienable freehold with a term leaseback arrangement for a national park.

### **Legal Planning for PBCs and Land Trusts**

There is a need for both PBCs and land and sea management agencies to have ready access to sound legal advice. Such advice will be necessary when making particular decisions about the management of native title lands. For example, assessing the nature of particular decisions will require advice as to whether it is a 'native title decision' thus requiring the implementation of the consultation and consent provisions. Legal services will also be required to advise on the negotiation of ILUAs, the doing of certain future acts over native title land and the recovery of compensation. The extent of demand for legal assistance will probably depend on the nature and extent of future act activity occurring within the determination area and also the ability of the PBC/LSM agency to establish systems to respond to such acts.

### **Government Policy and Legislative Planning**

At the time of this study, the Commonwealth Government and ATSIC had both indicated that there was no allocated money for the administration of PBCs. Findings by the current authors indicate that PBCs cannot meet their prescribed statutory functions without some base funding. Unless base funding is made available, the native title legislation is unworkable. Government failure to ensure funding for the basic maintenance of PBCs will create a political environment of uncertainty and vulnerability for such industries as mining, tourism, fishing and pastoralism. In the worst case scenario, continued lack of funding will lead to poorly negotiated outcomes marked by corruption, lack of accountability and legal uncertainty. To protect the mainstream corporate infrastructure of the Australian community, the Commonwealth Government spends millions of dollars on regulatory agencies such as the Australian Securities and Investment Commission and Australian Consumer and Competition Commission. By virtue of the restrictions of the PBC regulations, PBCs are denied the protection and benefits of operating within the mainstream system and are forced to operate within an unfunded, ill-conceived, over-regulated and yet an easily corruptible system. Recommendation 19 suggests rectification of this situation. Much the same observations may be made in relation to the Queensland State Government and the resourcing of land trusts created under the ALA.

The legislative framework governing the establishment and operation of PBCs displays a burdensome complexity which derives from a range of factors including:

- the inherent difficulty in corporatising native title interests;
- inappropriate regulations and practices which have developed in the administration of the ACAA, although both the Act and the ACA regulations are currently under review;
- poorly conceived and inappropriate PBC regulations;
- the involvement of both Commonwealth and state governments and their respective legislative and administrative regimes; and
- the intersection of numerous pieces of legislation governing land title and management.

A number of legislative reforms are raised in the current report for consideration by state and Commonwealth governments.



## SUMMARY OF RECOMMENDATIONS

1. That PBCs establish a register recording:
  - Details of each native title decision including the proponent, nature, location, purpose and duration of the act;
  - Details of any compensation proposed for the act;
  - Evidence of consultation with the NTRB about the native title decision;
  - Evidence of consultation with the relevant native title holders affected by the decision; and
  - Evidence of a decision by the relevant native title holders.
2. That PBCs include in their rules a requirement to establish and maintain such a register.
3. That each PBC provide in its rules for the making of classes of native title decisions by the PBC in its own right without reference to the native title holders.
4. That the PBC rules prescribe the minimum requirements for the making of native title decisions.
5. That priority be given to the transfer of land, under the ALA, which is subject to advanced native title proceedings rather than making land available under the ALA claims process.
6. That funding for the administration of land trusts be increased significantly to ensure compliance with minimum statutory provisions and functions.
7. That the Queensland Government provide a formal response to the proposal to appoint PBCs as grantees of land trusts.
8. That Aboriginal Councils and PBCs negotiate model ILUAs for future acts within Deed of Grant in Trust (DOGIT) and/or council areas.
9. NTRBs should look to forming and/or supporting one central service provider in each planning region (or sub-region) to provide an administrative service to the various PBCs and other Indigenous land-holding entities in that region or sub-region.
10. The NTRB should encourage its consultants to explain the concepts of PBC and RNTBC to native title claimants from the outset of their claim, and encourage the various phases of the Claim to draw upon the customary decision-making processes, in order to develop prototype PBC operations, and to experience and reflect on the advantages and disadvantages of such.
11. NTRBs should inform PBCs that if they wish to minimise the potential negative social impacts of cash disbursements in communities and in addition, simplify taxation responsibilities, that such disbursements could be in the form of practical and desired consumable goods eg white goods, vehicles, dinghies or other forms of investment.
12. There be an exploration of types of financial structures that can be set up for the receipt of funds from land enterprises which best fit with Indigenous interests (eg. the role of private family trusts and corporations, Land Agencies, CDEP).
13. The NTRB to have a compensation unit monitoring future acts within determination areas and pursuing payments of compensation on behalf of native title holders.
14. Utilisation of a percentage of any compensation paid to the PBC toward the costs of the Land and Sea Management Agency (and possibly the NTRB if it is the service provider).
15. Balance of compensation to be utilised in accordance with wishes of native title holders as directed to the PBC.
16. The NNTT as well as other relevant state and Commonwealth Departments should sponsor the appraisal, selection and adoption of a user friendly GIS software for national use by Indigenous LSM agencies.
17. That the Queensland Government resolve the impasse on leaseback arrangements for successfully claimed National Parks by agreeing to term leases of appropriate duration (30 years).
18. That the Queensland Government expedite discussions with native title claimants on appropriate arrangements for the involvement of PBCs in the management of national parks and other conservation areas, and implement those arrangements.
19. That the Commonwealth Government provide the basic annual costs of PBCs throughout Australia to (i) comply with the minimum requirements of the Aboriginal Corporations Act, and (ii) comply with their PBC functions, particularly in relation to native title decision-making. (This could be administered directly to PBCs through ATSIC or by Native Title Representative Bodies using tied ATSIC funding.)
20. That in order to facilitate the effective coordination of the native title land and sea management responsibilities of Cape York PBCs, recurrent funding be provided by the Commonwealth and state governments for the operational costs of indigenous land and sea management offices in each of the CYLC sub-regions of Cape York.
21. That the Queensland Government take steps to ensure that Trusts established under the ALA are operationally sustainable.
22. That, insofar as it may be necessary, the NTA and PBC Regulations be amended to clarify and confirm:
  - (a) the ability of the Federal Court to determine more than one PBC for any determination of native title; and
  - (b) the capacity of a single PBC to be determined in relation to several determinations of native title, provided that the native title holding groups are identical in each determination.
23. That the PBC Regulations be amended to widen the class of corporate entities eligible for nomination as a PBC (to include those under corporations law, state-based land rights regimes such as the ALA etc.).
24. That the 'deemed consultation and consent' provisions of the NTA be reviewed and amended to ensure the protection of native title holders' collective interests and ensure the integrity of traditional decision-making processes.
25. That consideration be given to the enactment of new wholesale legislation governing the incorporation and regulation of PBCs.
26. That the Queensland Government clarify the powers of land trusts by amendment of the ALA (ie whether the general provisions of the *Trusts Act 1973* (Qld) apply to land trusts).



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# CHAPTER 1: INTRODUCTION

## Background to the Research Project

The *Native Title Act 1993* sets out among its main objects, to provide for the recognition and protection of native title; to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and to establish a mechanism for determining claims to native title (ss3(a), 3(b), 3(c)). One of the ways in which the Act seeks to ‘recognise and protect’ native title is by requiring successful native title claimants to establish a Prescribed Body Corporate (PBC), which upon registration becomes a Registered Native Title Body Corporate (RNTBC)<sup>1</sup>.

The National Native Title Tribunal (NNTT) engaged the Cape York Land Council (CYLC) to carry out a study of native title land use and management in Cape York Peninsula. This project focuses on the protection of native title in Cape York in terms of:

- the use by native title holders through Registered Native Title Bodies Corporate (RNTBCs) of native title land and waters;
- the relationship between RNTBCs and other Indigenous land-holding and management bodies;
- the relationship between RNTBC responsibilities and other non-Indigenous land management bodies under State and Commonwealth programs and legislation.

There were some 22 or more native title claims in Cape York Peninsula at the time of writing. A number were close to determination. Many others were in active mediation. There is also a range of additional processes apart from native title whereby Indigenous people can obtain rights or forms of tenure in land in Queensland. These include, for example, land claims and land transfers under the Queensland *Aboriginal Land Act (ALA) 1991*, Deed-of-Grant-in-Trust (DOGIT), Indigenous Land Corporation acquisitions, land from Natural Heritage Trust negotiations, to name but a few. CYLC is concerned with addressing the question of how to achieve a coordinated approach to these various organisations and processes and wants to ensure that PBCs, as the bodies responsible for the management of native title lands, play an integrated role within broader Cape York land management strategies.

A broad project aim is to assist existing or future PBCs to operate effectively in relation to Indigenous land and sea management, in order to protect and maintain native title rights and interests; this having to occur within a complex pattern of Indigenous land and sea interests, types of land tenure, and co-existing stakeholder groups. Cape York is an appropriate example as there is a proliferation of Indigenous land titles and rights occurring or imminent in a patchwork pattern across the landscape. There is an emerging problem that the impact of this proliferation on land management might be negative. It has been suggested by some that land trusts created to hold Aboriginal freehold land under the ALA, and native title PBCs, may be set up to fail due to the unforeseen and unplanned responsibilities which might emanate without the guaranteed resources to fulfil such responsibilities. The current project takes a proactive approach to addressing this issue both in terms of immediate strategies that can be undertaken by Indigenous land interest groups and PBCs, and longer-term goals for the refinement and reform of legislation.

The impetus for the current project originated from a meeting between the CYLC and the NNTT in 1998. Since then the Queensland Government and the Indigenous Land Corporation (ILC) have also participated in the project design. From the point of view of the Queensland Government two main issues have been stressed for consideration in this project: (1) the proliferation of title-holding bodies, and (2) the nature of the Indigenous land management bodies. In relation to land trusts formed under the Queensland *Aboriginal Land Act 1991*, the State is keen to avoid duplication with PBCs, if possible. The State would like to see land management planned and administered at a regional level.

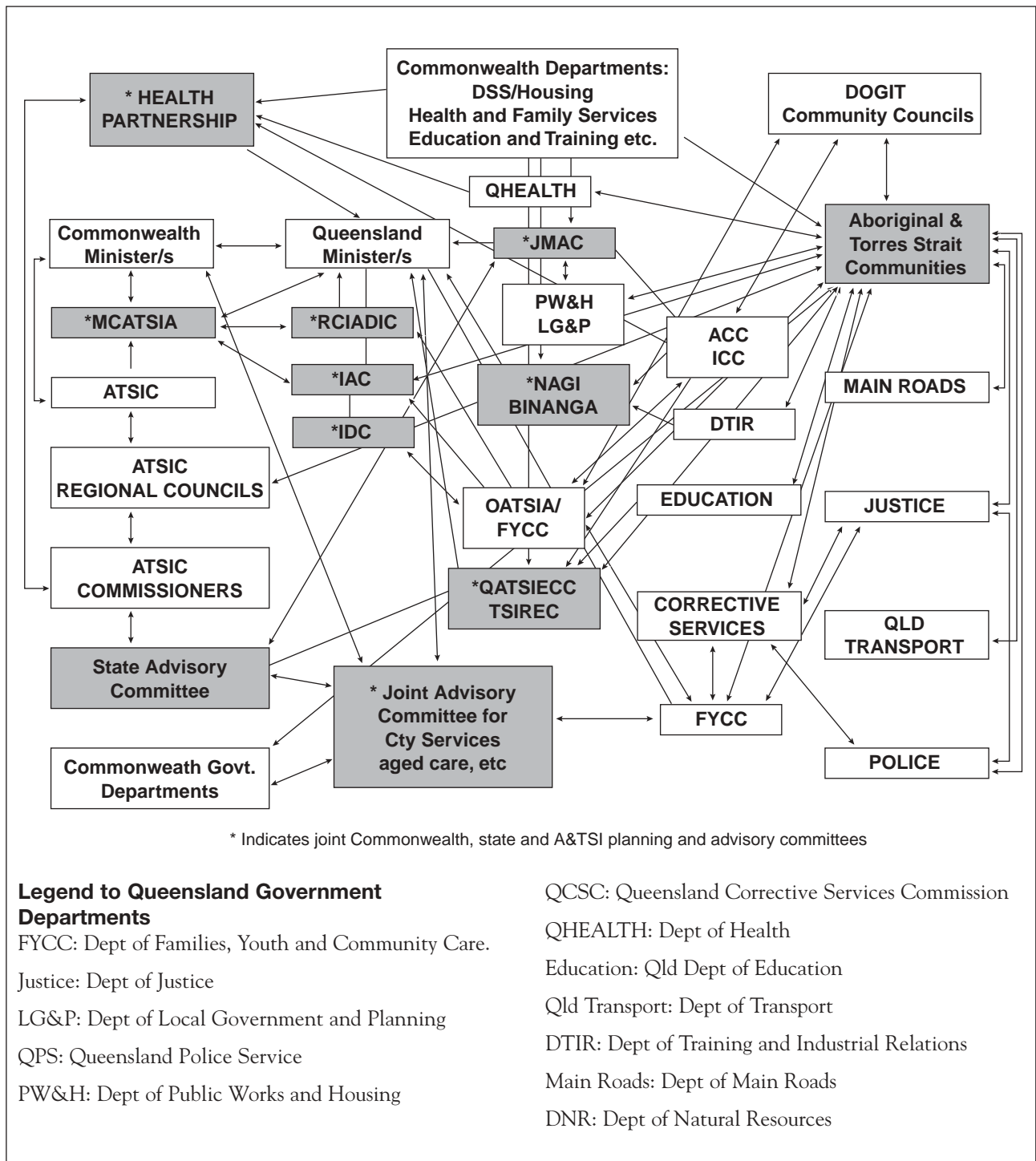
Something of the complexity for Aboriginal communities dealing with the Queensland State Government is graphically indicated in Figure 1, and to this one must add further regular liaison with Local Government, Commonwealth Government Departments and various private industry sectors (especially mining, pastoralism, and tourism).

There are also important economic and operational parameters to the project which should be outlined at the outset.

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<sup>1</sup> The authors have generally adopted ‘PBC’ to describe the Prescribed Body Corporate (registered or otherwise) in the remainder of this report. Unless otherwise specified, the terms PBC and RNTBC are interchangeable throughout this report.

**Figure 1 Indicative priority setting and funding processes for Aboriginal and Torres Strait Island communities, Queensland.** (Source: McDonnell Phillips 1997:66.)



## The Economic Context of the Study

Noel Pearson (2001), in striving for a creative approach to Aboriginal self-determination and the developing of an Indigenous economy, and recognizing that Aboriginal Australians have been largely by-passed by the Western capitalist economy and have a marginalized position in Australian economic history, argues that Aboriginal people nevertheless do have cultural assets and enterprise activities in their local informal domestic economies. He suggests that it is necessary to challenge and overcome the various socio-economic barriers embedded in the macro-capitalist framework, so as to convert these Indigenous assets from 'dead capital' to viable 'currency', and integrate them into the mainstream economy.

There is a need for Indigenous groups to gain the capacity to secure loans, based on existing assets and engage flexibly in a range of transactions; so as to assemble assets into more valuable combinations. However in attempting this, there is a conundrum to overcome: the locally politicized, informal, and culturally specific context of the Aboriginal community, versus the wider integrated legal, economic and property system of the nation and the globe. (Pearson 2001.)

“Aboriginal communities living on Aboriginal lands (though we own ‘property’) are locked out of the Australian property system that enables capital formation. All of our assets, in the form of lands, housing, infrastructure, buildings, enterprises etc – are inalienable and have no capital value therefore. They cost (huge amounts of) money to develop and to replace and renovate – but they don’t have a capital value. And billions of dollars transferred from government to Aboriginal communities end up in the form of dead capital: it cannot be leveraged to create more capital. We are therefore in a dead capital (poverty) trap.....

“This dead capital trap has valid cultural explanations. It is one of the consequences of (i) the communal nature of our traditional landholding title and (ii) the principle of inalienable land title (which may have had its origins in the common law, and has been given statutory force in relation to most forms of land title)..... It also has historical explanations: governments and missionaries maintained paternalistic policies which curtailed the ability of Aboriginal people to own or accumulate fungible economic assets.....But there are also other reasons why we are laden with dead capital. The laws that govern our property and asset ownership (State lands legislation, native title legislation, Indigenous Land Corporation legislation, ATSIC legislation) make our assets un-fungible – beyond the protection of inalienability. Land title-holding structures are unnecessarily complex and inefficient so that they make it too difficult to

leverage value out of our assets. Two owners for one area of land (say land trusts holding inalienable freehold title to land and Prescribed Body Corporates holding native title to the land) make the land in-amenable to capital formation.” (Pearson 2001.)

Speaking specifically of the current project, Pearson stated (2001), “We need to ensure structures are economically efficient... Whilst the land may be inalienable, there are other ways in which the lands can remain as fungible property (leases, licences, ILUAs etc) – but inefficient decision-making structures and dual title-holding bodies can effectively kill off any economic potential of the land.” Pearson goes on to discuss the potential of Indigenous Land Use Agreements (ILUAs) that can be formed by Native Title holders with other interest parties, as commercial assets given the legal imagination and entrepreneurial skill to make them so (Pearson 2001). Is it possible then, in the establishment of PBCs and land trusts and their concomitant legal attributes (inalienable freehold, ILUAs, rights and interests), to obtain forms of economic leverage for Indigenous groups? This is a substantial challenge for all those involved in Native Title and it is another theme that is threaded throughout this report.

## Typical Operational Limitations of Indigenous Organizations

There are a range of recurrent problems and limitations in Indigenous organizations which have also been flagged by Noel Pearson (pers. comm., 25/05/01) as a part of the challenging agenda for this project, and which relate to issues of inadequate consultation, lack of representativeness and internal power control. These features of operation are typical of the western-style incorporated ‘Association’ structure, viz one of elected representatives running an association or a corporation and who in turn elect a hierarchical group of office-bearers. This is a foreign concept to the customary decision-making practices of Aboriginal people. The cultural inappropriateness of such corporation structures has been well documented (see Fingleton et al 1996, Martin and Finlayson 1996, Sullivan 1996, Mantziaris and Martin 2000). How can prominence be given to Indigenous informal decision-making methods within the parameters of the Western corporate or association structure? Is it possible to match customary decision-making processes with the internal rules of land trusts and PBCs?

First there is the problem of chairpersons becoming all-powerful. Pearson is of the view that there should never be a chairperson in an Indigenous organization, only an umpire or referee. The concept of a chairperson is also alien to customary practices of decision-making. For many groups, customary dispute resolution if not resolvable through debate, was often settled through

adjudicated duals or 'square-up' fights, using seconds and adjudicators.

Another problem is that of imbalances occurring between the power of the board versus the power of 'the mob'; or put another way, the problem of the 'reps' or office bearers being unrepresentative of the membership of the organization. There are many examples of Indigenous Boards that take over responsibility for domains of operation and ignore the wishes of the wider group. Only too often the power of a larger traditional owner group may be fettered by a smaller group in a complex structure of hierarchical decision-making. Likewise, there is typically strong resistance by individuals to be restricted by the rules or decisions of a small, nominally representative, group of board members (Mantziaris and Martin 2000:303). In the case of traditional owner associations or corporations in relation to land, the result is all too often a mismatch between Indigenous land management aspirations and the administrative reality. Board members are often embedded in a matrix of relations based on kinship that are highly particularised and may compromise 'representativeness' regarding the broader constituency (Mantziaris and Martin 2000:305). How can one minimize the subordinating or corrupting influence of such Association or Corporate structures on the 'mob' or wider populace of traditional owners?

The State of Queensland also wants to see the land holding structures in some way reflect or observe traditional decision-making processes. The State is aware that this is not taking place at present and that this is leading to tensions on the ground (pers. comm., K.M., 25/05/01). It is now common for legislation to permit or even mandate the use of 'traditional' decision-making procedures for the elucidation of opinion or consent by Indigenous peoples with interests in land management or land use authorisation (Mantziaris and Martin 2000:314). As Mantziaris and Martin note, these statutory schemes can often create a situation where some representative body has to arbitrate over what is 'traditional' (see also Sullivan 1996a, Clark 1997, Finlayson 1997). Representations of traditional decision-making procedures vary and are subject to the influences of contact history. Further, traditional decision-making attracts differing levels of allegiance from group members, thus its potential to be binding is compromised. Finally, formalising the decision-making procedure into a legal framework requires that it be reduced to writing, a non-traditional form in itself. (Mantziaris and Martin 2000:314.)

Noel Pearson is also of the view that administration structures are necessary evils in the Indigenous domain and there is a need to create a 'people space' around them so as to minimize the inherent evil. By this he means the need for an open, transparent and accessible relationship and communication between the traditional owner families and the various individuals

who purport to represent those families and clans. There is a need for corporate mechanisms to drive decision-making towards the bottom of the organization hierarchy, ie towards the appropriate decision-making level of the wider group (the 'grass roots') in accordance with customary processes. Mantziaris and Martin (2000:316) also suggest the need to "develop a creative balance between using extant, primarily indigenous, mechanisms for dispute resolution, and using resources and techniques drawn from the general Australian society, such as mediation" in PBCs.

Although this may seem to be a challenging issue for Aboriginal Australia, it must be recognized that the presence of these weaknesses or vulnerabilities in Western corporate structures also occur in non-Aboriginal contexts. There are tens of millions of dollars annually spent on getting corporations to conform to legally appropriate decision-making processes all over the world (K.M. pers. comm., 25/05/01). PBC performance should be viewed within that broader global context.

The collective thrust of these warnings and caveats is that a PBC, if poorly structured and under-resourced, can potentially corrupt the Indigenous methods of doing things on the land. This then becomes another component of the project brief to be examined in this report.

### **Project Aims**

The specific aims of the Project are to analyze and address the following topics:-

- (a) the relationship between ALA land trusts and PBCs (or RNTBCs), for example whether ALA land trusts could work as PBCs;
- (b) the options, practical recommendations and regulatory and statutory changes, State and Federal, required to establish and maintain effective RNTBCs/PBCs;
- (c) recommendations of practical options for achieving a coordinated approach to land management in the case study areas, including recommendations of any issues requiring further attention;
- (d) draft rules (complying with the relevant legislation but if necessary identifying areas where changes to legislation would be beneficial) for a RNTBC/PBC in relation to at least one of the areas covered by the case studies.

As can be seen from the preceding sentences, there are also a range of broader project goals that are environmental, economic, administrative and social. Furthermore the authors have approached the project with the emphasis on a community aspirations focus, or a community oriented approach rather than a legal or technical approach. The project largely aims to analyse how PBCs will operate in their 'external' environment. Substantial work has already been done on the

‘internal’ environment of PBCs in the NNTT-sponsored Mantziaris and Martin publication, *Native Title Corporations* (2000). Nevertheless the current project also aims to make linkages to legislative frameworks with two outcomes: (i) recommendations of what are the best currently feasible arrangements under the existing legislative framework, and (ii) a best practice model, which is not currently feasible due to legislative restrictions etc, but may be potentially viable in five or ten years with changed legislation.

### Profile of the Cape York Peninsula Region

The Cape York Peninsula (CYP) Region which forms the Native Title Representative Body service area of the Cape York Land Council, covers approximately 150,000 square kilometres of outback Far North Queensland, stretching from the Daintree and Staaten Rivers in the south to the very northern tip of mainland Australia, and from the Coral Sea in the east to the Gulf of Carpentaria and the Arafura Sea in the west. (See map in Figure 4). The Aboriginal and Torres Strait Islander population comprises at least 60% of the region’s population, with over 10,000 Aboriginal people out of a total population of approximately 18,000. The Aboriginal people living in Cape York are statistically presented by the Australian Bureau of Statistics as one of the most disadvantaged groups in Australia. Issues of health, substance addiction, family violence, educational disadvantage and mortality (including suicide) are all present in Cape York, both in the more traditionally oriented communities and in households in urban and predominantly non-Indigenous areas. There are more than 50 named traditional land owning groups in the Region.

There are ten Aboriginal Community Councils holding land ‘in trust’, a form of Aboriginal freehold known as Deed-of-Grant-in-Trust (DOGIT), and administering local government and welfare services for their community members. These DOGIT lands are predominantly located around the coast of the Peninsula, and comprise approximately 11% of the land area. The majority of Indigenous people in Cape York Peninsula reside in these areas, either in the central community in each DOGIT area, or on homeland outstations. The ten Aboriginal Community Councils in CYP are:

- Hope Vale Aboriginal Council
- Injinoo Aboriginal Council
- Kowanyama Aboriginal Council
- Lockhart River Aboriginal Council
- Mapoon Aboriginal Council
- Napranum Aboriginal Council
- New Mapoon Aboriginal Council
- Pormpuraaw Aboriginal Council
- Umajico Aboriginal Council
- Wujal Wujal Aboriginal Council

The remainder of the Peninsula falls within three local Government Shires – Cook Shire (the largest area), Carpentaria (in the south west) and Aurukun Shire (central west coast). Aurukun is predominantly an Aboriginal community. There are also several Indigenous community corporations servicing Cape York Aboriginal People in Cooktown, Laura and Coen. These are:

- Gungarde Community Aboriginal Corporation (Cooktown)
- Ang Gnarra Aboriginal Corporation (Laura)
- Coen Regional Aboriginal Corporation (or CRAC) (Coen)

Near the tip of Cape York, but still within the Peninsula area, there are two Islander Community Councils at Seisa and Bamaga servicing the mainly Islander residents of these townships. These areas are excluded from the region for the purposes of CYLC’s NTRB functions.

### Land Tenures of Cape York (from CYLC 2001)

The majority of the Peninsula, and therefore of Aboriginal people’s traditional lands, falls within a relatively limited set of tenure categories. These are: leasehold, national park, Deed of Grant in Trust (DOGIT), Aboriginal freehold, statutory mining tenure and various forms of State-owned land.

**Table 1 Tenures on Cape York Peninsula** (taken from CYLC 2001)

Tenure Type	Hectares	Percentage
Leases	8 063 000	59.2%
National Park	1 647 709	12.1%
DOGIT	1 551 500	11.4%
Aboriginal Freehold	736 600	5.4%
USL	475 800	3.5%
Statutory Mining Tenure	597 800	4.4%
Reserve	269 361	2%
Timber Reserve and State Forest	189 613	1.3%
Freehold	90 600	0.7%
<b>TOTAL</b>	<b>13 621 983</b>	<b>100%</b>

There are several categories of Aboriginal owned land on the Peninsula:

- (i) *Deed of Grant in Trust (DOGIT)*  
Each DOGIT in CYP is held in trust by an Aboriginal Community Council for the benefit of the inhabitants of the land. Under the *Qld Aboriginal Land Act 1991*, all DOGIT lands are transferable and must become Aboriginal Freehold. DOGITs may also be subject to native title applications, and the first determination in Cape York was over the Hope Vale DOGIT.

*(ii) Aboriginal Freehold*

Aboriginal freehold resulting from claims and transfers under the ALA sits at approximately 5% of the Peninsula. National Parks are also claimable under the ALA. Note that Aboriginal freehold gained under the ALA does not extinguish native title.

*(iii) Determined Native Title Lands*

There are three areas of determined native title land on the Peninsula. In 1997, 13 Guugu Yimithiir clans were granted a Native Title determination by the Federal Court over the area of the Hope Vale DOGIT in the south east Peninsula. The Wik people were likewise successful in having a large area of the Aurukun Shire lease on the west coast determined during 2000. Further areas of the Wik application, notably pastoral leases and the statutory bauxite mining leases are yet to be determined. The third successful Native Title Claim was that of the Kaurareg over a number of islands off the northern tip of Cape York, determined in 2001.

*(iv) Aboriginal Owned Pastoral Leases*

There is a growing number of Aboriginal owned pastoral leases in the region. Under section 47 NTA, any past extinguishment on Aboriginal-owned pastoral leases caused by the grant of prior tenures, including the current pastoral lease, is to be disregarded for all purposes under the NTA, including for a native title determination. Therefore traditional owners' full native title is able to be recognized.

inputs from government and industry as well as a knowledge of the territorial groupings of language and tribal groups in Cape York. Recent changes to CYLC's constitution will allow for sub-regional representation to progressively replace community representation for Governing Committee elections. Over the next three years, the CYLC intends to work with traditional owners and communities to assist them to set up their own sub-regional resource and land management offices. As resources permit, the CYLC will also establish its own sub-regional offices, employing locally based project and field officers, to better provide NTRB services at the sub-regional level. (CYLC 2001.) There is a general proposal for a single Indigenous Land and Sea Management Agency for each sub-region.

In an effort to realistically understand the likely problems of land and sea use and management in relation to PBC structures, the methodological approach to this study has been designed to start with the Planning sub-region as a basic planning unit. An immediate issue, inherent in the selection of PBC case studies is how they relate to this sub-region definition and the planning processes that are already underway as part of this ten-year plan.

This report aims to prepare a model of the planning context (economic, social, cultural) of the CYLC sub-region in which a particular PBC will be situated. It is proposed to start with CYLC planning sub-regions and consider the impact of Native Title and ALA claims within same, ie. move from Indigenous planning context to a Western planning context. Taking such an approach allows for consideration of how a PBC (or land trust) is going to operate in its legal, environmental, social, cultural and economic environment. Nevertheless, no matter on what basis regions are selected there will inevitably be planning dilemmas when allocating boundaries. This has proved to be the case in the current project and will be discussed again in due course.

## Indigenous Planning Sub-regions in Cape York

CYLC, along with other peak Aboriginal organisations and an increasing number of government agencies, supports sub-regionalisation, and organises its project planning and service delivery with a sub-regional focus. Accordingly, CYLC has divided its NTRB area into thirteen sub-regions as part of its long term strategic planning, based on consultation with and multiple

**Figure 2 Cape York Sub-regional structure** (taken from CYLC 2001)





## Selection of Case Studies

The research study was carried out through two case studies in Cape York. The case studies were selected on the basis of variation in the complexity of local land tenure and co-existing land/sea management regimes. Another criterion for selection of case studies was that they be existing CYLC sub-regions. The two case studies selected were:-

- (i) Coen Sub-region (five native title claims, a pastoral lease purchased by ILC, some eleven existing, pending or proposed ALA Land Trusts, and a number of blocks of conventional freehold owned by Indigenous groups).
- (ii) Wik Sub-region (two native title claims made by a cultural bloc, on Aboriginal Shire lease, two Indigenous pastoral properties, two land trusts proposed/pending, two DOGIT Councils).

Within the CYLC's Coen Sub-region, there are four main language groups with native title interests, viz the Kaanju, the Umpila, the Lamalama and the Ayapathu. Here the Silver Plains pastoral lease area was of interest because of the four language groups being already represented in the KULLA Land Trust which had been established and was administered through the Coen Regional Aboriginal Corporation (CRAC). However these four groups had already signalled that they wanted to maintain a level of separation in any future PBC or land management regime, although there were practical reasons for coming together in KULLA. These aspirations provided a clear contrast to the Wik Sub-region where the native title holders were content with a single PBC. The Silver Plains area also had a significant ILC interest in it since the ILC contributed financially to the purchase of the Silver Plains pastoral property. However the interests of these four language groups extended beyond Silver Plains to adjacent areas of land and sea over which various claims (both NT and ALA) had been made. These areas all fell within the CYLC's Coen Sub-Region for planning purposes, and provided an example where no systematic consideration of native title and PBCs had yet occurred. This case study is one that looks at both the PBC and the Aboriginal Land Trust (ALA), ie native title rights combined with Aboriginal freehold land.

Most, but not all of the Wik Sub-region is covered by the Wik and Wik Way Native Title Claim. At the commencement of this project, work had already progressed on a PBC for the Wik and Wik Way Native Title Claim Area. Fortunately most of the Wik and Wik Way Native Title Claim Area fell neatly within the CYLC's Wik Sub-Region for planning purposes. This Sub-region is not without its own character of complexity however, particularly in the east where it meets the Coen Sub-Region. Here for example, the Mungkan Kaanju National Park which was the subject of a successful ALA Claim, straddles between the two Sub-regions. There was no ILC purchased property in

the Wik case study area, although there were two Aboriginal owned pastoral/grazing leases.

## Project Methodology

With respect to the two case study sub-regions; the issues and objectives of the NNTT project brief were explored by developing operational models or schematic plans (with issue statements and analyses) for proposed effective PBCs, which contain the following key attributes:-

- (a) Their internal structure, including membership, rules, goals, decision-making processes, land and sea management capacities, political stability and self-maintenance capacity; and drawing upon traditional principles and structures.
- (b) Their method of engaging and transacting with other local Indigenous organizations and whether the respective structures of the PBC and certain Indigenous organizations can be rationalized and merged to some degree where there are common or overlapping memberships and interests in lands and seas.
- (c) Their method of engaging and transacting with the wider stakeholder groups and their priorities/goals for the purposes of land and/or sea management.
- (d) The likely impacts of the wider stakeholder groups on the PBC including demands for services, land and sea management and management planning, decision making, endorsement of land and sea agreements, etc.
- (e) The economic prospects of the PBC given the above functions, including the ability to receive income in return for its services to the wider stakeholders, and thus its capacity for economic sustainability as a PBC,
- (f) how the PBC and its structure will relate to the 10 year plan currently being developed by the ATSIC, government and other bodies, and
- (g) how the above will lead to a viable land and/or sea management strategy.

The data collection methodology is described in Appendix 4, and can be summarized as follows:-

- (i) Literature analysis of legal material on PBCs, and on relevant anthropological and planning material relevant to the two case study sub-regions.
- (ii) Consultation with the traditional owner and native title holder groups in the two case study sub-regions to discuss and record their land use needs and aspirations, native title rights and interests, the status of their native title and land claims, existing land and sea management structures and aspirations, land and sea management operational preferences, homeland visions, etc.
- (iii) The collection of literature about service providers and stakeholder organizations operating in the sub-regions, in order to profile their structure, services

and operational methods; and where necessary the interviewing of representatives from such agencies.

- (iv) Regular meetings with the Project Advisory Committee to obtain project direction and feedback.

Appendix 4 also contains the identities and roles of the members of the Project Team and the Advisory Committee, as well as lists of various issues, objectives and outcomes that were to be addressed in the project.

## Summary of Report Chapters

The contents of the remaining chapters in this report can be briefly summarized as follows:-

Chapter 2 provides an outline of the legislative legislative environment of PBCs. The major constraints and opportunities created by the legislative framework are identified and analysed for their implications concerning the establishment and operation of PBCs. Other existing forms of Indigenous land tenure and management in Queensland are examined to identify opportunities for harmonising the administration of the land title and management regimes on Cape York Peninsula.

Chapter 3 introduces the general planning environment of Cape York. Various government and Indigenous agencies with a role in land and sea planning across the Cape are outlined, as well as contemporary regional strategies and alliances.

Chapters 4 and 5 detail the two case study sub-regions, Coen and Wik, respectively. Both chapters include an outline of the constituent areas of land in each sub-region and an overview of the different tenure arrangements; an overview of the various Aboriginal groups and land tenure systems; an analysis of the existing native title claims; an overview of the local planning environment; outstation developments; and other issues relevant to the specific sub-regions.

Chapter 6 considers some of the issues relevant to the internal design of PBCs and provides some analysis of the draft Wik rules (which are contained in full in Appendix 1). PBC design is restricted by the existing state of the law as set out in the NTA, ACAA and PBC Regulations. Issues are addressed arising out of the internal workings of the agency PBC in ways which best

reflect the traditional decision-making processes of native title holders on Cape York Peninsula. PBCs must be designed in order that they are accountable to, and respected by native title holders, flexible to change, and relatively simple, efficient and low cost. The outline of PBC design options includes a consideration of agency and trust functions and a choice between passive and active types in terms of native title decision-making. One of the key determinants for PBC design is seen to be the availability of funding for their administration.

Chapter 7 contains designs of hypothetical operational environments for land management in the Coen and Wik Sub-regions. For each of these sub-regions, a proposal is presented covering the relation of PBCs and ALA land trusts to Indigenous land and sea management functions, taking into account native title holder rights and decision-making processes, administration needs and the economic sustainability of the proposal. These preliminary models demonstrate a range of design problems and issues, as well as generating two diverse sub-regional solutions to local Indigenous planning needs.

In Chapter 8 the various planning and design issues as revealed in the body of the report, and pertaining to PBCs, their relation to other Indigenous land-holding entities, and their capacity to discharge land and sea management functions, are considered under the following sub-headings:-

- Regional planning.
- PBC Design-Internal (planning for the establishment and operation of the PBC).
- PBC Design-External (planning the PBC in relation to other agencies and organizations with related functions).
- Social planning.
- Economic planning.
- Environmental planning.
- Legal planning.
- Government policy planning.
- Legislative and regulatory planning.

A range of issues and emergent principles about designing and sustaining PBCs are summarized in the expectation that they may be applicable elsewhere in Australia as well as in Cape York.

Figure 3 Map of Queensland showing the Coen and Wik Sub-regions in relation to the Cape York NTRB Area (Map produced by Aboriginal Environments Research Centre, 2002.)

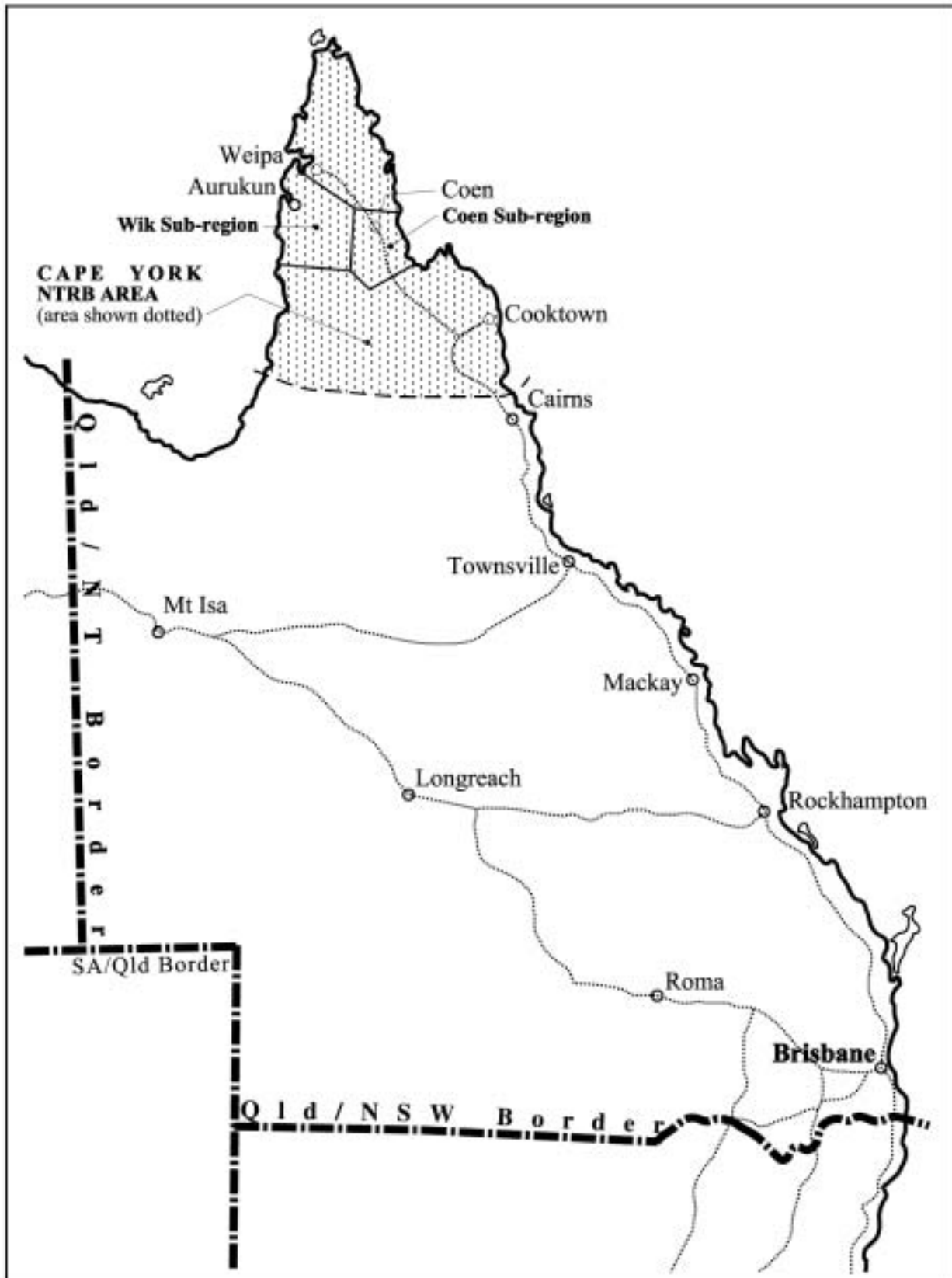
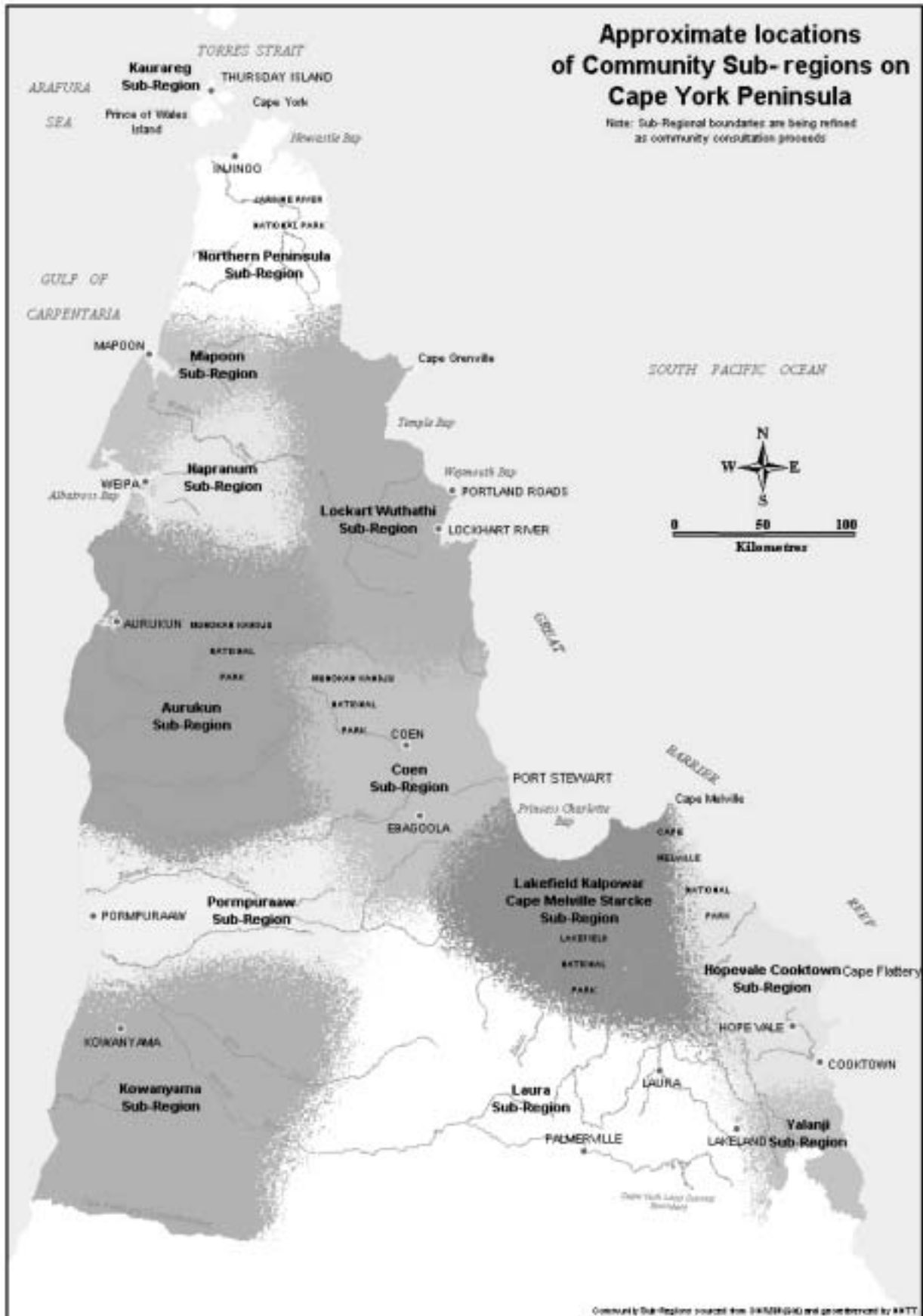


Figure 4 Map showing the approximate locations of planning sub-regions of Cape York Peninsula used by the CYLC (Map produced by NNTT's Geospatial Unit, 2002. Community Sub-regions sourced from DNR&M (Qld) and georeferenced by NNTT.)



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## CHAPTER 2: THE LEGISLATIVE ENVIRONMENT

### Introduction

This chapter provides an outline of the legislative framework within which PBCs must be established and operate. The major constraints and opportunities created by the legislative framework are identified and analyzed for their implications concerning the establishment and operation of PBCs. Other existing forms of Indigenous land tenure and management in Queensland are examined to identify opportunities for harmonising the administration of the land title and management regimes on Cape York Peninsula.

This chapter is divided into three main parts:

- Part A examines the Native Title and PBC legislative framework
- Part B examines the Queensland Government's statutory land title and land management mechanisms
- Part C pertains to the legislative aspects and functions of the Indigenous Land Corporation.

The chapter contains several recommendations for legislative amendment. However other recommendations are offered for the establishment and operation of PBCs within the existing framework in the event that such legislative change is not forthcoming or is delayed. All of these recommendations will be formally laid out later, in Chapter 8.

### Part A The Native Title and PBC Framework

The framework for the creation and operation of PBCs is principally governed by the combined workings of the *Native Title Act 1993 (Cth)* (NTA), the *Native Title (Prescribed Body Corporate) Regulations 1999* (PBC Regulations), *Native Title (Indigenous Land Use Agreements) Regulations 1999* (ILUA Regulations), and the *Aboriginal Councils and Associations Act 1976 (Cth)* (ACAA). Each of these legislative items will be examined in turn.

#### Native Title Act 1993 (Cth)

The *Native Title Act 1993* (NTA) establishes a mechanism whereby successful native title claimants can nominate, or the Federal Court can appoint, a PBC<sup>1</sup> to hold the native title or represent the native title holders. At the time of making a determination of native title, the Federal Court is required to determine either: (a) that the PBC is to hold the native title on trust for the native title holders; or (b) that the PBC is to “act as agent or representative” of the native title holders<sup>2</sup>. The choice presented to native title holders is of significant legal and practical consequence as it

determines legal relationships as between: (i) the native title holders, (ii) the PBC as a corporate entity, and (iii) the actual native title rights and interests.

#### Agency or Trust PBC?

Traditional owner groups on Cape York Peninsula have to date expressed a preference for the PBC agency relationship over that of the PBC trust.<sup>3</sup> It is understood that this preference stems from past experiences of traditional owners in attempting to exercise control within decision making structures and a desire to “own” their native title rights. There may also be sound legal reasons why the agency relationship should be preferred. The law governing agency PBCs is itself burdened with the complexity of several layers and sources of law. However to elect the trustee PBC is to add yet another layer of complexity and gives rise to the vagaries surrounding the law of trusts. Accordingly, the authors do not propose to consider in any detail the option of PBC trust relationships within the confines of this report. Unless otherwise stated, the reader can assume that the proposed PBCs discussed herein are of the agency type.

#### Only one PBC per determination?

There remains uncertainty as to whether the NTA requires that there cannot be more than one PBC determined with respect to a single determination of native title. A literal, if not narrow, interpretation of sections 56 and 57 of the NTA would suggest that this is the case; however it must be noted that the in the Hopevale determination, orders of the Court have provided for the determination of three separate PBCs with respect to the single determination of native title. On the other hand, it appears to be the case that a single PBC can be determined in relation to several determinations of native title provided that the native title holders, as described in each determination, are identical.

The affording of some flexibility in this regard is appropriate. The rationale for restricting the number of PBCs created with respect to any particular determination of native title would appear to be to avoid the costs incurred by the proliferation of organizations. This reasoning is sound; however the restriction may lead to other costs. For example, sub-groups within native title claim groups may not be prepared to lodge composite native title claims if they are not prepared to have *their* native title held or managed by one PBC. This could lead to separate native title claims being lodged on behalf of each sub-group, thus increasing costs and the potential for disputes about boundaries etc. A flexible approach to

the number of PBCs allowed per determination would go some way toward recognizing the difficulties involved<sup>4</sup> in making multiple claims on behalf of multiple sub-groups and in situations where the boundaries of non-indigenous tenures straddle multiple Indigenous groups.

On the other hand, a narrow interpretation of the NTA PBC provisions will mean that native title applications will have to be prepared on the basis that the native title claim group is satisfied with one body corporate representing the interests of all sub-groups involved in the claim. Such a restriction may therefore be useful in drawing out and resolving political issues within the native title claim group prior to the commencement of proceedings.

In any event, it would be prudent for consideration to be given to the structure of any PBC(s) prior to the lodgment of any native title proceedings. Whilst this may add significantly to the time and cost incurred in preparing a claim, the investment is likely to ensure a smoother transition from native title claimant group to functioning native title body corporate. It would also seem desirable that the NTA and PBC Regulations be amended to clarify and confirm the ability of the Federal Court to determine more than one PBC for any determination of native title; and the capacity of a single PBC to be determined in relation to several determinations of native title, provided that the native title holding groups are identical in each determination. (See Recommendation No. 20 in Chapter 8.)

### **Native Title (Prescribed Body Corporate) Regulations 1999 (Cth)**

Whilst the NTA is concerned mostly with the establishment and legal form of PBCs, the PBC Regulations provide the source of some but not all of the functions<sup>5</sup>, powers<sup>6</sup> and responsibilities of PBCs.

The most significant features of the PBC Regulations are:

- Restriction on the type of corporations;
- Restriction on the date of incorporation;
- Restriction on membership;
- Statutory functions; and
- Consent and consultation procedures for making native title decisions.<sup>7</sup>

#### **Restriction on the type of corporations**

At present, the PBC Regulations only provide for Aboriginal associations incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) (ACAA) to be determined as PBCs.<sup>8</sup> Accordingly, other existing land title holding and land management entities, such as s established under the *Aboriginal Land Act 1991* (Qld) (ALA) or ILC-funded land holding corporations established under the Corporations Law, are prevented from becoming PBCs. This restriction has

serious consequences for achieving coordinated and efficient administration of both land title and land management on Cape York Peninsula and is discussed later in this report.<sup>9</sup> It is also a desirable subject of legislative reform (see Recommendation No. 21 in Chapter 8).

#### **Restriction on the date of incorporation**

The PBC Regulations require that:

- the PBC be incorporated after 30 December 1994<sup>10</sup>
- the incorporation be for the purpose of being made the subject of a PBC determination<sup>11</sup>
- such purpose must be included in the objects of the corporation.<sup>12</sup>

#### **Restriction on membership**

The PBC Regulations require that all members of the corporation be members of the claimant native title group. Thus, in contrast to the ALA, Aboriginal persons with “historical” association to land are precluded from becoming members (including associate members) of PBCs.<sup>13</sup>

#### **Statutory Functions**

The PBC Regulations establish the following functions for agency PBCs:

- “(a) to act as agent or representative of the common law holders in respect of matters relating to those rights and interests;
- (b) to manage the rights and interests of the common law native title holders as authorised by the common law holders;
- (c) to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;
- (d) to invest or otherwise apply money held in trust as directed by the common law holders;
- (e) to consult with the common law holders in accordance with regulation 8;
- (f) to perform any other function relating to those rights and interests as directed by the common law holders”<sup>14</sup> [authors’ emphasis added]

These are not the only functions imposed upon agency PBCs. Other functions are imposed by other regulations, for example the detailed consultation and consent provisions (see below) and by the laws governing the operation of corporations under the ACAA. The implications of these functions on the design and operation of PBCs are considered below and in Chapter 6.

#### **Consent and consultation procedures**

The regulations stipulate consultation and consent procedures that a PBC must follow before making any “native title decision”, defined as a decision that *would affect the native title rights and interests* of the native title holders<sup>15</sup>. The NTA defines the term ‘affect’ as follows:

### 227 Act affecting native title

An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

When an act ‘affects’ native title is the key to the application of the future act provisions of the NTA as well as the definition of a ‘native title decision’. The term was considered by a Full Court of the Federal Court (French, Merkel, Dowsett JJ) in *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland* [2001] FCA 414 where it was found the mere possibility that an act may affect native title was insufficient to establish that the act ‘affects’ native title and so qualifies as a future act<sup>16</sup>. Therefore, an act which affects native title is one which actually curtails or prevents native title holders exercising their native title rights. A clear example would be the grant of a mining lease conferring exclusive possession on the lessee over the surface area of native title land. However difficulties can be anticipated in PBCs determining whether their decisions about other, more innocuous acts, constitute a native title decision therefore triggering the requirement to undertake the consent and consultation procedures.

There are of course differing standards of consultation. The quality of consultation undertaken in any particular situation will depend on several factors including time, resources, the professionalism of those undertaking the consultation, the availability of reliable information, the composition and location of the relevant native title holders, the complexity of the issues at hand, etc.

Under the consultation and consent procedures, it would appear that a low standard of consultation is imposed upon the PBC. The PBC must ensure that the native title holders “*understand the purpose and nature of a proposed native title decision*” by consulting and considering the views of the Native Title Representative Body (NTRB) and if considered by the PBC to be *appropriate and practicable*, by giving notice of the NTRB’s views to the native title holders<sup>17</sup>. The Regulations however do not impose any particular standard of consultation, even in the giving of such notice of the NTRB’s views. There are no requirements imposed, for example, for the minimum standards of consultation that have become common practice in resource development on Aboriginal lands<sup>18</sup>. Such practices may include:

- Identification of affected native title holders;
- Preliminary meetings to discuss and determine a proposed consultation methodology;
- Preparation and distribution of information;
- Personal interviews;
- Meetings with family, clan or other sub groups;
- Telephone/Video conferences;
- Newspaper and radio advertisements;

- Surveys that canvas the views of native title holders; and
- Field trips and site inspections.

Rather than require evidence of actual consultation with native title holders, the Regulations deem the consultation requirements to have been met where a document signed by five members of the PBC certifies that a NTRB has been consulted and its views taken into consideration and a document signed by an officer of the NTRB certifies that the NTRB has been consulted.<sup>19</sup>

### Decision-making processes for the giving of consent

The Regulations provide that if there is a process of decision-making that under the traditional laws and customs of the native title holders must be followed in relation to the giving of consent (to the making of a native title decision), then that process must be followed.<sup>20</sup> If there is no such process required by traditional law and custom, the consent must be given by the common law holders in accordance with a process of decision-making agreed to, or adopted by, them for the proposed native title decision or for decisions of the same kind as that decision.<sup>21</sup>

Note that the PBC Regulations therefore contemplate that some decisions will be agreed by native title holders to belong to a class that can be made by the PBC without reference to the native title group. Therefore native title holders could agree that the certain types of native title decisions can be made by the PBC without proceeding through a detailed and expensive consultation process. This provision may be usefully employed to deal with particular classes of future act (e.g. the construction of sewerage pipelines) where impacts to native title rights are considered minimal and compensation payable would be nominal.

### Deemed consultation and consent

Regulation 9 provides for consent to be ‘deemed’ where a document certifying the fact of consent is signed by five members of the PBC whose native title rights and interests would be affected by the proposed native title decision<sup>22</sup>. There remains legal uncertainty as to what extent the deeming provisions undermine traditional decision-making processes about consent. It appears that traditional processes of decision-making can be usurped by securing the signatures of five members of the PBC, notwithstanding that they may not hold traditional authority even if they hold native title rights and interests affected by the decision.<sup>23</sup>

This regulation should be viewed with serious concern by native title holders. It provides considerable scope for collusion amongst unscrupulous elements within government, industry and native title groups to give effect to native title decisions against the will of the wider group of affected native title holders.

The problems created by the deemed consent provisions pose the question as to whether the PBC rules should prescribe minimum requirements for the making of native title decisions. To this extent the Cape York Land Council has prepared a draft *Certificate of Consultation and Consent* which requires the executing native title holders to “state” that there has been compliance with the PBC rules governing the making of native title decisions<sup>24</sup>. However it appears that the remedies available to any aggrieved native title holders in the event of any failure to comply with such rules will be limited to those available for breach of contract. Such remedies are usually limited to damages and will not include the equitable remedies of specific performance or injunctive relief. Therefore where the deeming provisions of the PBC Regulations have been complied with, aggrieved native title holders may not be able to challenge the validity of any act which is the subject of a purported native title decision, notwithstanding that there has been a failure to comply with any specific rules of the PBC concerning consultation and decision-making procedures.<sup>25</sup>

It is therefore desirable that the ‘deemed consultation and consent’ provisions of the NTA be reviewed and amended to ensure the protection of native title holders’ collective interests and ensure the integrity of traditional decision-making processes. In the short-term, it is recommended that PBCs establish a register recording all the pertinent details of each native title decision process including the preceding consultations and of any compensation proposed for the act; and further that the requirement of using such a register be formally included in the PBC rules. A further recommendation would be that the PBC rules clearly prescribe what types of decisions the agency type of PBC can make on its own and which types of ones require full consultation. These recommendations will be elaborated in the concluding chapter (Recommendation nos. 1-4).

### Outstanding Regulations

The NTA provides for the making of further regulations in relation to PBCs. To date no regulations have been made with respect to:

- (i) The circumstances in which the rights and interests may be surrendered, transferred or otherwise dealt with;<sup>26</sup>
- (ii) Establishing the parameters of what the Federal Court may determine in relation to PBCs;<sup>27</sup>
- (iii) The termination or replacement of a trustee PBC by the native title holders<sup>28</sup>; and
- (iv) The replacement of a PBC by the native title holders<sup>29</sup>.

Given the complexity of issues that are likely to arise in the administration of PBCs by virtue of the multiple legislative components of the PBC regime, there may well be benefit in replacing the existing regime with specific purpose PBC legislation.

### **Aboriginal Councils and Associations Act 1976 (Cth)**

A separate source of powers and functions for PBCs arises out of their compulsory status as incorporated Aboriginal associations under the *Aboriginal Council and Associations Act 1976 (Cth)* (ACAA). The ACAA was enacted in response to the recommendations of the 1974 Woodward Aboriginal Land Rights Commission. The historical context of the legislation is significant. At the time of the Woodward Commission, very few States or Territories provided general legislation for the incorporation of unincorporated associations. All relevant Australian jurisdictions now do so. In many respects, part 4 of the ACAA has failed to keep track with the contemporary forms of most State and Territory ‘associations incorporation legislation’, particularly in respect to the dynamism of constitutional form.

Part 4 of the ACAA provides for the formation, regulation and accountability of incorporated Aboriginal corporations. Consistent with other associations incorporation legislation, the ACAA requires that an unincorporated association previously exists for which an application to incorporate is then made<sup>30</sup>. The application must include certain information including a statement of the rules that will govern the body in the event of its incorporation<sup>31</sup>.

The rules accompanying an application for incorporation must make provision for the following matters:

- (a) the qualifications of members of the association;
- (b) the creation of the executive offices of the association and the procedure for filling those offices;
- (c) the procedure for the settling of disputes between the association and its members;
- (d) the constitution of the Governing Committee of the association and the powers of that Committee;
- (e) the procedure for the conduct of meetings of the Governing Committee of the association;
- (f) the matters for which the Rules are to provide under ACAA s. 58A in relation to meetings of the association;
- (g) the manner in which the funds of the association are to be managed;
- (h) the method of altering the rules of the association, whether by making new rules or by varying or rescinding rules in force; and
- (i) the method of altering the objects of the association.<sup>32</sup>



The rules may contain any other provision, not contrary to law.<sup>33</sup> The ACAA specifically stipulates that rules ‘with respect to any matter may be based on Aboriginal custom’.<sup>34</sup> However, this provision does not remove the requirement for the rules to address the required matters ((a) to (i)) and it is these requirements that create the basic governance structure of an incorporated Aboriginal association with a governing committee, secretary, general meetings of members and specified accountability arrangements.

The Registrar of Aboriginal Corporations has a discretion when dealing with an application for incorporation. The Registrar may refuse a certificate of incorporation in four circumstances:

- (a) where the corporation uses an unauthorized name<sup>35</sup>,
- (b) where the applicant association lacks the requisite number of members<sup>36</sup>,
- (c) where the Registrar is satisfied the rules ‘are unreasonable or inequitable’<sup>37</sup>, or
- (d) where the Registrar is satisfied the rules do not make sufficient provision as required by ACAA s. 58B to give the members ‘effective control over the running of the association’<sup>38</sup>.

Mantziaris and Martin (2000: 224-232) provide an extensive description of the controversy surrounding the application of the discretions described in paragraphs (c) and (d). Interestingly, there is no merits-based judicial review available of the exercise of these discretions (see Mantziaris and Martin, 2000: 232).

Where a certificate of incorporation is issued, the pre-existing unincorporated association becomes an incorporated Aboriginal association with typical grant of corporate capacity<sup>39</sup>. As is the typical provision for incorporated associations, the rules of an incorporated Aboriginal association are an enforceable contract between the various members and officers of the association<sup>40</sup>.

Certain persons are disqualified from being a member of the governing committee of an incorporated Aboriginal association<sup>41</sup>. Bankruptcy also affects the capacity for a person to be a governing committee member<sup>42</sup>. Incorporated Aboriginal associations are required to appoint a public officer, and keep that office filled<sup>43</sup>. The public officer must maintain an accurate register of members<sup>44</sup>. A variety of financial accountability requirements exist for incorporated Aboriginal associations including the duty to keep proper records and maintain adequate control of assets, to prepare an annual financial statement (the committee’s report), to have the committee’s report assessed by an examiner and to file a copy of the examiner’s report with the Registrar<sup>45</sup>.

The Registrar has a variety of powers of intervention available to him or her including the power to examine the documents of an incorporated Aboriginal association<sup>46</sup>, to require specified action to ensure compliance with the ACAA<sup>47</sup>, to obtain injunctions in aid of compliance<sup>48</sup>, to apply for the winding up of an incorporated Aboriginal association<sup>49</sup> and to appoint an administrator<sup>50</sup>.

Mantziaris and Martin (2000: 194-214, 224-232) detail the organisational consequences of the requirement to use an incorporated Aboriginal association as the corporate vehicle for successful native title claimants. The consequences include:

- (a) the existence of a discrete membership and board (governing committee);
- (b) constraints upon membership under the ACAA;
- (c) the authority relationship between general meeting and executive;
- (d) the special duties of board members;
- (e) the need to observe reporting requirements;
- (f) the regulatory oversight, and powers of intervention of the Registrar of Aboriginal Corporations; and
- (g) the capacity for a variety of interventions in corporate operation in the form of possible administration, receivership or winding up.

Both Fingleton et al (1996) and Mantziaris and Martin (2000: 183-194) provide extensive details of the limited capacities of, and constrained available constitutional structures for, Aboriginal corporations. These matters are relevant to the establishment of PBCs and include the following:

- (a) membership of a native title group and of a PBC are unlikely to be coterminous;
- (b) the legal requirements for an Aboriginal corporation arise from considerations quite separate to those of a landholding body for Indigenous people;
- (c) the introduction of corporate law requirements into Indigenous organisational culture and the *Native Title Act 1993* (Cth) obligations of a PBC (whether as trustee or agency);
- (d) the general absence of consent as a pre-requisite to membership of a native title group which is inconsistent with the essential features of a voluntary association (whether or not incorporated).

A summary of the process for PBC Incorporation and the combined minimum requirements imposed by the NTA, PBC Regulations and ACAA is set out in Table 2<sup>51</sup> on the following page.

**Table 2 Summary of process for PBC Incorporation and combined minimum requirements imposed by NTA, PBC Regulations and ACAA** (adapted from Chaney 2000:7).

1. The PBC must incorporate under the ACAA (s.59 NTA)
2. The PBC must be incorporated after 30 December 1994 (PBC Reg 4(1))
3. The Registrar of Aboriginal Corporations must be satisfied that it is proper for a certificate of incorporation to issue (s.45 ACAA)
4. The application for incorporation must state:
  - The name and objects of the proposed PBC;
  - The names and addresses of the Governing Committee members;
  - The place where the proposed PBC intends to conduct its activities;
  - The extent of member's liability ss.43(2) and 48 ACAA.
5. Incorporation must be for the purpose of being a PBC/RNTBC (PBC Reg4(1))
6. Objects of incorporation must expressly provide for the PBC purpose (PBC Reg 4(2)(b))
7. The Rules of Association must accompany the application (s.43(2) ACAA) and must address:
  - Qualifications of members s.43(3)(a) ACAA;
  - Creation of offices and process for filling them s.43(3)(b)ACAA;
  - Dispute resolution s.43(3)(c) [note NTA NTRB functions include dispute resolution for PBCs s203BF NTA];
  - Constitution and powers of 'Governing Committee' s.43(3)(d)ACAA;
  - Conduct of Governing Committee, general and special meetings s.43(3)(e) and (ea) and s.58BACAA;
  - Management of funds s.43(3)(f);
  - Distribution of pecuniary profits to the members where securing pecuniary profits forms one of the purposes for which the corporation exists s.44 ACAA;
  - A process for alteration of the Rules and objects (ss.43(3)(g)and(h)).
8. The Rules may be based on Aboriginal custom s.43(4) ACAA;
9. The Registrar must be satisfied that the Rules:
  - Are reasonable and equitable (s.45(3)(a) ACAA);
  - Make sufficient provision for members effective control over the running of the PBC, s.58B and s.45(3)(b).
10. Any alterations to the Rules must be approved by the Registrar s.54(2) ACAA
11. Native title holders must elect either a 'trust' or 'agency' PBC ss.56 and 57 NTA
12. Federal Court determination of PBC (NTA ss.56 and 57)
13. Governing committee members must:
  - Act diligently and honestly s.49C;
  - Disclose pecuniary interests s.49D; and
  - Keep proper records, ensure that all payments are properly authorized and adequately control the assets and liabilities of the PBC s.59(1).
14. Certain criminal convictions may bring about disqualification of Governing Committee members s.49B
15. Must have minimum of 25 members s.45(3A) ACAA
16. All members must be determined native title holders PBC Reg 4(2)(a)
17. Members must be native title holders in relation to land the subject of the native title determination PBC Reg 4(2)(c)
18. The PBC must keep a register in which the name and address of every member is recorded

## Part B Queensland's Statutory Land Title and Land Management Mechanisms

In addition to native title, a variety of specialist mechanisms are available within the study region of Cape York to enable Aboriginal people to gain title to land other than on a commercial basis. The most significant of these mechanisms are that of Queensland's land rights legislation, the *Aboriginal Land Act 1991* (Qld) (ALA) and the Indigenous Land Corporation. Other land-holding devices of historical significance continue to be relevant such as DOGIT land held by Aboriginal Councils under the *Community Services Act 1984* (Qld) (CSA).

Other land management regimes of relevance to the operation of PBCs include National Parks and land under the control of Local Government. In these instances, native title held by the PBC co-exists with the statutory interests of the other agencies. Generally a determination of native title over these forms of tenure will not result in any change of statutory tenure<sup>52</sup>. Therefore in these cases, the focus herein will be on the rationalisation of management (including processes for future dealings in the native title land) as opposed to title-holding mechanisms.

### **Aboriginal Land Act 1991 (Qld)**

The ALA provides for freehold land to be granted to trustees for the benefit of Aboriginal people or a group of Aboriginal people. The ALA offers two discrete mechanisms for the delivery of land ownership to trustees, by:

1. the grant of 'claimable land' after:
  - (a) the making of a recommendation by the Land Tribunal under the ALA that the land be granted upon a successful claim by a group of Aboriginal people; and
  - (b) the acceptance of the recommendation by the responsible Minister leading to an appropriate recommendation to the Governor in Council and the making of a grant; or
2. immediate grant of 'transferable land'.

### **Claimable land**

Claimable land is 'available Crown land' that has been declared to be claimable land by regulation. Available Crown land is generally that land in which no person other than the Crown has an interest, subject to a large number of exclusions such as land set apart and declared as a timber reserve or State forest under the *Forestry Act 1959* (Qld) (ALA s. 19). It is noteworthy that the existence of native title rights and interests or a mining interest such as a mining lease under the *Mineral Resources Act 1989* (Qld) does not prevent land being available Crown land (ALA s. 19(3)). In contradistinction, 'land subject to a special mining Act' is specifically excluded from the category of available Crown land (ALA s. 19(1)(g)). The term 'special

mining Act' is defined to include the *Alcan Queensland Pty. Limited Agreement Act 1965* (Qld) and the *Commonwealth Aluminium Corporation Pty. Limited Agreement Act 1957* (Qld) (ALA s. 3). These both have direct relevance to Cape York Peninsula and to this study since they cover substantial areas of mining leases in western Cape York between the Archer and the Skardon Rivers, with a significant proportion of the latter (Comalco leases) located within the Wik case study area.

Claimable land is also land that has been granted to trustees under the transfer process ('transferred land'), with certain exceptions. In other words, land that has already been transferred to trustees under part 3 of the ALA. The exceptions arise when a regulation is made declaring that transferred land is not claimable. Such a regulation can not be made unless:

- (a) the land is primarily used or occupied by Aboriginal people for residential or community purposes; or
- (b) the Minister has consulted with Aboriginal people particularly concerned with the land and a substantial majority of the Aboriginal people are opposed to the land being claimable land (ALA s. 18(4)).

The use of regulation making to declare transferred land not claimable has been relatively extensive. Schedule 4 of the ALR contains 39 entries of transferred land declared not claimable. This figure compares with only 44 grants of transferred land (DNRM, pers. comm.).

### **The claim process**

A claim for claimable land may be made by a group of Aboriginal people (ALA s. 45) on any of the three following grounds:

- (a) traditional affiliation;
- (b) historical association; or
- (c) economic or cultural viability (ALA s. 46(1)).

However, a claim on the ground of economic or cultural viability may not be made for a national park that is claimable land (ALA s. 46(2)) or land that was previously Mornington Shire or Aurukun Shire lease land (ALA s. 46(3)). Claims are heard and determined by the Land Tribunal created under the ALA. If a claim is made out, the Land Tribunal must make the appropriate recommendation to the responsible Minister (ALA s. 60). In the event of a recommendation from the Land Tribunal that land be granted, and if the responsible Minister is satisfied that the land should be granted in its entirety or in part, the Minister must direct the preparation of a appropriate deed of grant (ALA s. 63). For claims established on the basis of economic or cultural viability, however, the Land Tribunal may only recommend that the claimable land be granted for a lease in perpetuity or for a term of years (ALA s. 60(1)(b)).

### **Transferable land**

At the time of its enactment, the purpose of the category 'transferable land' was to deliver secure land title to trustees for that land that was:

- (a) Aboriginal reserve land;
- (b) freehold land granted in trust for the benefit of Aboriginal people; or
- (c) Mornington Shire or Aurukun Shire lease land under the *Local Government (Aboriginal Lands) Act 1978* (Qld) (ALA ss. 12-16).

On 5 December 1994, the *Native Title (Queensland) 1993* (Qld) amended the ALA to add another category of land, that of 'available Crown land declared by regulation to be transferable land' (ALA s. 12(e)). This amendment substantially increased the capacity for the Queensland Government, by regulation, to nominate land for transfer without undergoing the claims process. Until the amendment was made, only former roads bounded by DOGIT land (ALA s. 13, concluding words), reserve land reserved other than for Aboriginal people, that was on 12 June 1991 being used as an Aboriginal reserve or for the benefit of Aboriginal people (ALA s. 14, concluding words) and former roads bounded by the Mornington Shire lease (ALA s. 15, concluding words) or Aurukun Shire lease (ALA s. 16, concluding words) could be declared to be transferable land by regulation. The link between 'available Crown land' and 'transferable land', combined with the capacity for the State to attenuate the amount of available Crown land through the use of its powers under the *Land Act 1994* (Qld), confers upon the State a broad discretion to engage the claim process under the ALA for particular available Crown land, or to immediately transfer that land.

### The Nature of 'Inalienable freehold'

Similarly to Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR(NT)A), freehold land granted under the ALA has been described as 'inalienable freehold' (see *Hansard*, 22 May 1991, p. 7772). This is not meant to convey that no interest may be granted to third parties once the land has been conveyed to persons acting on behalf of Aboriginal people. Rather, it is meant to reflect that the interest in land is subject to special legal rules that render it safe from coercive processes that would otherwise deprive Aboriginal people of its benefit.

One way in which the ALA seeks to secure Aboriginal land, both transferred and granted (freehold) land, from loss is by limiting the interests that can be created in respect of it by trustees. The ALA sets out a code of permitted dealings with transferred land (ALA s. 39) which is almost identical with that for granted land (ALA s. 76). In respect of transferred land, the ALA provides that leases or licences may be granted over the whole or part of the land to either an Aboriginal person particularly concerned, the crown, or another person. However, in the case of grants to third parties, there is a

ten year cap on the term unless the Minister's consent is obtained. No grant of an interest including consent to a mining interest may take place unless statutory criteria regarding the consent of the Aboriginal people particularly concerned is followed.

Non-compliance with the code of permitted dealings renders a transaction invalid (ALA ss. 40 and 77). The ALA also specifically excludes the possibility of compulsory acquisition, compulsory sale or other legal process in respect of Aboriginal land other than under special legislation for that purpose (ALA ss. 41 and 78). This special provision does not apply to leased land. The 'permitted dealings' provisions therefore offer much greater protection against unscrupulous dealings than the PBC Regulations provide for native title transactions.

### Creation of a Land Trust

Deeds of grant of transferred land and granted<sup>53</sup> land (ALA ss. 32 and 69), and leases of granted land (ALA s. 70), commence on delivery. Another consequence of delivery is incorporation of the grantees of the deed or lease as a land trust.

Similarly to land trusts under the ALR(NT)A, land trusts under the ALR are bodies corporate with perpetual succession (ALR s.21(1)). However, unlike the 'corporate shell' that is a land trust under the ALR(NT)A, lacking capacity to exercise its power in the absence of a land council direction<sup>54</sup> land trusts under the ALR are not under any corresponding disability (see ALR s.21(2)). A land trust relating to transferred land, has, subject to the ALA, apparently (see below) all the powers of a trustee under the *Trusts Act 1973* (Qld) (ALR s.21(3)). It is curious that the ALR does not similarly provide such powers in the case of a land trust relating to granted land despite the existence of a provision<sup>55</sup> in respect of granted land cognate to ALA s.28(6) which is referred to in ALR s. 21(3).

ALR land trusts must adopt rules<sup>56</sup> including rules concerning the following matters:

- (a) the constitution and functions of the land trust's executive committee;
- (b) the process for decision making by the land trust and its committees;
- (c) the creation of the land trust's executive offices and the procedure for filling the offices;
- (d) the appointment of a person to act in the position of a member of the executive committee when the member is, or is to be, absent;
- (e) the procedure for settling disputes between the land trust and the individual grantees forming the land trust;
- (f) a requirement for quarterly, or more frequent, meetings of the executive committee, and how the meetings are to be held;
- (g) the way the land trust's general meetings are to be

- called and held;
- (h) requirements for managing trust property, including requirements for the following—
  - (i) keeping records of the land trust’s transactions;
  - (j) procedures for authorising payments, and for making payments, out of the land trust’s funds;
  - (k) keeping control over trust property;
  - (l) procedures for incurring liabilities by or for the land trust;
  - (m) the procedure for adopting changes to the rules of the land trust and for adopting new rules<sup>57</sup>.

Land trusts must comply with certain financial reporting obligations (ALR part 3, div 4). Land trusts are obliged to hold an annual general meeting as soon as practicable after the end of each financial year (ALR s.35D). The corporate structure of ALR land trusts is based on the incorporated association model and for most practical purposes there is very little difference in their day-to-day operation.

### **The nature and terms of the trust of Aboriginal freehold under the ALA**

The term ‘trust’ is often used loosely in association with the holding of land for Aboriginal people. It seems likely that the form of grant and lease used in practice, together with the statutory scheme of the ALA, support the conclusion that interests in land held by trustees, are held by such as trustees of an express trust in equity. Grants of transferred land must ‘show that the land is held by the grantees for the benefit of Aboriginal people of Queensland and their ancestors and descendants’ (ALA s.27(3)), and grantees are appointed ‘as trustees for the benefit of Aboriginal people, of the land the subject of each deed of grant’ (ALA s.28(1)). Grants of claimable land are subject to similar provisions except that the class of beneficiaries is confined to the relevant Aboriginal group making the claim (ALA ss.63(3), 64(4), 65(1)).

While ALR s.19(4) describes a land trust as ‘holding’ land, the better view is that a land trust provides trustees with a corporate form through which they may act despite the absence of some of their number. In that sense, the land trust provides a corporate form to facilitate the business of the trustees (see ALR ss. 21(1) and 25).

The terms of the trusts created by the grant of transferable and claimable land are extremely vague. The trustees are largely deprived of the benefit of the *Trusts Act 1973* (Qld) in clarifying their powers because of the exclusion of that Act (see ALA ss. 28(6) and 65(5)). As noted above, a land trust in respect of granted land is purportedly conferred with the powers of

a trustee under the *Trusts Act 1973* (Qld). However, there is real doubt about the validity of that provision. No express provision of the Act authorises such extension of power, and ALA ss. 28(6) and 65(5) are confined to altering the application of the *Trusts Act 1973* (Qld) to ‘trusts created for the purposes’ of ALA part 3 division 1 and part 5 division 1. In the context of the Act, that reference clearly means the trust created by the appointment of trustees and the grant of interests in land. Specifically, it refers to trusts in equity and not the bodies corporate known as ‘land trusts’ created under the ALR (see ALA s. 3, definition of ‘land trust’). These features create a problematic relationship between the ALA and the ALR in respect of the powers of trustees, in the office of trustee, and the powers of trustees acting through their land trust. There is clearly a need for clarity in the powers of land trusts here, which should be addressed as a matter of legislative reform (see later Recommendation No. 24 on this in Chapter 8).

### **Use of the ALA in native title negotiations**

Increasingly the ALA is being used as a tool for resolving native title negotiations by including transfers of inalienable freehold within “negotiated packages”<sup>58</sup>. These are often combined with consent native title determinations, especially as a means of “giving land back” where native title has been extinguished.<sup>59</sup> The combination of the ALA and NTA systems has led to a situation where several parcels of land with differing tenures may be subject to the one determination yet also divided into some areas of ALA freehold held by one or more land trusts. Hence the need to harmonise the title management and land management systems.

### **Grants of Land under the ALA**

The following two tables demonstrate that there has been considerably more land transferred under the ALA than claimed under that Act. It may bring into question the rationale for continuing the ALA claims process, particularly for areas that may become the subject of applications for native title determinations. Given the evidentiary requirements of the native title claim process, if the Queensland Government is prepared to consent to a determination of native title (usually on the strength of a “Connection Report” and a number of supporting affidavits), then there would appear to be no reason why it should not be prepared to make grants of transferable land on the same basis and thus dispense with the ALA claims process. (A recommendation to this effect is contained in Chapter 8; see recommendation No. 5.)

**Table 3 Land under ALA claim in Queensland**

Category	Parcels	Area (Ha)	Land Trusts
Land Gazetted for claim	76	3 301 000	N/A
Claim Process completed	33	2 779 000	N/A
Claim still in progress	43	522 000	N/A
Granted by Minister	10	2 500	1

**Table 4 Land being obtained by the ALA transfer provisions in Queensland**

Category	Parcels	Area (Ha)	Land Trusts
Land Gazetted for transfer	178	2 695 000	N/A
Land Transferred	85	769 000	43

The arguments in favour of retaining the ALA claims process include the fact that land transferred must be held for the benefit of “Aboriginal people generally”<sup>60</sup> whereas land successfully claimed under the ALA is held on behalf of the successful *claimants*.<sup>61</sup> Further, under existing arrangements, the Queensland Government meets some of the expenses of the ALA claim process. In this context, the transfer mechanisms of the ALA present a real opportunity to streamline claims processed under both the NTA and the ALA. The important question is: to what extent can the operation of the NTA and ALA regimes be reconciled post transfer and determination of native title?

### **Rationalising Title and Management Regimes**

The prospect of land trusts and PBCs operating independently of each other with respect to the same land within regions of Cape York has been identified as a source of concern to traditional owners. Such a scenario may give rise to several problems including unnecessary duplication of administration, wastage of resources, the development of organisational rivalries and so on. Both regimes offer distinct advantages to traditional owners and it is unlikely that traditional owners would reject the added benefits of holding inalienable freehold over their native title lands<sup>62</sup> or reject a determination of native title over inalienable freehold. The difficulty therefore facing traditional owners is the means by which the two regimes can comfortably sit together.

There would appear to be three options available to reconcile the operations of a PBC and land trust concerned with the same area of land:

- Land trust as a PBC;
- PBC as a land trust; and
- Separate entities in agreement.

### **The Land Trust as a PBC**

It is clear that a land trust holding ALA freehold at this stage cannot be determined as a PBC. To do so would require amendment of the PBC Regulations<sup>63</sup> but importantly not of the NTA itself<sup>64</sup>. Whilst the ATSIC review is considering amendments to the PBC Regulations to enable this to occur it is likely to take a considerable period of time and involve applications by State Governments to the Commonwealth Minister for a determination that a land trust (e.g. under the ALA) be eligible for nomination as a prescribed body corporate.<sup>65</sup>

The advantages of a land trust PBC would include:

- A sole corporate entity (a PBC being appointed as a land trust on the other hand would result in two corporate entities – see below);
- Streamlined administration; and
- Some (albeit currently insufficient) funding is available from the Queensland Government to assist in the administration of land trusts.

There are three possible disadvantages of a land trust PBC. First, in the event that the PBC regulations were to be amended to allow ALA land trusts to be determined as PBCs, it is likely that they would be required to amend their rules to establish the purpose of becoming a PBC and thus overcome any challenges based on grounds of *ultra vires*. Second, the ALA empowers the Minister to remove and suspend the grantees of a land trust. A land trust PBC would therefore provide scope for political interference by a future Queensland Government in the operation of native title body corporates by effectively allowing the Government to control its membership. Third, the Minister would be required to remove any non-native title holder trustees, to ensure that the membership of the PBC is limited to native title holders.

### **The PBC as a Land Trust**

The consideration of this question is one of the major tasks undertaken in this report. The question gives rise to legal, policy and practical considerations.

### **The Legal Issues**

Legal issues in response to this question, “Can a PBC become a land trust?”, are considered here under six headings.

#### **(1) ALA provisions.**

The ALA provides for the appointment, suspension and removal of trustees for both transferable land and claimable land. The relevant provisions for both transferred (s28) and granted land (s65) both provide “The Minister must appoint such persons as the Minister considers necessary to be the grantees, as trustees .. of the land” (s28(1), s65(1) ALA).

## (2) Interpretation of the term ‘person’ as a body corporate.

The starting point for any analysis of the capacity to appoint PBCs as trustees of transferable or claimable land is the use of the term ‘person’ as the object of the Minister’s power of appointment under the ALA. A provision that the term ‘person’ includes a body corporate is a universal feature of interpretation legislation in Australia (Pearce 1981: 114). Such a provision has always been found in the *Acts Interpretation Act 1954* (Qld) – originally as s.32 but, after a major reconfiguration in 1991, now as the more detailed s.32D(1), which provides:

*32D.(1) In an Act, a reference to a person generally includes a reference to a corporation as well as an individual.*

As with all interpretation provisions, the above may be displaced by contrary intention (see AIA s.4).

There is no express limitation of the term ‘person’ to that of ‘natural persons’ in subsections (1) or (2) of ALA ss.28 or 65. Such an express limitation would have been achieved by using the term ‘individual’, which means a natural person under s.36, AIA.

It is noteworthy that the term ‘individual’ in s.36 and s.32D AIA was inserted in that Act by the *Acts Interpretation Amendment Act 1991* (Qld), which was enacted on the same day as the ALA (12 June 1991). The fact that Parliament extensively reconfigured interpretation legislation simultaneously with the enactment of the ALA suggests that no limitation of the term ‘persons’ to natural persons in subsections (1) or (2) of ALA ss. 28 or 65 was intended.

## (3) Exclusion of corporate trustees by implication.

The possibility of the limitation of ‘persons’ to natural persons as potential trustees by implication must also be considered. Such an implication would necessarily amount to a contrary intention capable of excluding the interpretive provisions of the AIA. However, there is nothing in the balance of ALA ss.28 or 65, or arising from this Act as a whole, that appears to justify such an implication.

Both ALA ss.28 and 65 require the responsible Minister to take certain considerations into account before appointing, suspending or removing trustees. There is a slight difference between the two provisions. ALA s.28 relevantly provides:

- (3) *Before exercising powers under this section, the Minister must consult with, and consider the views of, Aboriginal people particularly concerned with the land.*
- (4) *In exercising powers under this section, the Minister must, as far as practicable, act in a way that is consistent with any Aboriginal tradition applicable to the land concerned.*

- (5) *Despite subsection (4), the Minister may appoint the trustees of transferable land to be the grantees of a deed of grant over the land, or part of the land, if—*
  - (a) *a declaration is in force under section 18(3) in relation to the land; or*
  - (b) *the Minister considers that in all the circumstances it is appropriate to do so.*

ALA s. 65 relevantly provides:

- (3) *Before exercising powers under this section, the Minister must consult with the group of Aboriginal people concerned and, unless the Minister is satisfied that exceptional circumstances exist that require the Minister to do otherwise, must act in a way that is consistent with—*
  - (a) *any Aboriginal tradition applicable to the land; and*
  - (b) *the views of the group so far as they are not inconsistent with any such Aboriginal tradition.*

A contention that the ALA manifests an implied intention to exclude the definition of ‘person’ in *Acts Interpretation Act 1954* (Qld) s.32D, could be based in the requirement of the responsible Minister to consider Aboriginal tradition when exercising powers of appointment, suspension and removal under ALA s.65. Aboriginal tradition, the argument would run, is not cognizant of bodies corporate and so they cannot be appointed as trustees. But such an argument is flawed because the same could be said of the appointment of trustees to hold fee simple interests or the creation of a trust with fee simple as the corpus of the trust.

The duty of the responsible Minister to act, in some way, consistently with ‘Aboriginal tradition’ is best understood in context. Trustees hold trust property for the benefit of Aboriginal people, in the case of transferred land (ALA s. 28(1)), or for the benefit of the ‘group of Aboriginal people concerned’ (ALA s. 65(1)). Of course, trustees must act in the interest of beneficiaries to whom they have a fiduciary duty. Nothing in the ALA means that the identity of trustees alters the extent of their duties to beneficiaries. Also, and in contradistinction to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s.3(1) definition of ‘traditional Aboriginal owners’, the term ‘Aboriginal tradition’ is not defined by reference to any unit of Aboriginal society.

Given this context, the duty to act consistently with ‘Aboriginal tradition’ should only require that persons appointed as trustees have an appropriate relationship with persons responsible for particular land under ‘Aboriginal tradition’ (e.g. those persons have nominated or approve of the person). In the case of a body corporate, this may mean that its rules or articles of association make it representative of persons responsible for particular land under ‘Aboriginal tradition’.

Notably, ALA s.28(5) allows the Minister to appoint a person as trustee other than that just described.

This was the mechanism created by *Aboriginal and Torres Strait Islander Land (Consequential Amendments) Act 1991* (Qld) s.6 to allow for the appointment of Aboriginal Councils under the CSA as trustee for the land in the town areas of DOGIT communities. The then responsible Minister Warner in her second reading speech stated:

There is therefore no single or simple administrative mechanism that can be universally applied to the future of these lands. Certainly the National Party approach of requiring that Aboriginal Councils automatically act as trustees of land has been criticized by many Aboriginal people and has placed many councils in an invidious position in relation to those people who hold traditional religious and other responsibilities for the land. Conversely, however, in certain circumstances it may be that councils are the appropriate body to hold title to all or part of the former trust areas. The Aboriginal Land Act will be amended to enable the Minister to appoint an Aboriginal council to be the grantee of transferred land where that is appropriate. Similarly, it may be appropriate in some areas to allow the community lands to be subdivided through the claims process. It may be quite inappropriate and socially disruptive in other areas. This is a matter that needs to be seriously considered by all those Aboriginal or Torres Strait Islander people who are particularly concerned with the land. If it is their advice that an area of land should not be subject to claim, then the Government must be able to respect that advice and act upon the will of the substantial majority of people. The Aboriginal Land Act will be amended to enable areas of transferred land to be declared unavailable for claim. It is likely that this mechanism will be particularly appropriate in the township areas. In summary, the proposed amendments are designed to facilitate the appointment of Aboriginal Councils as trustees for these areas and to facilitate the declaration of the areas as unavailable for subsequent claim if this is the will of Aboriginal people particularly concerned with the land. (*Hansard*, 23 October 1991, p. 1975.)

Given the description of the duty to act in accordance with 'Aboriginal tradition' given above, it is apparent why an amendment for this purpose was required. It was required not because Aboriginal Councils under the CSA are bodies corporate, but because they lack the requisite (constitutional) connection with persons responsible for land under 'Aboriginal tradition'.

In summary, the duty for the responsible Minister to act consistently with 'Aboriginal tradition' imposes a deliberative obligation prior to the appointment of trustees for Aboriginal land but does not exclude the appointment of appropriate bodies corporate.

#### **(4) Limitations on power to appoint, suspend or remove trustees.**

It has been suggested that the winding up of a trustee corporation could render Aboriginal land vulnerable to use other than for its trust purpose. There does not, however, appear to be any substantial basis for this suggestion. As is the case with a natural person, insolvency does not render trust property available to the creditors of an insolvent corporate trustee (*Re Australian Home Finance Pty Ltd* [1956] VLR 1). A liquidator must apply to the Supreme Court for the appointment of a new trustee. In the context of the ALA, insolvency of a corporate trustee would presumably lead to removal from office by the responsible Minister. The fact that a corporation is liable to be wound up in a variety of circumstances, including insolvency, is no grounds for concluding that an implied restriction exists on the appointment of corporate trustees under ALA ss.28 or 65, any more than the fact that an individual may die is grounds for concluding that natural persons may not be appointed trustees.

A suggestion that a corporation should not (rather than cannot) be appointed as trustee because Aboriginal land held by a corporate trustee would revert to the Crown in the event of the winding up of that corporation (which would arise in *bona vacantia* if the corporation had absolute property in the land and no other person were entitled on winding up: see *Property Law Act 1974* (Qld) s. 20(4)) is also baseless. A trust will not fail for want of a trustee (Evans 1988: 256). Even if no new trustee is appointed by the responsible Minister, or by the Supreme Court in its supervisory jurisdiction, prior to the completion of the winding up of a corporation, the trust would continue to subsist and a new trustee could be appointed (*Sonley v Clockmakers' Company* (1780) 1 BroCC 80, 28 ER 998).

The capacity to appoint corporate trustees under ALA ss. 28 and 65 is consistent with the rules of equity. Equity has always (or at least since 1744: see *Attorney-General v Landerfield* (1744) 9 Mod 286 at 287, 88 ER 456 at 457 per Lord Hardwicke) recognised the capacity for bodies corporate to be appointed as trustees subject to the internal limitations arising from its article or objects (Ford and Lee, 1983: 328).

#### **(5) Land trusts and corporate trustees.**

Given the incorporation of grantees as a land trust upon delivery of a grant under the ALA, there may be some apparent confusion in having a 'double corporation' in the event of an appointment of a single corporate trustee. However, this confusion is more apparent than real. The same situation arises for a single member corporation under *Corporations Act 2001* (Cth) s. 114 where the member is a body corporate. There are four land trusts in Queensland with a single corporate trustee (DNRM, pers. comm.).



## **(6) Capacity of PBC to take on Land Trust functions.**

PBCs as corporate entities constituted under the ACAA are limited constitutionally by the objects set out in their rules. Therefore care should be taken in the drafting of PBC rules to ensure there is sufficient scope within the objects to take on the land trust functions and thus avoid any challenges based on *ultra vires* grounds.

### **Relevant Policy Issues – Queensland Government**

The Queensland Government is required to play a major role in the appointment of trustees. The Government also plays a role in the administration of land trusts. Land trusts are required to:

- Adopt rules;
- Keep proper accounts of their operations;
- Provide an annual financial statement to the land registrar;
- Audit their accounts each financial year; and
- Hold annual general meetings.

The Department of Natural Resources and Mines has developed a register of land trusts to monitor compliance by the land trusts with the regulatory requirements. At the time of carrying out this study, 38 land trusts had been created; however only 13 of these land trusts complied with the statutory requirements. The Queensland Government spent approximately \$78,000 supporting land trusts in the 1999/2000 financial year and approximately \$100,000 during 2000/2001. Given the low level of compliance, these figures suggest that the funding assistance to land trusts, amounting to approximately \$2,500 per land trust per annum, is substantially inadequate. It would appear that a significant increase in funding is required to provide adequate training and support services to the land trusts to enable them to carry out their mandatory administrative functions. (See recommendation 6 in Chapter 8 on increased funding for land trusts.)

In this context the Queensland Government may be concerned that the appointment of a PBC as a land trust, in the absence of adequate funding for the operation of PBCs, may only lead to more demands being placed upon the already strained resources of land

trusts. It is also likely that the Queensland Government will be reluctant to allocate its resources toward what it may perceive to be a 'Commonwealth issue', namely the operation of PBCs. Nevertheless the wider benefits for the regional and State economy that would flow from the rationalization of regional land management and planning as outlined throughout this report, would arguably offset these additional costs.

A further issue, although not an insurmountable one, is the requirement of the ALA to accommodate Aboriginal persons with 'historical' association with the land. Membership of PBCs is limited to native title holders. Unless the traditional laws and customs provide for the inclusion and conferral of native title rights and interests upon people with historical association, such people cannot be said to be native title holders and therefore are precluded by the PBC Regulations from membership (including Associate membership)<sup>66</sup>.

By virtue of s.65(3) ALA, the Minister is required to consult with the "*Aboriginal people particularly concerned with the land*" about the appointment of trustees. This would probably require the Minister to include those with historical interests in his consultations. However the Minister is also required to "*as far as practicable, act in a way that is consistent with any Aboriginal tradition applicable to the land concerned*". Accordingly if traditional law and custom does not provide for the inclusion of Aboriginal people with historical interests in traditional decision-making about land matters, there should be no basis for rejecting the appointment of a PBC as trustee.

### **Summary**

In light of the above, there is no apparent technical or policy impediment to the appointment of PBCs as trustees of ALA land although it may be preferable or necessary to amend the ALA to provide specifically for the appointment of PBCs as trustees of land trusts. However as noted above the appointment of a PBC as a land trust will not overcome the difficulties arising out of having two distinct corporate entities. The question remains as to the extent to which the operation of the two entities can be harmonized. A preliminary model of how this might occur is set out in Table 5 on the following page.

**Table 5 Model of harmonised rules for a PBC as grantee of a land trust**

Issue	Land Trust Rules	PBC (as Grantee) Rules
Objects	Objects are for purposes set out in the ALR.	Objects to include acting as grantee of land trust and as a PBC.
Membership	Limited to one grantee – the PBC. Alternatively could include “historically affiliated” persons as grantees. Historical members to be qualified with no voting powers.	Open to adult native title holders only. Note “historically affiliated” persons are ineligible for membership.
Committee	Limited to PBC. PBC is Chairperson.	By election at AGM.
Meetings	AGM (same day as for PBC) Committee must meet quarterly.	AGM (same day as for land trust) Committee meet as required by rules (at least quarterly).
Decision-Making Processes	As set out in rules and in accordance with code of ‘permitted dealings’ provisions in ALA. To be identical to those of the PBC.	Prescriptive decision-making processes set out in rules. To be identical to those of the land trust.
Administration	Separate accounts/audit. Annual statement to Land Claims Registrar.	Separate accounts/audit. Reports to Registrar of Aboriginal Corporations.

It would be desirable if the Queensland Government could provide a formal response to this proposal, viz the capacity to appoint PBCs as grantees of land trusts (see recommendation No. 7 in Chapter 8 on this).

### **Maintaining the PBC and the Land Trust as Separate Entities**

An alternative but inferior response to the problem of having separate land holding entities, would be to have the two entities (land trust and PBC) enter into a cooperative agreement. Under the agreement, which could take the form of a PBC ILUA, the two entities could reach agreement about such matters as:

- Decision-making processes including for future acts;
- Co-ordination of Annual General Meetings;
- Administrative issues;
- Dealing with historically associated Aboriginal people;
- Rules etc.

If the Queensland Government is opposed to the appointment of PBCs as grantees of land trusts, and the Commonwealth Government does not amend the PBC Regulations to allow land trusts to become PBCs, then such an agreement may be the only means by which some degree of co-ordination of the entities can be achieved. It would of course be preferable to commence the agreement at the earliest possible stages to ensure that the rules of each corporate entity are as similar as possible.

### **Deeds of Grant in Trust (DOGITs)**

All Aboriginal Councils established under the *Community Services Act 1984* (Qld) hold, or at one time held, DOGITs in respect of their Council areas. Deeds-of-grant-in-trust have been a feature of land legislation

in Queensland since the colonial period but specialist DOGITs were created by legislation in 1982 (Brennan 1992). Aboriginal Councils hold DOGITs as trustees; however this role can be performed by a statutory body, an incorporated body, a group of individuals or a named individual.<sup>67</sup>

Like grants under the ALA, DOGITs are inalienable and can only be reduced in size or terminated by an Act of Parliament.<sup>68</sup> A significant qualification to this general inalienability principle results from the ability of DOGIT trustees to grant both term and perpetual leases over DOGIT areas.<sup>69</sup> It has been suggested that the grant of such leases to Councils and to corporations comprised of individual residents conflicts with “traditional and (communal) responsibilities for land”.<sup>70</sup>

### **Aboriginal Councils**

Aboriginal Councils are bodies corporate, legal entities capable of suing and being sued, and of acquiring and holding real and personal property.<sup>71</sup> Aboriginal Councils are provided with broad functions and powers. Such functions include:

- “(a) the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of its council area;
- (b) the planning, development and embellishment of its council area;
- (c) the business and working of the local government of its council area;
- (d) the provision, construction, maintenance, management, and control of roads, bridges, viaducts, culverts, baths and bathing places; and... health, sanitation, cleansing, scavenging and drainage, the removal, suppression and abatement of nuisances, public conveniences, water conservation, agricultural

*drainage, village planning, subdivision of land, the usage and occupation of land, building, the usage and occupation of buildings, protection from fire, boundaries and fences, disposal of the dead, the destruction of weeds and animals”.*

Interestingly Aboriginal Councils are charged with the good government of Council areas ‘in accordance with the customs and practices of the Aborigines concerned’<sup>72</sup> This suggests that the customs and practices of the native title holders of Council areas should be incorporated into the decision-making and discharge of functions by the Aboriginal Councils. On a narrow interpretation of this provision, Aboriginal Councils could be bound to respect the customs of native title holders in, for example, land use planning, by not establishing infrastructure over significant places. However any encouragement for native title holders seeking control over the actions of their Council under this provision needs to be tempered with the fact that the State Government holds considerable powers of intervention and control including to overrule by-laws created by Aboriginal Councils, appoint financial controllers and to dissolve Councils.

### **Interaction between DOGITs and Native Title – The Relationship between Aboriginal Councils and PBCs**

A critical aspect of the future management of native title in Cape York Peninsula is the relationship between native title holders and the various Aboriginal Councils. There are two main issues arising out of this relationship.

#### **1. Title.**

The policy imperative of the ALA has been to secure the rapid transfer (see ALA s.29) of all, or the vast majority, of DOGIT land in Queensland to Aboriginal land as soon as possible after 21 December 1991 (the commencement day of the ALA). Largely, this policy has not been implemented. The reasons for the delay in transfer of DOGIT areas to Aboriginal trustees is not immediately apparent. However, the delay may be due to concerns on the part of the Queensland Government and perhaps the Aboriginal Councils themselves, as to native title implications of such land transfers. These concerns might relate to:

- the management of infrastructure on existing DOGIT areas;
- the interests of Aboriginal people having historical association with the DOGIT areas; and
- potential impacts on native title by the grant of inalienable freehold.

Each of these concerns should be able to be addressed by the negotiation of an Indigenous Land Use Agreement (ILUA) which provides for:

- validation and continued use and operation of existing and perhaps some specified future infrastructure;

- a process (if desired) of identifying and addressing the interests of Aboriginal people with historical association;
- consent to the grant of inalienable freehold over the former DOGIT lands.

It may be however that unless there is a rationalization of the respective title and management systems of the ALA and NTA regimes, native title holders will be reluctant to pursue the transfer of DOGIT lands to ALA inalienable freehold. Rather, native title holders may seek alternative title options including the option of having no statutory title over the former DOGIT area and relying solely on the NTA regime for its title and management.

#### **2. Management of Future Dealings over Native Title Land within Council Areas.**

The second issue arising out of the relationship concerns future dealings on native title land either creating an interest in favour of the Aboriginal Council (e.g. a lease) and/or occurring on DOGIT land held by the Aboriginal Council.

In this respect there is a need to distinguish between the powers held by Aboriginal Councils under CSA and their powers held as trustees of DOGITs. For example, even if DOGITs are transferred under the ALA or surrendered to the Crown and held by the native title holders, Aboriginal Councils will still be able to perform certain functions (such as the construction of a road) over council areas in accordance with the future act provisions of the NTA<sup>73</sup>. Such future acts, whilst being valid will still give rise to compensation for the impairment or extinguishment of native title. Other future acts may not be valid and will require some form of consent of native title holders. Accordingly irrespective of the statutory title of the Council area, it may be important to have agreed future act processes in place as between the PBC and Aboriginal Councils for future dealings over Council areas subject to determinations of native title. In this respect it is noted that the Queensland Government has apparently adopted a position to the effect:

- township areas should be kept within DOGIT areas (therefore excised from any transfer of inalienable freehold under the ALA);
- township areas should be excluded from any determination of native title; and
- acts of Aboriginal Councils over DOGIT areas are past acts<sup>74</sup>.

It is therefore recommended that Aboriginal (and Torres Strait Islander) Councils and PBCs negotiate model ILUAs for future acts within DOGIT and/or Aboriginal (and Torres Strait Islander) Council areas (see Chapter 8, recommendation No. 8 on this issue).

### **Nature Conservation – Title and Management Issues**

Conservation in Queensland is governed by the *Nature Conservation Act 1992 (Qld)* (NCA) which provides for the creation of various statutory mechanisms for the management of conservation areas. These range from the imposition of covenants on private freehold to the most ‘restrictive’ mechanism of a National Park. At the time of writing, approximately 12 % (1,647,709 hectares) of Cape York Peninsula was covered by National Parks. The major issues arising out of the nature conservation regime on Cape York Peninsula for the purposes of this report are Indigenous land title and management.

#### **Leaseback arrangements for National Parks under the ALA**

The NCA and ALA provide for:

- the making of claims over gazetted National Parks;
- the hearing of such claims by a tribunal;
- the grant of inalienable freehold to successful claimants; and
- the compulsory leaseback of the land as National Park (in perpetuity).

To date 15 National Parks have been gazetted as claimable under the ALA. Several have been successfully claimed, however no lease and management arrangements have been entered into due to an inability to reach agreement on several issues including:

- the requirement to prepare a management plan prior to the grant of freehold;
- the requirement to lease the land back in perpetuity as opposed to a term lease;
- the composition of the Board of Management (whether Aboriginal majority or not); and
- the failure of the Government to guarantee minimum levels of rent.

There is therefore an urgent need for the Queensland Government to resolve the impasse on leaseback arrangements for successfully claimed National Parks by agreeing to term leases of appropriate duration (e.g. 30 years) (see Recommendation Nos 17 and 18 in Chapter 8 on this).

#### **Determinations of Native Title over National Parks**

So far there have been no agreed determinations of native title over National Park in Queensland.<sup>75</sup> This is apparently due to the fact that satisfactory arrangements have not yet been agreed to by native title claimants and the Department of the Environmental Protection Agency (EPA) as to the future management of National Parks.

The outstanding issues are similar to those relating to the ALA, however they also include issues as to the extent of extinguishment caused by prior gazettals of

National Parks. A further outstanding issue concerns the effect of s69 NCA which preserves existing rights unless regulated by a Management Plan.

#### **Management of Conservation Areas**

Despite the provision for joint management of National Parks being available now for one decade in Queensland, there has not been a single agreed joint management arrangement put in place. It is understood by the authors that a briefing has been prepared for the Premier’s office seeking political direction about options for the future joint management of National Parks in Queensland. It is understood that the report draws a distinction between “Options for decision making processes” and “Options for joint management of national parks in Queensland” as follows.

Three joint management decision-making options are:-

##### **(a) Board of Management.**

Currently there are no provisions enabling the establishment of Boards of Management except for National Park Aboriginal Land granted under the ALA. It may be possible to overcome this problem by establishing Boards of Management by ILUA. The Minister (EPA) would retain the ability to override the decisions of such a Board.

##### **(b) Alliance between PBC and the Chief Executive Officer (CEO) of the EPA, supported by an ILUA.**

Features of an ‘Alliance’ ILUA between a PBC and the Chief Executive Officer (CEO) of the EPA would include: (a) meetings between PBC representatives and CEO (or delegate); (b) no board of management; and (c) no actual devolution of power to the PBC.

##### **(c) Advisory Committee under the NCA.**

Section 132 NCA enables the Minister to appoint a committee to provide advice on the management of a National Park. For example such an arrangement has been established for Lawn Hill National Park in north-west Queensland. It would be possible to appoint the PBC as an advisory committee to the Minister however the recommendations of the PBC would not be binding in any way.

Options for joint management of National Parks in Queensland are:-

- (a) ALA lease-back in perpetuity;
- (b) Agreement under the NTA; and
- (c) Contractual management of a National Park.

#### **Summary**

There is therefore considerable scope, via a range of legislative and administrative mechanisms, for a PBC to be meaningfully involved in the management of nature conservation areas. It would be possible for the Board of Management of a Conservation Area to be comprised of the PBC Governing Committee or be nominated by the

PBC under an agreement with the Minister (ILUA). It would also be possible to create a PBC which was then appointed as grantee of ALA inalienable freehold.

### **Local Government Authority Areas**

Most of Cape York, excluding DOGIT areas, falls under the local government authority of the Cook Shire Council, which is governed in its operation by the *Local Government Act 1993* (Qld). There is a second Shire Council in Cape York, the Council of the Shire of Aurukun (ASC) in central west Cape York, established under the *Local Government (Aboriginal Lands) Act 1978* (Qld). The ASC holds a fifty year lease, granted at the time of its establishment<sup>76</sup>. The ASC is also governed in its operation by the *Local Government Act 1993* (Qld). The application of these Acts in the study region is taken up in the next chapter.

### **Department of Natural Resources and Mining Lands – Administration and Management**

The Department of Natural Resources and Mining (DNRM) is charged with the administration of dealings in land in Queensland principally through the *Land Act 1994* (Qld), and also the ALA. DNR regulates the creation of interests in land such as reserves, DOGITs, leases etc. DNRM plays a major role in the Queensland Government in ensuring compliance with the requirements of the NTA, especially the future act provisions generally and specifically the notification requirements. DNR is also allocated responsibility within the Queensland Government for the management of Unallocated State Land and holds a limited budget for the purposes of weed and pest eradication. Approximately 3.5% (475,800 hectares) of Cape York Peninsula is Unallocated State Land.

### **Part C Indigenous Land Corporation (ILC) Entities**

The ILC is established by part 4A of the ATSI Act. The purpose of ILC is to assist Aboriginal people and Torres Strait Islander to acquire land and to manage ‘indigenous-held’ land (ATSI Act s. 191B). The ILC has access to the proceeds of the Indigenous Land Fund for this purpose. The land acquisition functions of the ILC are as follows:

- (a) to grant interests in land to Aboriginal or Torres Strait Islander corporations;
- (b) to acquire by agreement interests in land for the purpose of making grants under paragraph (a);
- (c) to make grants of money to Aboriginal or Torres Strait Islander corporations for the acquisition of interests in land;
- (d) to guarantee loans made to Aboriginal or Torres Strait Islander corporations for the purpose of the acquisition of interests in land (ATSI Act s.191D(1)).

The ILC is only able to purchase those interests in land which are available in the general market (see ATSI Act s.4, definition of ‘interest’). There are no statutory provisions applicable to ILC operations equivalent to those which confer ‘inalienable freehold’ status on Aboriginal land under the ALA. An Aboriginal or Torres Strait Islander corporation which has obtained an interest in land with the assistance of the ILC wishing to dispose or mortgage the land must obtain the consent of the ILC (ATSI Act s.191S). A wide range of ILC transactions are tax exempt (ATSI Act s.193R).

The ILC has for some time been considering whether it is advisable to make a grant of land to a PBC. The general view taken by the ILC is that it should recommend that a title holding body should not be formed as a PBC. The authors have been provided with a legal advice from ILC legal representatives setting out the basis for the view<sup>77</sup>. The authors do not necessarily agree with some aspects of the advice and consider that some of the problems identified with the vesting of land in PBCs may have been overstated<sup>78</sup>. A detailed analysis of the ILC’s advice is beyond the scope of this report, however it is encouraging that notwithstanding its legal advice, the ILC has not settled on a rigid policy of rejecting the vesting of land to PBCs. Rather the ILC as a matter of practice will consider each case on its merits<sup>79</sup>. It therefore remains possible that a PBC could be vested with title (fee simple or leasehold) in land by the ILC over which it may (or may not) hold native title.

Some of the problems that the ILC has faced in making a grant of monies to an Aboriginal corporation for the transfer of land by the State under the Aboriginal Lands Act, are exemplified in the case of the purchase of Silver Plains in the CYLC Coen Region. (This is discussed further in Appendix 5.)

### **Conclusion**

The regulatory requirement that PBCs be incorporated under the ACAA has come under sustained and growing criticism and is currently under review by ATSI<sup>80</sup>. Whilst increased recognition of the problems associated with this requirement may lead to reform, there are no guarantees as to the speed with which change will arrive or that any amendments will satisfy the particular needs of native title holders on Cape York Peninsula or elsewhere.<sup>81</sup>

The complexity of the legislative framework governing the establishment and operation of PBCs derives from several factors including:

- the inherent difficulty in corporatising native title interests;
- poorly conceived ad hoc legislation such as the PBC Regulations;
- the application of the ACAA legislation to the PBC regime without adequate consideration of the inherent design problems that might arise;

- the involvement of both Commonwealth and State Governments and their respective legislative and administrative regimes; and
- the intersection of numerous pieces of legislation governing land title and management.

There is presently a high degree of confusion and frustration about the respective operations of land trusts and PBCs particularly where they are comprised of similar membership and hold functions with respect to the same areas of land. Given the importance of both the native title and ALA regimes to the traditional owners of Cape York Peninsula, it is imperative that a solution be found to reconcile the practical day to day operations of the land holding and managing entities. This in turn will reduce parallel confusion and frustration being experienced by external parties trying to engage in negotiations, communications and contracts with the traditional owners.

There would appear to be three options for co-ordinating the operations of land trusts and PBCs. These are:

1. Determination of a land trust as a PBC;
2. Appointment of a PBC as a grantee of a land trust; and
3. Coordination between PBC and land trust by agreement.

The first of these options is unavailable without amendments to the PBC Regulations. This option

would deliver the best outcome by limiting the resultant structure to a singular corporate entity.

The second option relies on the Queensland Government to appoint a PBC as grantee of a land trust. Such appointments should not be controversial as the appointment of singular corporate trustees is commonplace in land administration. However, it is discouraging to note that despite the existence of the statutory land rights regime in Queensland for more than ten years, there remain fundamental unresolved issues preventing the active involvement of traditional owners in the management of land. The deadlock reached in negotiating leaseback arrangements for National Parks is an example of the bureaucratic inertia that can result in such circumstances.

The third option may have to be given priority in the event that the other options are unable to be implemented within reasonable timeframes. This option would appear to be the least efficient and provides the greatest scope for fragmentation of Indigenous interests.

The harmonisation of the land rights and native title regimes is not the only challenge facing those seeking to establish PBCs on Cape York Peninsula. There are several other problems identified in this chapter that arise out of the legislative framework. The recommendations which have been provided in respect to some of these issues throughout this chapter will be reiterated in the conclusion to this report.

## Endnotes

- <sup>1</sup> Pt 2 Div 6 NTA establishes the PBC regime.
- <sup>2</sup> NTA ss 56, 57.
- <sup>3</sup> pers. comm. P. Blackwood and P. Decle, CYLC, 16.11.01.
- <sup>4</sup> Such difficulties include financial, organisational, logistical and political issues.
- <sup>5</sup> See additional functions and powers created by ACAA at p.15.
- <sup>6</sup> PBC Reg 7(2). Powers of PBCs are also defined by ACAA.
- <sup>7</sup> Note these should be read with the provisions of the NTA and ILUA Regulations.
- <sup>8</sup> PBC Reg 4(1).
- <sup>9</sup> See Chapter 7
- <sup>10</sup> PBC Reg 4(1)(a).
- <sup>11</sup> PBC Reg 4(1)(b).
- <sup>12</sup> PBC Reg 4(2)(b).
- <sup>13</sup> Under the ACAA, associate membership can be made available to the non-Aboriginal spouses of Aboriginal members. Associate members are entitled to membership but not to voting rights.
- <sup>14</sup> PBC Reg 7.
- <sup>15</sup> PBC Reg 8 (1).
- <sup>16</sup> The rationale for this decision remains contentious. Despite a commonly held view that the decision is wrong at law, no appeal has been lodged (pers. comm., A. Chalk, Chalk Fitzgerald Solicitors 16/11/01).
- <sup>17</sup> PBC Reg 8(3).
- <sup>18</sup> O'Faircheallaigh (1996).
- <sup>19</sup> PBC Reg 9(5).
- <sup>20</sup> PBC Reg 8(4).
- <sup>21</sup> PBC Reg 8(5).
- <sup>22</sup> Unless there are less than five affected common law Yorl native title holders, in which case the document must be signed by five PBC members and by each affected common law holder who is a member of the PBC (Reg 9(4)).
- <sup>23</sup> NTC pp125 and 144.
- <sup>24</sup> A copy of the draft certificate appears in Appendix 2.
- <sup>25</sup> If the native title decision is to enter into an ILUA, S.199C(3) NTA enables aggrieved native title holders to seek the removal of the ILUA from the NNTT Register of ILUAs on the grounds that "a party would not have entered into the agreement but for fraud, undue influence or duress by any person". The removal of an ILUA from the Register may not however invalidate any future act, the subject of the native title decision or ILUA. S.24EB(1)(b) NTA would appear to protect the act provided the ILUA is on the register "when it is done". Such validation and protection would not appear to be lost by the subsequent removal of the ILUA.
- <sup>26</sup> NTA s56(4)(c).
- <sup>27</sup> NTA s56(4)(d).
- <sup>28</sup> NTA s56(4)(e).
- <sup>29</sup> NTA s60.
- <sup>30</sup> ACAA s. 43(1).
- <sup>31</sup> ACAA s. 43(2).
- <sup>32</sup> ACAA s. 43(3).
- <sup>33</sup> ACAA s.43(3).
- <sup>34</sup> ACAA s.43(4).
- <sup>35</sup> ACAA s. 45(2).
- <sup>36</sup> ACAA s. 45(3A).
- <sup>37</sup> ACAA s. 45(3)(a).
- <sup>38</sup> ACAA s. 45(3)(b).
- <sup>39</sup> ACAA s.46.
- <sup>40</sup> ACAA s.47.
- <sup>41</sup> ACAA s.49B.
- <sup>42</sup> ACAA s.49E.
- <sup>43</sup> ACAA s.56.
- <sup>44</sup> ACAA s.58.
- <sup>45</sup> ACAA s.59.
- <sup>46</sup> ACAA s.60.
- <sup>47</sup> ACAA s.60A.
- <sup>48</sup> ACAA s.61.
- <sup>49</sup> ACAA s.62A.
- <sup>50</sup> ACAA s.71.
- <sup>51</sup> Chaney 2000:7.
- <sup>52</sup> Unless the existing tenure was granted after 1 January 1994 as a 'low impact future act'.
- <sup>53</sup> Granted land refers to claimable land that has been claimed and granted; transferred land refers to transferable land that has been granted.
- <sup>54</sup> ALR(NT)A s.5(3).
- <sup>55</sup> ALA s.65(4).
- <sup>56</sup> ALR s.21A.
- <sup>57</sup> ALR s.21B.
- <sup>58</sup> For example Western Yalanji, Western Cape Communities Co-Existence Agreement, Century Mine Agreement where negotiated settlements have included transfers of land under the ALA as part of the Queensland Government's commitments.
- <sup>59</sup> Note that s.47A NTA provides for certain areas previously subject to extinguishment to be included within a determination of native title.
- <sup>60</sup> This may conflict with the functions imposed by the PBC Regulations if the PBC is to become a Land Trust for transferred land.
- <sup>61</sup> ALA ss.63(3), 64(4), 65(1).
- <sup>62</sup> Note however that in certain claims such as Kaurareg, the transfer of land under the ALA has been excluded from township areas in order to minimise constraints to development.
- <sup>63</sup> Such an amendment is currently being considered in the ATASIC review of PBCs – see Version 3, ATASIC Options for Reform.
- <sup>64</sup> Achieving an amendment to the NTA would be a more difficult and lengthy task.
- <sup>65</sup> Version 3, ATASIC Options for Reform, p. 48.
- <sup>66</sup> If historical persons were permitted by the PBC Regs to be admitted as associate members of PBCs, they would be able to participate in the meetings and hold 'speaking' rights but not voting rights.
- <sup>67</sup> *Land Act 1994 (Qld) s44(2)*.
- <sup>68</sup> *Land Act 1994 (Qld) s43(1)*.
- <sup>69</sup> *Aborigines and Torres Strait Islander (Land Holding) Act 1985 (Qld)*.
- <sup>70</sup> See Way and Beckett (1999:55).
- <sup>71</sup> *Community Services (Aborigines) Act (Qld) ss15(2),(3)*.
- <sup>72</sup> CSA s25(1).
- <sup>73</sup> NTA s24KA.
- <sup>74</sup> The Queensland Government apparently asserts the acts of Aboriginal Councils are past acts (presumably based on a pre-existing rights based argument) (pers. comm. P. Decle, CYLC, 16/11/01).
- <sup>75</sup> pers. comm. P. Decle, CYLC, 16//11/01.
- <sup>76</sup> *Local Government (Aboriginal Lands) Act 1978 (Qld) s6, sch 1*.
- <sup>77</sup> See Appendix 3.
- <sup>78</sup> For example the problems associated with the potential conflict of interest for a PBC in its respective roles as a native title body corporate and a holder of a lease, should not be considered insurmountable.
- <sup>79</sup> pers. comm., M. Treloar, ILC, 7/12/01.
- <sup>80</sup> Mantziaris and Martin (2000: 182), Sullivan (1999), Hayes (2000).
- <sup>81</sup> Note ATASIC Options Paper Version 3, in discussing the option of making existing State land rights entities eligible for nomination as PBCs, noted that it "is put forward for the purpose of promoting discussion and in full knowledge that there are some difficult problems to overcome in pursuing it."

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## CHAPTER 3: THE PLANNING ENVIRONMENT IN CAPE YORK

### Introduction

In this chapter an overview is provided of government and Indigenous agencies which have a broad planning role across Cape York in relation to land and sea management and/or to Indigenous land. It does not include local or regional agencies, which will be examined later in Chapters 4 and 5 under the two case study sub-regions. Those agencies, departments and interest groups with which traditional owners most likely have to interact, and which are profiled in this chapter are as follows: -

#### (a) Aboriginal Organisations

- ATSIC Peninsula Regional Council
- Cape York Land Council (CYLC)
- Balkanu Cape York Development Corporation Pty Ltd

#### (b) Government Organisations

##### *Commonwealth*

- ATSIC NTRB administration
- Indigenous Land Corporation (ILC)
- Environment Australia (EA)/ANCA
- Natural Heritage Trust (NHT)
- Great Barrier Reef Marine Park Authority (GBRMPA)

##### *State*

- Environmental Protection Agency (EPA) and the Queensland Parks and Wildlife Service (QPWS)
- Department of Aboriginal and Torres Strait Islander Policy (DATSIP)
- Department of Natural Resources and Mines (DNRM)
- Aboriginal and Torres Strait Islanders Land Acts Branch (ATSILAB)
- Department of Primary Industries – fishing, forestry

##### *Local*

- Cook Shire Council

#### (c) Regional Strategies and Alliances

- The Cape York Land Use Strategy
- Cape York Land Use Heads of Agreement
- The Cape York Partnerships

This chapter will aim to explore the types of relationships these various organisations are likely to have with PBCs. The development of working relations may not necessarily occur early or readily in the life of the PBC. Already there have been a number of legal test cases in which traditional owners have challenged

certain government agency decision-making. It is likely that until PBCs have become adequately integrated into the government decision-making framework they will continue to rely on the judicial review of administrative decisions which they consider adversely impact on their native title. In the interests of environmental planning however, the sooner that meaningful recognition of native title rights and interests can be accommodated into the way these various organisations conduct their services and business, then the sooner will effective stable partnerships emerge in land and sea management between Indigenous and non-Indigenous people.

### Aboriginal Organisations

#### **Aboriginal and Torres Strait Islander Commission Peninsula Regional Council**

The ATSIC Peninsula Region (also known as the Cooktown Region) covers an area of around 150,000 square kilometres. The region includes most of the Cape York Peninsula, from the Daintree River in the south to the tip of the Cape, 900 km north, and from the Coral Sea in the east to the Gulf of Carpentaria to the west (ATSIC 2001).

The region is made up of the following five wards:

- Cape York (which has three councillors)
- Aurukun (two councillors)
- Kowanyama (two councillors)
- Hope Vale (two councillors)
- Coen (one councillor).

The wards relevant to the current study are Aurukun, Coen and Kowanyama. The geographic extent of the wards in the Peninsula region appear in Figure 5 (p. 32). The extent of the ATSIC Aurukun and Coen Wards are at significant variance to the planning sub-regions of the Cape York Land Council.

In 1999-2000, ATSIC provided \$54M in grants to the Cape York Region – this is a substantial contribution to the regional economy. Of this, \$37M involved funding to the Community Development Employment Projects (CDEP) program, which employed nearly 3,000 participants, representing the majority of working age adults in the region.

CDEPs in the region are involved in:

- enterprises such as market gardens, concrete block making, camping facilities
- community broadcasting operations
- youth, sport and recreation programs
- municipal services (parks and gardens maintenance, roadworks, hygiene services)
- ranger programs to care for country



- maintenance of community housing
- art and cultural activities.

### **Draft ATSIC Peninsula Regional Plan**

The ATSIC Peninsula Regional Plan identifies its key goals as reflecting the need to find “creative and meaningful activity for Aboriginal people in Cape York in and beyond a world which for many presents only limited options in the area of work and leisure”. Consequently, its priorities for the period 1995-2005 are economic development, education and training, outstation development, sport and recreation, and the arts. Other areas of continuing importance to ATSIC in Cape York are health, housing and infrastructure, women’s men’s and family issues, law and justice, land and sea, and self-governance. (CYLC 2001.)

The following are some of the objectives from the plan that are relevant to Indigenous land and sea management and the functions/objectives of PBCs:

- To recover, protect and strengthen culture as a foundation for community well being.
- To increase Indigenous control and ownership of land and sea in the Cape York region.
- To promote economic participation and real job creation throughout the region, to break the pattern of passive welfare dependency.
- To support the development of homelands in the region and the desire of Indigenous people to become more self-reliant on their own land.
- To establish an education and training framework that will assist regional communities in becoming more self-reliant, and will enable individuals to participate in the regional economy.
- To develop culturally appropriate ways by which Indigenous people can exercise greater autonomy in local and regional government. (ATSIC 2001.)

There are three significant initiatives in this region which provide a context for the ATSIC Regional Council to negotiate with other agencies for better outcomes, viz Cape York Heads of Agreement, Cape York Peninsula Land Use Study, Cape York Partnership Proposal. (See later for details on these).

An issue which requires collaborative action with other agencies and which is not adequately addressed within existing land strategies is the need to assist people in developing their homelands. This was the subject of a conference held in Cairns in November 2000, which recommended a review of ATSIC’s National Homelands Policy, negotiation of a Queensland policy with the State Government, and the development of regional homelands policies. It was considered that an audit of all existing homelands/outstations in Cape York should be carried out as a basis for development of the regional policy. (ATSIC 2001.) At the time of carrying out the current project, the ATSIC Regional Council was tendering for someone to assist with policy development

on regional homelands including the effectiveness of Regional Council to manage homelands.

### **Cape York Land Council**

Chapter 1 contains a description of the mechanisms and strategies employed by the CYLC to assist Indigenous people to exercise their native title rights in relation to the various tenures of land on Cape York Peninsula. That chapter also included a description of the CYLC’s project planning process, including the division of the Peninsula into 12 sub-regions. Further aspects of the CYLC’s corporate planning are described below.

A corporate objective of CYLC is to “Manage Our Land”. This breaks down into two sub-goals:-

- The Control and Management of Land  
*Assist Aboriginal landowners to control, manage and develop their land and sea-based resources.*
- Decisions on Land Management  
*Provide effective Aboriginal participation in decisions affecting land and sea use and management in Cape York Peninsula. (CYLC 2001.)*

The Land Council shares a unity of purpose and complementarity of function with a number of regional organizations, jointly committed to the broad objectives of the ATSIC Peninsula Regional Plan (1995 – 2005) for the promotion of self determination, economic independence and social well-being of the Peninsula’s Aboriginal traditional land owners and their local communities. (CYLC 2001.)

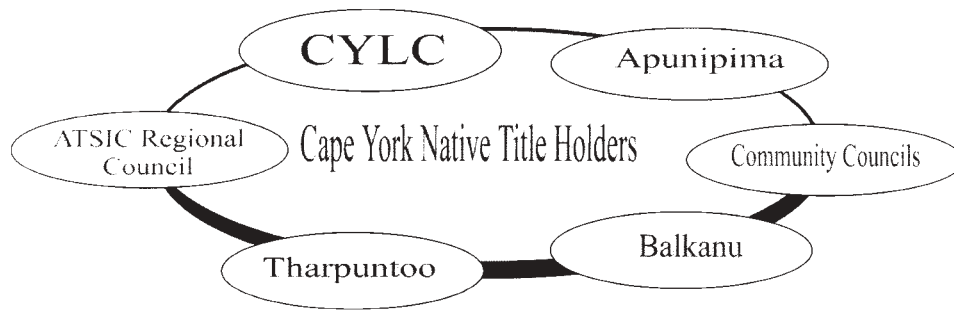
The Land Council has important roles to play in assisting community councils to deal with the often complex issues of reconciling the interests of native title holders with the need for housing and infrastructure development on communities, progressing the transfer under the ALA of council DOGITs, and negotiating ILUAs between councils and native title holders.

The Land Council and ATSIC Peninsula Regional Council have long worked together on projects and regional initiatives which are part of the Land Council’s general assistance to native title holders under its own constitution. In this respect there is significant congruence between the objectives of CYLC and those of ATSIC, as set out its Regional Plan. (CYLC 2001.) Of particular relevance to CYLC, is the Peninsula Regional Council’s goal of increasing Aboriginal control and ownership of land and sea in Cape York which largely focuses on activities undertaken by CYLC. Therefore, ATSIC registers its continued support for CYLC in its assistance to Aboriginal people to acquire land, and to otherwise exercise their native title interests in land and sea. ATSIC further supports the annual Cape York Land Summit, which provides a forum for Aboriginal people to set the land, health and community development policies for their peak organisations, including CYLC, Apunipima and Balkanu. (CYLC 2001.)

**Figure 5** The five ATSI ward of the Cape York Peninsula region (reproduced from ATSI's 'Zones and Regions' map 'Cooktown' - 99/14, 1999.)



**Figure 6 Regional Aboriginal Organisations of Cape York** (from CYLC 2001)



**Balkanu Cape York Development Corporation Pty Ltd**

ATSIC originally promoted the establishment of the Cape York Community Development Centre (now more commonly known as ‘Balkanu’) to assume the role of supporting the establishment of Land and Natural Resource Management Centres in the communities of Cape York. Like CYLC, Balkanu is committed to supporting the Aboriginal people of Cape York Peninsula to improve their economic, social and cultural standing in the region, and to working co-operatively with other organizations sharing this objective.

Balkanu’s key objectives are to assist with the management and economic development of Aboriginal owned land; the development of Indigenous business enterprises; resourcing of outstations and homeland centres; development of regional infrastructure networks; and the development of improved service delivery to Cape York people.

There is a clear complementarity between the Land Council’s core functions of getting land back for people, and Balkanu’s role in the management and economic development of land, such that the two organizations regularly work together on projects that combine native title with future management and development aspects. In this way the organizations are able to take a long term view which incorporates not only the determination of native title, but also how people may use and enjoy the land as a basis for their future economic and social development. That is, native title is delivered not only as a legal entitlement, but also as a practical benefit. (CYLC 2001.)

Balkanu is owned by Cape York Corporation Pty Ltd as Trustee of the Cape York Aboriginal Charitable Trust. The Cape York Aboriginal Charitable Trust is a Perpetual Charitable Trust. (‘Cape York Partnerships’ 2001.)

Balkanu received \$140,000 for Cape York outstation planning, and \$100,000 for conducting the annual Land Summit from ATSIC in the financial year 1999-2000 (ATSIC 2000:16).

**Commonwealth Government  
Aboriginal and Torres Strait Islander  
Commission**

The relationship between ATSIC and the administration of native title on Cape York operates at two levels. That discussed above, of the elected Regional Council with its function of improving the economic, social and cultural status of Aboriginal and Island people living in the Cape; and that of its statutory administrative and funding role in relation to CYLC’s NTRB functions. In the former case, significant decision-making and interaction with CYLC happens at the regional level, both with the Regional Council and the local ATSIC network office. But for its NTRB functions, decisions affecting the achievement of native title for the people of Cape York, through the NTRB functions of the CYLC, are made primarily within the ATSIC bureaucracy in its central native title administrative unit. The local network office has a facilitation and monitoring role in relation to CYLC’s NTRB funding and the performance of its functions; but decisions about the level of funding and its use by the CYLC, including, for example, its assistance to native title holders to set-up and run their PBCs, are made within the ATSIC national office.

**Indigenous Land Corporation**

The legislative regime of the Indigenous Land Corporation (ILC) was outlined in Chapter 2. The focus in this chapter is on its role in Land Management and Regional Planning.

The ILC is a Commonwealth statutory authority established to assist Indigenous peoples to acquire and manage land, under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*. It was set up in recognition that the majority of Indigenous Australians have been dispossessed of their land and would be unable to regain ownership and control of their land through native title processes. The Land Fund was therefore established to complement the Native Title Act. By the year 2004, the Land Fund will be valued at approximately \$1.3 billion. Government allocations to the Land Fund will then cease, but the

fund will be self-sustaining and will continue to fund the work of the ILC from investment income. (ILC n.d.) Each year an annual allocation of approximately \$45 million (in 1994 values) is transferred from the Land Fund to the ILC. In most years, the ILC allocates in the order of \$28 million to land purchase, \$12 million for land management and \$5 million for administration costs. (ILC n.d.)

The ILC has a seven member board, appointed by the Minister for Aboriginal and Torres Strait Islander Affairs. The Act provides that the Chairperson and at least four other members of the Board must be Indigenous persons. The ILC Board makes all policy and land purchase decisions (ILC n.d.). The ILC purchases land that holds particular cultural significance to Indigenous people. It assesses areas according to national and regional land strategies and priorities. The ILC purchases land for communities, not individuals. (NNTT 2000:1.)

### Land Management

“The ILC Act is specific in the powers it gives the ILC in performing its land management functions. These powers are designed to ensure that the ILC develops a strategic approach to assisting Indigenous land managers to manage their land in sustainable ways. The ILC’s policy on land management is based on building partnerships with Indigenous landowners and other Commonwealth and State agencies with land management responsibilities..... The ILC is also seeking information from Indigenous landowners through the national Land Use/Land Management Survey to help the ILC to develop a National Land Management Response based on a strategic approach to sustainable management of Indigenous-held land.” (ILC n.d.)

The National Indigenous Land Strategy has identified the following strategic initiatives eligible for support by the ILC.

1. *Group Based Planning:* The ILC will support group based planning to assist groups to identify and clearly define achievable goals for the use of their land.
2. *Enterprise Development:* The ILC will assist groups to develop viable and sustainable enterprises on their land. This support will be forthcoming at all stages of development.
3. *Regional Development:* The ILC will contribute to regional development processes to ensure that benefits accrue to local Indigenous landholders.
4. *Coordination:* The ILC will provide Indigenous groups with information on coordination, available funding and support programs in their region. The ILC will coordinate the delivery of services to achieve maximum benefit for local Indigenous landholders with other agencies
5. *Research:* The ILC will undertake research to ensure that groups benefit from land management and enterprise opportunities and to ensure that the ILC continually improves in policy development and service delivery.

Regional ATSIC Councils are asked to comment on any proposals for activities on land in accordance with these strategic initiatives in their respective regions (ILC n.d.a). ILC responsibilities for land management cover all Indigenous-held land, not just land purchased by the ILC. This includes land that has been transferred under the ALA 1991 and land purchased by ATSIC which has been divested to an Aboriginal corporation.

However there are further policy restrictions to acquiring ILC funds. One is that organizations must exhaust other funding avenues first. “The ILC is able to make grants or loans of money, and guarantee loans for land management activities – but only when alternative approaches are impracticable.” A second is that the monies received must be spent productively, “The ILC will not continue to provide grant funding to unsustainable commercial enterprises and will look at innovative ways to provide assistance to commercial enterprises which are in the process of restructuring for long term viability” (ILC n.d.b).

The following policy statement suggests that funding expenditure will focus on sustainability. Once commercial activity is at an environmentally and culturally acceptable level, any additional funding must be sought from alternate sources.

“While the ILC’s land management functions can be directed towards establishing, maintaining and enhancing economic development through land-based enterprises, they are also (and equally importantly) directed at ensuring that land management activities provide cultural, social and environmental benefits.... One of the major issues confronting the ILC is the fact that the present Indigenous estate consists of a considerable proportion of land which has been degraded by inappropriate (non-Indigenous) land uses in the past. The challenge for the ILC is to assist Indigenous landholders to identify land uses that are consistent with their cultural, social and economic objectives and that are designed to rehabilitate degraded land. In many cases Indigenous landholders have also inherited past land uses, such as unsustainable pastoral operations. The ILC sees its major immediate role in land management as assisting these landholders to identify and implement more appropriate land uses. These land uses will sometimes have a commercial focus. Where this is the case, the ILC’s policy priorities are directed at sustainability and facilitating access to other ‘mainstream’ funding programs in view of the ILC’s very limited resources.” (ILC n.d.b).

### **Regional and Sub-regional Approach**

The ILC's long-term task is to rebuild an Indigenous land base in Australia. The ILC aims, over time, to build a representative land base regionally. The ILC policy regarding land acquisition is detailed in the National Indigenous Land Strategy (ILC 2001a) and the ILC Guidelines. The ILC has also developed Regional Indigenous Land Strategies for each state and the Northern Territory (for Queensland see ILC 2001b). The ILC is coordinating a national Land Needs Planning Process aimed at developing a more detailed picture of Indigenous land needs on a regional basis. This research will be used to revise the Regional Indigenous Land Strategies. (ILC n.d.)

Each State and Territory has different legislation affecting land issues for Indigenous peoples. Each of the Regional Strategies details these laws within the region and the ILC's proposed policy and strategic response to the differences between the States. (ILC n.d.a.) The ILC has determined its regional areas to be the six States and the Northern Territory. (The Australian Capital Territory is included in the New South Wales region and the Torres Strait is included in Queensland). The ILC is required by legislation to consult with the ATSIC Regional Councils in each region when revising the Regional Indigenous Land Strategies. (ILC 1998.)

Sub-regional Land Strategies will be prepared by the ILC from the information provided by regional organisations and local groups. The ILC sub-regions generally correspond with the boundaries of ATSIC Regional Council boundaries (ILC 1998). A Sub-regional Land Strategy has not yet been developed for the Cooktown Sub-region. Hindrances to the process include the unwillingness of regional and local groups to take the process seriously and their misconceptions about the capacity and statutory limitations of the ILC. There is a perceived need by the ILC for increased consultation with ATSIC and the NHT in developing the Land Needs Strategy for the sub-region (pers. comm. Ashley Martens ILC 6/12/01). The ILC considers it important to develop a co-ordinated approach to land management, with the ATSIC Regional Council and CYLC, for the Cape York Peninsula region. At this stage, outstation development is the only area where a degree of co-ordination exists. (pers. comm. Ashley Martens ILC 6/12/01.)

### **Environment Australia (EA)**

(formerly ANCA)

Environment Australia advises the Commonwealth Government on policies and programs for the protection and conservation of the environment, including both natural and cultural heritage places. It also manages a number of major programs, the most significant of which come under the umbrella of the Natural Heritage Trust (see below). Environment Australia also administers environmental laws, including the Environment

Protection and Biodiversity Conservation Act 1999 and a range of other Acts. It is also responsible for Australia's participation in a number of international environmental agreements. (Aust, E.A. n.d.)

### **Natural Heritage Trust (NHT)**

The Natural Heritage Trust focuses on five key environmental themes – land, vegetation, rivers, coasts and marine, and biodiversity. These programs aim to develop sustainable agriculture and natural resource management, as well as protect biodiversity through improved management and delivery of resources. The Commonwealth Government has invested over \$1.5 billion through the Trust while also establishing a capital base of \$300 million to be retained in perpetuity to fund future environmental activities. The Trust provides funding for environmental activities at a community level, a regional level, a State/Territory level and at a national level.

The Natural Heritage Trust will deliver assistance at four levels:

- (i) Community Projects
 

The Natural Heritage Trust encourages community groups to develop proposals in response to problems confronting them at the local and regional level. Community groups are able to lodge a single application for assistance in the areas of Landcare, Bushcare, Rivercare, Wetlands and the Murray-Darling 2001 programs.
- (ii) Regional Strategies
 

The Regional Strategies component of the Natural Heritage Trust provides assistance to implement regional strategies which integrate biodiversity conservation and sustainable agricultural management. These major regional scale projects are to be developed in cooperation with State and Territory and local governments.
- (iii) State/Territory Component
 

Through the State/Territory Component, the Commonwealth, States and Territories co-operate to deliver Natural Heritage Trust programs that are best undertaken on a State-wide basis or across States and Territories. They also cover activities funded through State agencies to support community group initiatives.
- (iv) Commonwealth Activities
 

Natural Heritage Trust activities that will be directly funded by the Commonwealth include projects which have national strategic benefits, such as national education activities, and national research and development programs.

### **Indigenous Land Management Facilitator Program (Aust, EA n.d.f)**

The goal of the Indigenous Land Management Facilitators Program project is to encourage Indigenous

communities to participate in Natural Heritage Trust projects on land under their care, or in which they have an interest. There are a number of Indigenous Land Management Facilitators around Australia who provide a practical two-way link between Indigenous land managers and other individuals and agencies involved in sustainable land management and nature conservation activities. The facilitators provide information to Indigenous communities about the types of support and technical advice which is available to assist them with the land management issues on their lands. The facilitators also provide feedback to Commonwealth Government policy-makers on land management issues that are of concern to Indigenous communities, and help to raise awareness within Government agencies and the non-Indigenous communities of Indigenous values, aspirations and capacity in land management.

Land management projects involving Indigenous communities include:

- establishing nurseries for revegetation with native plants;
- rabbit and weed control;
- fencing out stock from ecologically sensitive areas such as river banks; and
- developing interpretation trails to inform the broader community about Indigenous land management practices and the benefits of protecting cultural sites.

There is an Indigenous Land Management Facilitator for Cape York Peninsula, who works out of the Balkanu office in Cairns.

### Indigenous Protected Areas (IPA) Program

An Indigenous Protected Area is defined as “an area of land in relation to which Traditional Aboriginal Owners have entered into a voluntary agreement for the purposes of promoting biodiversity and cultural resource conservation” (Aust, EA n.d.a.) The Indigenous Protected Areas Program is part of the National Reserve System Program which aims to establish a network of protected areas, including a representative sample of all types of ecosystems across the country. Through this program, Indigenous landowners are being supported to manage their lands for the protection of natural and cultural features in accordance with internationally recognised standards and guidelines for the benefit of all Australians. (Aust, EA n.d.a.) The goals of the IPA programme are:-

- To establish partnerships between government and Indigenous land managers to support the development of a comprehensive, adequate and representative national system of protected areas which is consistent with the international protected areas classification system, by: assisting Indigenous people to establish and manage protected areas on

their estates for which they hold title; and assisting Indigenous Groups and Commonwealth, State and Territory agencies to develop partnerships and agreements for the cooperative management of existing protected areas.

- To promote Indigenous involvement in protected area management by supporting the establishment of cooperatively managed protected areas in each jurisdiction, and promotion of national best practice approaches to cooperative partnerships in protected area management.
- To promote and integrate Indigenous ecological and cultural knowledge into contemporary protected area management practices in accordance with internationally endorsed protected areas guidelines.

Environment Australia believes that the IPA Program can accommodate the cultural priorities of Indigenous people with the biodiversity conservation objectives of the nature conservation agencies and so contribute to the National Reserve System as well as meeting the land management aspirations of Indigenous landowners. (Aust, EA n.d.a.)

IPA program funding is available to Indigenous organisations to enable them to carry out the following activities:-

- To consider the implications of establishing an Indigenous Protected Area on their land. This may include seeking advice on the legal, cultural heritage or conservation aspects of the proposed IPA to inform the decision-making by the landowners.
- To develop a Plan of Management for the area they propose to declare as an Indigenous Protected Area. This may include holding discussions with the relevant State/Territory conservation agencies and other agencies that may be able to support the project and incorporating expert advice on the values of the IPA and how these should be managed and protected.
- Declaration of an IPA. Declaration takes the form of a formal and public announcement of the intention to manage land as an Indigenous Protected Area according to the prepared Plan of Management. The Plan of Management for an IPA will identify the on ground management activities and the decision-making structure which will govern management decisions. The Plan will also identify the relevant IUCN (International Union for the Conservation of Nature) Categories for conservation management which apply to the IPA.
- Implementation of the management plan through on-ground works as specified in the Plan of Management such as weed and feral animal control, cultural heritage conservation activities or the establishment of infrastructure to control visitor access.

- Monitoring the implementation of activities under the Plan of Management and the effectiveness of the on-ground works in achieving the desired outcomes; to be undertaken by the landowner in consultation with other agencies. (Aust, EA n.d.e )

### **The Cape York Natural Heritage Trust Plan (Aust, NHT 2001b.)**

The Cape York Natural Heritage Trust Plan is administered by Environment Australia, and is delivered through the Natural Heritage Trust. In February 1998, the launch of the Cape York Natural Heritage Trust Plan confirmed the Commonwealth Government's commitment to provide up to \$40 million to protect the outstanding natural and cultural values of Cape York. The Plan was developed by the Commonwealth in consultation with the Queensland Government and is being delivered by both governments in partnership with the Cape community.

The Cape York Natural Heritage Trust Plan has identified ten strategies that need to be implemented in an integrated way to ensure that land use activities across the Cape occur in accordance with the principles of ecologically sustainable development and that those areas of greatest natural and cultural significance are protected.

- Strategy 1 – Element 1 – Cape York Property Plans
- Element 2 – An Enhanced & Expanded Network of Protected Areas
- Element 3 – Indigenous People's Land Management
- Strategy 2 – Enhancing Cape York Protected Areas
- Strategy 3 – Controlling Feral Animals and Weeds
- Strategy 4 – Heritage Site Management
- Strategy 5 – Land Rehabilitation
- Strategy 6 – Assessment of Natural and Cultural Values
- Strategy 7 – Cooktown Interpretive Centre
- Strategy 8 – Cape York Community Grants
- Strategy 9 – Rare and Threatened Species Assessment and Recovery
- Strategy 10 – Making it Happen.

Where Integrated Catchment Management Groups or regional groups are formed they will be able to identify specific regional or catchment priorities, develop integrated action plans and implement on-ground activities consistent with the Cape York Natural Heritage Trust Plan. Groups will be guided by the priorities set by the Cape York Property Plan Technical Group and technical advice and information from State agencies on integrated catchment management and property management planning.

The responsibility for delivering the Cape York Natural Heritage Trust Plan is held by the Cape York Natural

Heritage Trust Unit situated in the Queensland Department of Natural Resources and Mining (DNRM). It aims to provide a central coordinating or linkage point for key stakeholders and the general community.

### **Land and Sea Management Co-ordination**

The Indigenous people's land management component of NHT is focussed on the same planning sub-regions of the Peninsula as used by CYLC and other organisations. There are now several sub-regional NHT-funded Indigenous land and sea management coordinators and offices established on the Peninsula. In relation to the case study areas, these include:

- At Aurukun, a co-ordinator and office which covers the Aurukun Shire Council;
- At Pormpuraaw a co-ordinator and office which covers the south-west corner of Wik and Wik Way Claim;
- At Coen a co-ordinator who works out of the Coen Regional Aboriginal Corporation (CRAC) office for Coen Area and east part of the Wik and Wik Way Claim;
- At Napranum a co-ordinator who covers the north part of Wik and Wik Way Claim.
- At Lockhart River, a co-ordinator and newly established office covering the Lockhart ALA transferred lands (formerly Lockhart River DOGIT) and adjacent traditional lands of the main groups resident in the community.

These positions and offices are being funded for a limited period of several years by NHT. There is no long term funding commitment from either the Commonwealth or State governments. If these offices are to have long-term impact, securing ongoing funding must be a priority for ATSIC, Balkanu and CYLC.

### **The Fisheries Action Program (Aust, NHT 2001c)**

The Fisheries Action Program is also a component of the Natural Heritage Trust. It aims to rebuild Australia's fisheries to more productive and sustainable levels through fish habitat restoration and protection, encouraging community participation in activities to improve fisheries ecosystems, aquatic pest control, ensuring that fishing by commercial and recreational fishers is sustainable and responsible, raising community awareness, and promoting related research encouraging integrated approaches to fisheries resources management and habitat conservation.

Key objectives of the Fisheries Action Program are to:

- Develop an awareness amongst all resource users and the wider community of important fisheries issues, the sources of fisheries habitat problems and the actions required to remedy them;
- Develop a sense of ownership and responsibility amongst all user groups for the sustainable use of the resource;

- Encourage participation, particularly by the direct users of fisheries resources, in habitat rehabilitation, aquatic pest identification and other Fisheries Action Program activities;
- Enhance sustainable resource use by fishers and 'upstream' groups by ensuring that impacts on fish resources and habitats are considered in their actions, processes and plans;
- Integrate habitat considerations into fisheries management strategies;
- Encourage development and use of sustainable fishing practices;
- Integrate fisheries issues with regional planning.

### **Great Barrier Reef Marine Park Authority**

The Great Barrier Reef Marine Park Authority (GBRMPA) is the Commonwealth agency for Great Barrier Reef World Heritage Area issues. The Authority is the principal adviser to the Commonwealth Government on the care and development of the Great Barrier Reef Marine Park. The goal of the GBRMPA is to: *Provide for the protection, wise use, understanding and enjoyment of the Great Barrier Reef in perpetuity through the care and development of the Great Barrier Reef Marine Park.*" (Aust, GBRMPA n.d.)

The Authority's aims of most relevance to the current project, are as follows (also see Appendix 7):-

- To protect the natural qualities of the Great Barrier Reef, while providing for reasonable use of the Reef Region.
- To provide for economic development consistent with meeting the goal and other aims of the Authority.
- To achieve integrated management of the Great Barrier Reef through active leadership and through constantly seeking improvements in coordinated management.
- To achieve management of the Marine Park primarily through the community's commitment to the protection of the Great Barrier Reef and its understanding and acceptance of the provisions of zoning, regulations and management practices.
- To provide recognition of Aboriginal and Torres Strait Islander traditional affiliations and rights in management of the Marine Park. (GBRMPA n.d.a.)

The Authority undertakes a variety of activities including (i) developing and implementing zoning and management plans, (ii) environmental impact assessment and permitting of use, (iii) research, monitoring and interpreting data, and (iv) providing information, educational services and marine environmental management advice. Day-to-day management of the Great Barrier Reef Marine Park is carried out by Queensland agencies subject to the Authority's mandate (Aust, GBRMPA n.d.b).

### **The 25-Year Strategic Plan for the Great Barrier Reef World Heritage Area**

In 1994, *The 25 Year Strategic Plan for the Great Barrier Reef World Heritage Area* was adopted, providing strategies for the management and preservation of the Great Barrier Reef World Heritage Area. The Strategic Plan gave all stakeholders in the Reef's long-term future a say in how the Great Barrier Reef World Heritage Area is to be managed over the next 25 years. Emphasis was placed on the concerns and opinions of all stakeholders. These included governments, Aboriginal and Torres Strait Islander communities, conservationists, scientists, recreational users and established Reef industries such as fishing, shipping and tourism.

To realise its vision, the plan identifies eight broad strategy areas:

- Conservation
- Resource Management
- Education, Communication, Consultation and Commitment
- Research and Monitoring
- Integrated Planning
- Recognition of Aboriginal and Torres Strait Islander Interests
- Management Processes
- Legislation

For each of these broad areas, the Plan provides the Rationale, 25-Year Objective, 5-Year Objectives and strategies to fulfil these objectives. (Aust, GBRMPA n.d.c)

### **Indigenous issues**

An Indigenous Cultural Liaison Unit (ICLU) was established by the Authority in 1995 to more effectively identify the interests and needs of Indigenous peoples in relation to native title, governance, and the maintenance of the cultural and traditional values associated with the Great Barrier Reef. Issues addressed by the Unit include the recognition of cultural heritage values, semi-subsistence resource use, information sharing, cooperative management, protocols, cultural advice, and liaison.

Through the Unit, the Authority supports, rather than instigates, Indigenous community initiatives through information sharing and resource support. The involvement of Indigenous groups in all user-group management issues (such as tourism, Coastcare programs and permitting) leads to the development of management structures or models that involve all concerned so that effective and mutually acceptable management practices can be put in place.

The Unit has been instrumental in:

- highlighting Indigenous relationships with the marine environment to ensure cultural and heritage values are recognised;



- providing equity for Indigenous involvement in setting directions and management action;
- presenting Indigenous values of the World Heritage Area positively to stakeholders and the wider community;
- providing for the maintenance and protection of Indigenous subsistence activities within the bounds of ecological sustainability, with particular emphasis on ensuring the long-term viability of threatened species;
- ensuring fisheries management strategies meet the traditional, social, cultural and economic needs of Aboriginal and Torres Strait Islander communities; and
- Implementing mechanisms to resolve conflicts between stakeholder interests and cultural values.

(Aust, GBRMPA n.d.d.)

### Reef Zoning and Management

One of the primary tools for protecting and preserving the Great Barrier Reef specified by the *Great Barrier Reef Marine Park Act 1975*, is zoning. Zoning aims to separate activities that may conflict with each other, such as commercial fishing and tourism. Zoning also allows areas that need permanent conservation to be protected from potentially threatening processes by being placed 'off limits' to users (except for the purpose of scientific research) for varying lengths of time. (Aust, GBRMPA n.d.e.) (See Appendix 7 for a list of the 13 zones.)

Plans of management are generally prepared for intensively used, or particularly vulnerable groups of islands and reefs, and for protection of vulnerable species or ecological communities. Plans of management complement zoning by addressing issues specific to an area, species, or community, in greater detail than can be accomplished in the broader, Reef-wide zoning plans. (Aust, GBRMPA n.d.e.) (See Appendix 7 for a list of the objectives of plans of GBR management as defined within legislation.)

### State Government

#### ***Environmental Protection Agency and the Queensland Parks and Wildlife Service***

The Environmental Protection Agency (EPA) (formerly the Department of Environment and Heritage) was created/renamed by publication of a notice in the Queensland Government Gazette dated 11 December 1998. The Queensland Parks and Wildlife Service (QPWS) was created by the same notice, and declared to be part of the Environmental Protection Agency. Identified key functions of the organisation include environmental planning, environmental policy and economics, environmental operations and service delivery, sustainable industries, and environmental and technical services. (Qld, EPA n.d.)

#### **Ideology (Qld, EPA n.d.a)**

The Environmental Protection Agency is both a regulator and a strategic planner. EPA handles traditional environmental protection matters concerning water, air, and noise pollution, contaminated sites, and greenhouse emissions along with aspects of environmental planning and research matters such as biodiversity planning, coastal management and waterways, conservation science, and protection of cultural heritage. Developing partnerships with business and industry is a key priority for the Agency. The EPA undertakes the normal operational licensing and compliance monitoring that goes with environmental laws, and promotes guidelines for good planning and ecologically sustainable development. The Sustainable Industries Division has been established within the EPA to help integrate best practice environmental management with the social and economic benefits of industry. Sustainable industries aim to generate jobs and at the same time, protect the environment.

The Environmental Protection Agency's corporate mission is *working with the Queensland community to achieve a healthy and sustainable environment as a foundation for economic security*. The Queensland Parks and Wildlife Service's mission is *presenting and protecting Queensland's natural heritage in an ecologically sustainable way to enhance our economic and social wellbeing*.

The following seven program areas are addressed by EPA's Planning Policies (each known as State Interest Planning Policy (SIPPs))

- Air Quality
- Cultural Heritage (Historical)
- Cultural Heritage (Indigenous)
- Nature Conservation
- Noise Management
- Queensland Waters
- Waste Management and Contaminated Land. (Qld, EPA n.d.d.)

#### **QPS and EPA regional and district structure (Qld, EPA n.d.b)**

The QPWS and EPA operate under a regional and district structure. The 'Environmental Operations' section is responsible for the Environmental Protection Agency's three Regions through the Regional Service Directors (Southern, Central and Northern) and the District Managers. Regional Planning and Assessment Groups deal with a range of responsibilities best managed at regional level, including environmental impact assessment; assessment and approval of coastal works and structures; dredging; regional coastal management plans; cultural heritage management; biodiversity assessment and management; and local government planning schemes.

Each Region subdivides into a number of Districts for administrative purposes. The Northern Region includes the majority of the Great Barrier Reef, Gulf of Carpentaria, and all of Cape York Peninsula and the Torres Strait. Within CYP, the Great Barrier Reef is a World Heritage Area. The Regional Centre is located in Townsville, with District offices at Cairns and Mt Isa.

District operations include:

- providing public information and promoting environmental responsibility
- licensing of environmentally relevant activities, processing annual returns and conducting licence audits
- encouraging development of Environmental Management Systems (ISO1400) and statutory Integrated Environmental Management Systems
- advising local government in relation to conditions for approvals under the Integrated Planning Act 1997
- responding to environmental complaints, conducting investigations and carrying out enforcement actions
- supporting delivery of responsibilities devolved or delegated to local government and other agencies
- local implementation of waste management actions

### **Department of Aboriginal and Torres Strait Islander Policy**

The vision of the Department of Aboriginal and Torres Strait Islander Policy (DATSIP) is to provide outstanding leadership on Indigenous issues and, through the promotion and creation of effective alliances and partnership arrangements, improve the quality of life of Aboriginal and Torres Strait Islander Queenslanders. DATSIP's approach is embodied in its long term planning framework, *Towards a Queensland Government and Aboriginal and Torres Strait Islander Ten Year Partnership 2001-2011* (Ten Year Partnership). (Qld, DATSIP n.d.)

### **DATSIPD 10 Year Agreements**

DATSIPD is offering to negotiate Ten Year Agreements on ways it can assist different regional and local Indigenous communities, using its role of brokering support within the State Government. This planning approach stems from the realization that lack of coordination between departments creates problems for both community and the Government. The community suffers most because it has to deal with many different agencies, and does not receive optimum service from the Government. The Ten Year Partnership proposal involves the Queensland Government coordinating its activities more effectively as well as putting in place ways of measuring progress. It is hoped this will reduce duplication and confusion for Aboriginal and Torres Strait Islander communities in dealing with a range of different government departments. (Qld, DATSIP 2001.)

There are eight key areas to be addressed under the Ten Year Partnership: justice; family violence; reconciliation; human services; service delivery; economic development; community governance; and land heritage and natural resources. Eight Working Groups and a senior level steering committee have been formed accordingly. Each of the Working Groups has set a proposed goal, and methods of monitoring how to measure progress towards that goal. Each Working Group has members from the Aboriginal and Torres Strait Islander Advisory Board and Queensland Government Departments. For example,

- The proposed goal for Service Delivery is to achieve a higher standard of flexible service delivery that satisfies the needs of Aboriginal and Torres Strait Islander Queenslanders.
- The proposed goal set by Community Governance Working Group is for all Aboriginal and Torres Strait Islander communities to develop and implement ways of governing which have local support and enhance community well-being.

The Queensland's Government's Cape York Partnerships is given as one example of the type of partnerships which could be developed under the Ten Year Partnership (Qld, DATSIP 2001.) This is described later in this chapter.

### **Queensland Department of Natural Resources and Mines**

The Department of Natural Resources and Mines (DNRM) manages the use of the State's resources including water, minerals, petroleum and vegetation, to ensure that, while generating income, they are maintained and continue to add to the quality of life in Queensland (Qld, DNRM 2001a). The Department's Mission Statement is *to support the economic security of Queensland through sustainable use, development and management of land, water and native vegetation resources, while protecting the rights and interests of the individual and the community* (Qld, DNRM 2001).

### **Managing the Land (Qld, DNRM 2001)**

The Department of Natural Resources and Mines provides a range of land services and related land information to support Queensland communities and business activities:

- Protected ownership and interests in land through a secure titling system.
- Providing statutory land valuations for rating and taxing purposes
- Maintaining surveying and mapping infrastructure, including boundary information.
- Maintaining a land tenure system which meets community and industry needs.
- Administering Body Corporate and Community Management legislation including advisory and dispute resolution services.

- Pursuing partnerships with local government, property owners, industry and community groups, with the goal of the development of long-term land management practices.
- Develop policies, guidelines and strategies for land resource planning to ensure that land is put to its most appropriate use, eg the development and conservation of agricultural land.

A critical role in managing land is the control of pest plants and animals. The Strategic Weed Eradication and Education Program (SWEEP) is aimed at strategic control of weed infestations. Weed research continues into control mechanisms for mesquite, rubbervine, parthenium, lantana, prickly acacia and mother-of-millions. Research is ongoing into best management practice for mice and rabbits.

DNRM carries out the coordination of spatial information, to achieve improved public access. Information products include the Basic Land Information Network (BLIN) which offers a wide range of land services.

#### **Managing the Water (Qld, DNRM 2001.)**

The DNRM has the responsibility of managing water to ensure the present and future rural, industrial and urban needs of Queenslanders are met whilst ensuring river and groundwater systems remain healthy. This includes:

- Developing new water industry policies to comply with state and national agreements, facilitating community catchment management and planning for adequate supplies of water to meet the economic growth of Queensland.
- Implementing the Government's program to develop an adequate, cost-effective and well-managed water infrastructure, to supply bulk water, distribute water for irrigation and reduce the effects of flooding through the development and implementation of water management schemes and stormwater drainage.
- Ongoing planning and development of new water infrastructure which support continued economic growth and enhancement of community lifestyles.
- Monitoring the safety of dams to ensure the highest structural soundness and safety of large water storages and mine tailings dams.

The Department undertakes major water infrastructure planning and development program in consultation with its clients. This aims to achieve the supply of additional water for rural, industrial and urban use, improved groundwater management, increased water use efficiency, wastewater reuse, water quality monitoring and enhanced environmental management of waterways. Within this Department, the state water infrastructure is managed by the commercial operator, State Water Projects, through three separate regional offices.

The Water Allocation and Management Plans (WAMPS) have a primary role in managing the water resources of the State. A WAMP determines the amount of water available for use and the amount of water that must be left in the system for the environment. Another water planning mechanism is the Queensland Wastewater Reuse Strategy which provides a framework for the reuse of wastewater. This project was developed in partnership with many community groups and will address specific policies, guidelines and community education programs for the safe use of reclaimed water.

#### **Managing the Native Vegetation (Qld, DNRM 2001.)**

The State Forests of Queensland have many uses including timber production, grazing of cattle, conservation of plants and animals, bee-keeping, protection of water catchments and recreational uses. DNRM has a responsibility to manage the forest resources for both commercial and non-commercial uses. DNRM plays a dual role in the management of Queensland's forests.

It is custodial manager of four million hectares of Queensland State Forests, and develops codes of practice for such, including fire prevention and guidelines for commercial forest operations. DNRM manages access to the native forests and allocates land for state plantations including commercial forestry. The Department also manages many recreational facilities around the State for the community.

DNRM is also involved in and supportive of the Landcare and Integrated Catchment Management community groups operating around the State. Another role for the department is to administer the regional broadscale tree clearing guidelines to manage tree clearing on leasehold land. It monitors trends in tree clearing, tree growth and regrowth of woodlands and forests.

#### **Aboriginal and Torres Strait Islanders Land Acts Branch (ATSILAB)**

ATSILAB is a unit within DNRM with responsibility for the administration of the Aboriginal and Torres Strait Islander Land Acts. These acts provide statutory land rights to Aboriginal and Torres Strait Islander groups in Queensland, through the twin processes of transfer and claim of land which is gazetted as available under each process by the Queensland Government. ATSILAB provides State Government funding to claimants and/or their agents for claims under these acts. In the Cape York Peninsula region, a number of claims, particularly over national parks, have been successfully run under the ALA by the CYLC. These have been funded by ATSILAB.

ATSILAB also runs its own programme, using its own local staff, of consultations leading to the grant of transferable land under the ALA. This includes the large areas of DOGIT land associated with the various communities on the Peninsula, as well as other parcels (e.g. old Aboriginal reserve lands) available for transfer.

Of most significance to the present study, ATSILAB is responsible for the establishment and administration of land trusts which come into being by the grant of both transferred and claimed land to grantees under the ALA by the Queensland Government. At the time of writing, ATSILAB has only very limited resources for this function, which allows it only to assist grantees/trustees to workshop and adopt a constitution, and to hold their first general meeting. There is no state government funding available for the ongoing operations of ALA land trusts, including compliance with their own constitutions for such things as AGMs and the election of committees and office-bearers.

### **Queensland Department of Primary Industries**

Services and agencies overseen by the Department of Primary Industries (DPI) are diverse. The following are of particular interest to the present study:

**Queensland Fisheries Service** and Agency for Food and Fibre Sciences (Fisheries and Aquaculture) (Qld DPI, 2001.)

This group is responsible for research and development in the aquaculture and fishing industries, as well as monitoring the regulations associated with commercial and recreational fishing. Services to Queensland's fishing and aquaculture industries are coordinated and streamlined through the Queensland Fisheries Service (QFS).

The QFS delivers commercial fishing and aquaculture programs and is enhancing services to recreational fishing. This agency is also providing a coordinated approach to monitoring and assessment, and to freshwater fisheries. Day-to-day services include licensing and Queensland Boating and Fisheries Patrol operations. The research and development component is with the Agency for Food and Fibre Sciences (AFFS), whose work focuses on the development of new methodologies for aquaculture, fisheries and habitat management.

**DPI Forestry** focuses on the commercial aspects of forest plantations throughout Queensland, and is responsible for information on timber resources and forest management. DPI Forestry is Queensland's major forest grower, responsible for approximately 80% of the State's domestic timber production. The Queensland Forestry Research Institute conducts research and development programs for the forestry and timber industries.

## **Local Government**

### **Cook Shire Council**

The area presently administered by Cook Shire Council (CSC) covers 115,000 sq km, which is the largest local government area in Queensland. It extends from the Bloomfield River in the south to the 11th parallel of latitude in the north, but excludes the DOGIT areas and the Aurukun Shire. The population of the Shire was 4300 at the 1996 Census. The major centre of population is Cooktown, whilst established townships are at Ayton, Rossville, Lakeland, Laura, Coen and Portland Roads. Major industries in the Shire are tourism, grazing, mining, and fishing.

Corporate goals of the Council that are relevant to Indigenous land management and PBCs include: -

- To preserve the heritage and culture of all inhabitants of the Shire.
- To encourage arts and cultural development.
- To improve the environment and encourage the conservation of the Shire's ecological systems.
- To encourage environmentally and economically sustainable development.
- To take social, environmental and cultural factors into account when measuring costs and outcomes.
- To be actively encouraging employment and training programmes within the Shire.
- To actively pursue mutual understanding and tolerance between Aboriginal and non-Aboriginal Australians.
- To assist and encourage new enterprises toward improving the communities' economic prosperity.

## **Regional Strategies and Alliances**

### **The Cape York Peninsula Land Use Strategy**

'The Cape York Peninsula Land Use Strategy' (CYPLUS) was established as a joint initiative of the Queensland and Commonwealth Governments in 1992 to provide a cross-agency vehicle for the establishment of regional land and land-related resource use objectives in Cape York within the context of an ecologically sustainable development policy (Cape York Regional Advisory Group 1996:12). The Strategy originally consisted of three stages: -

- Stage 1 incorporated data collection, issues identification, and analysis of opportunities and constraints for existing and future land use.
- Stage 2 involved the development of a strategy for sustainable land use and economic and social development and was presented in the form of a vision, principles, broad policies and mechanisms for the implementation of these policies.
- Stage 3 was to be a strategy implementation phase.

The CYPLUS planning process has been based on an analysis of the values of the region, the development

potential of the region's resources, community aspirations, the distinctiveness of the region, and a number of identified planning and management issues. Stage 2 of CYPLUS included a set of visions, goals and implementation strategies which were to provide a broad policy framework for guiding ecologically sustainable land and resource use and management on Cape York Peninsula and specific action which was needed to help achieve the communities' agreed vision for the future of Cape York Peninsula. The peak regional planning group for CYPLUS in Stage 2 was the Cape York Regional Advisory Group (CYRAG).

The diagram in Figure 7 illustrates the overall CYPLUS vision for the future of Cape York Peninsula as it appeared in the 1996 Draft Stage 2 Report. The vision includes: a breakdown of goals which have been divided into four sectors pertaining to conservation, cultural, economic, and lifestyle and social issues. The sector visions are guided by a set of principles (to guide decision-making) and are based on established regional values. The five overarching strategies are: the Natural Resource Management Strategy, the Cultural Resource Management Strategy, the four Sector Strategies, the Infrastructure Strategy and the Land Tenure Strategy. The four Sector Strategies reflect the working group structure devised by CYRAG in its strategy planning and development stage. (Chapter 6 of the Stage 2 report outlines the individual visions and goals for the various Strategies.)

The CYPLUS project was interrupted for a number of years during Stages 2 and 3, due to a change in State Government and temporary withdrawal of support. The Beattie Government has re-affirmed its commitment to CYPLUS in 1999 by releasing the CYP 2010 Action Plan, and through the re-establishment of the Cape York Regional Advisory Group (CYRAG). For the implementation phase, CYPLUS was separated into two different projects, the Cape York Natural Heritage Trust (CYNHT) Plan, which focused on Strategies 1, 2 and 3 of the Stage 2 Report, and the 'Cape York Peninsula to the Year 2010' program (CYP2010). The CYP Action Plan is a whole-of-government response by Queensland Government Agencies to the recommendations in the CYPLUS Stage 2 Report. The CYP 2010 framework progresses the economic, environmental, social and cultural and infrastructure recommendations through support from relevant State Government agencies coordinated by a Secretariat within the Environment Protection Agency (EPA) (pers. comm., Don Taylor, Regional Coordinator CYP 2010, Secretariat).

A significant component of the implementation is through a Cape York Natural Heritage Plan which was allocated up to \$40M in funding. The Natural Heritage Trust funding package is for promoting conservation of natural resources in the region. (ATSIC 2001.)

The re-formation of CYRAG retained the same membership format as for Stage 2 which had an Independent Chair and 14 interest constituency groups across Cape York Peninsula, these being 50% Indigenous. However the role of CYRAG changed from Stage 2 when it was primarily responsible to advise on strategy development, to one of being the main vehicle for community consultation on the implementation of the CYP2010 Action Plan.

CYRAG has been responsible for facilitating and coordinating support for many outcomes from the CYPLUS Stage 2 Report, which have included:

- The formation of a tourism working group to look at the issues of bush camping and its impacts across Cape York Peninsula and the subsequent funding application to Natural Heritage Trust.
- Supporting the development and establishment of the Cape York Tourism Advisory Group (CYTAG), which is implementing the Cape York Peninsula Tourism Management Plan.
- The establishment of an Economic Sector Steering Committee to oversee the assessment of the economic potential for Primary Industries on Cape York Peninsula which has resulted in the establishment of specific Primary Industry working groups.
- A Beef Industry Strategy was developed and is now in the early stages of being implemented by a working group of industry people.
- A Mining Industry Strategy Group was formed that included Indigenous members to develop a Mining Strategy for Cape York Peninsula.
- The establishment of Horticulture Group to not only develop detailed strategies for the industry but also establish sustainable working outcomes.
- The facilitation of a Fishing Discussion Paper to look at all aspects of the fishing industry with particular reference to Indigenous involvement within the industry.

(pers. comm., Don Taylor, 17/10/01, CYP 2010 Secretariat of Stage 3.)

Aboriginal interests cut across all of the previously mentioned sectors and strategies. As CYNHT and CYP2010 proceed, the general vision and strategies identified in the Stage 2 Report will be highly relevant as they are further developed and implemented in relation to the operation of PBCs in the Central Cape York Peninsula region.

### ***The Cape York Land Use Heads of Agreement***

The Cape York Land Use Heads of Agreement was a regional agreement made in 1996 between five organizations representing pastoralists, Aboriginal peoples and environmentalists with interests in Cape York Peninsula. The Agreement struck between the Cattlemen's Union of Australia, the Cape York Land

Council, ATSIC (Peninsula Regional Council), the Wilderness Society and the Australian Conservation Foundation, established that they would work together for the common goal of improving the society, culture, environment and economy of Cape York. The agreement sets out a list of voluntary measures which secure access to leasehold land for traditional purposes, conservation outcomes and provide security of tenure for pastoralists. (Stark 2000:34, CYRAG 1996:46.) The agreement also provides a framework for transfer of ownership and management of land in order to achieve better protection of natural resources and improve land access for Aboriginal people.

The Federal Coalition supported the agreement in its election platform of 1998, and \$4 million of its \$40 million allocation for Cape York from the Natural Heritage Trust was dedicated to activities that supported the Heads of Agreement (Stark 2000:35). The State Government has recently re-established its commitment and involvement to the Agreement. In September 2001, Premier Beattie formally signed the Queensland Government on to the Heads of Agreement, and agreed to make the principles of the Agreement a driving policy in the region (Wilderness Society 2001).

As the nominated Project Manager, Balkanu facilitates negotiations towards agreement between Governments, traditional owners and land holders of Cape York properties. The implementation of this agreement on a property by property basis has commenced.

### **The Perceived Gains from the Agreement** (adapted from Stark 2000:35)

Pastoralists gain:

- security in relation to native title,
- guaranteed ability to negotiate on any conservation initiatives on the Cape,
- lease restructure and upgrading of tenure,
- improved ability to attract investment restore capital values and develop the live cattle export trade,
- sustainable cattle industry on CYP.

Aboriginal peoples gain:

- resolution of native title issues by negotiation rather than litigation,
- access to pastoral leases as a condition of the restructure of the leases,
- title to pastoral leases that are purchased for their high conservation value,
- an improved economic base, including pastoral properties.
- right to hunt, fish and camp,
- access to sites of significance,
- access for ceremonies under traditional law;
- protection and conservation of cultural heritage.

Environmentalists gain:

- assessment and protection of World Heritage values throughout the Cape,
- environmentally sustainable land use management,
- a Commonwealth fund to purchase land with assessed high natural and cultural values,
- money to manage land purchased through the fund.

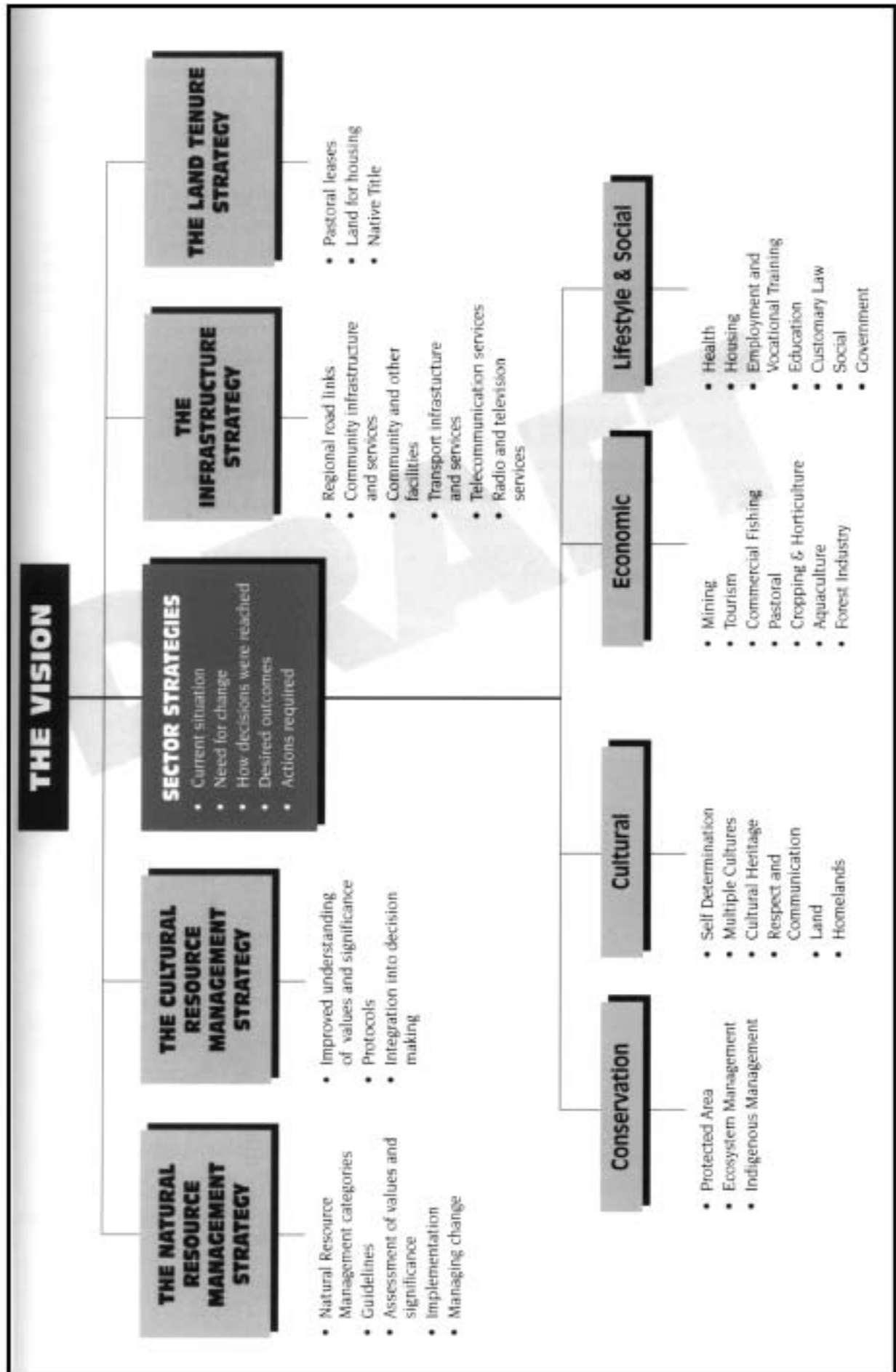
The parties acknowledge that there exist on Cape York Peninsula areas of significant conservation and heritage value encompassing environmental, historical and cultural features, the protection of which is the responsibility of State and Federal Governments in conjunction with the parties. All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula. (Wilderness Society 1996:C1.3,5.)

The parties agree that areas of high conservation and cultural value will be identified by a regional assessment process according to objective national and international criteria. The parties support the establishment of a fund for the purpose of purchasing such land with identified high environmental and cultural values by the Commonwealth Government. The fund also shall be used for effective management of the land purchased by the fund. Land purchased through the fund shall be assessed for World Heritage values. The management regime to apply to land purchased through the fund shall be negotiated between the Commonwealth and State Governments and traditional owners and shall be based on culturally and ecologically sustainable use of the land's resources to achieve Aboriginal economic viability. (Wilderness Society C1.13,16,7,18.) Negotiations will involve relevant community organisations and traditional owners on a sub-regional basis employing the CYLC/Balkanu sub-regions.

### **The Cape York Partnerships Proposal**

The Cape York Partnerships is a concept which is based on the traditional value of reciprocity. It involves the regional Indigenous organisations who are carrying out services for the Cape York Aboriginal people (viz CYLC, Apunipima), Balkanu and Cape York Corporation Pty Ltd as Trustee for the Cape York Aboriginal Charitable Trust. The formation of these organisations, other than the Land Council, evolved directly from the Aboriginal and Torres Strait Islander Commission (ATSIC) Peninsula Regional Plan 1995-2005. The ATSIC Regional Plan is seen as the basis for the development of regional organisational structures established to represent and provide services to Aboriginal people in Cape York. These organisations share the same geographic areas of responsibility and constituencies. This provides a commonality of purpose and function to negotiate and ensure they support one another in their various pursuits.

Figure 7 The draft vision of the original Cape York Land Use Strategy in 1996 (reproduced from CYRAG 1996:5)



All of the constituent organisations have grown from expressed desires of Cape York Aboriginal people, who have been consulted during each step. Consultations have been conducted during the formation of the Regional Plan, Land and Health Summits, Annual General Meetings and many other meetings between Cape York Aboriginal people and their representative bodies. The combined structures of the organisations provide a multitude of possibilities to conduct business on behalf of all Cape York Aboriginal people. The structures of these organisations, and their interlinked relationships are clearly defined in the Regional Plan. (Cape York Partnerships 2001.)

The Cape York Partnerships proposal involves an innovative model for service delivery to Aboriginal people in the region, based on mutual obligation agreements negotiated with family groups at the community level. The State Government is highly supportive of the proposal, and industry has made significant funding commitments to assist its implementation. Several communities are being consulted about the possible establishment of pilot projects. There is some controversy about the proposal, but it will not be clear what outcomes it can deliver until some practical pilot projects are underway. (ATSIC 2001.) The Cape York Partnerships Plan is being put forward as a new model for breaking the cycle of passive welfare dependence at the family and community level.

### Other Departments and Agencies

There are still further departments, agencies, networks, groups etc with whom PBCs and their land and sea management bodies may find themselves engaged. For example:-

- Apunipima Cape York Health Council
  - Tharpuntoo Cape York Legal Service
  - Centre for Alternative Technology (CAT)
  - Aboriginal Coordinating Council (ACC)
  - Registrar of Aboriginal Corporations
- (See Appendix 7 for profile of the above agencies).
- Department of Housing, Aboriginal and Torres Strait Islander Housing (ATSIH)
  - Queensland representatives of Coastcare, particularly the Indigenous Programs Facilitator.
  - DNRM Integrated Catchment Management.
  - Queensland Department of Employment, Training and Industrial Relations.
  - Australian Quarantine Inspection Service under Agriculture, Fisheries and Forests – Australia (AFFA)
  - Tertiary institutions and research organisations, including James Cook University, Northern Territory University, Queensland University, Far North Queensland College of TAFE and the Tropical Savannahs CRC.

- Primary producers and their key staff and representative organisations.
- CASA (Aviation Industry) re airstrips, eg. Coen, Lockhart, Silver Plains, Port Stewart.
- Mining Interests, including Comalco and other companies with statutory rights to mine bauxite in the Wik study area.
- Non-government agencies such as World Wide Fund for Nature, OXFAM, etc (LRC 2001.)

There are also probably a range of less direct links and impacts that might occur between PBCs and State Education, Health, Police, Courts and Correctional Services.

## Conclusion

### The regional planning environment

The CYLC shares a unity of purpose and complementarity of function with a number of regional organizations, jointly committed to the broad objectives of the ATSIC Peninsula Regional Plan (1995 – 2005). These include Balkanu and Cape York Partnerships. Other significant land management and planning initiatives in the region, involving negotiations and planning between groups with disparate interests are CYPLUS, the Cape York Heads of Agreement and NHT. The following agencies and services have publicly stated the necessity or desire to work co-operatively with other agencies and the Indigenous community to achieve their goals: EPA, QPWS, DATSIP (creating partnerships within government and increased co-ordination is one of their primary goals), DNRM and other Queensland Government departments, GBRMPA and NHT.

The ATSIC Regional Council and CYLC demonstrate a high degree of congruency in multi-issue regional planning. CYLC and ATSIC both share the focus of increasing Aboriginal control and ownership over land. CYLC and Balkanu (established by ATSIC) work closely together with a longitudinal outlook. Other agencies who have developed a regional plan or approach for the Peninsula include ILC, EPA and QPWS. DNRM is a significant source of information regarding land resources and spatial data for Regional Planning. It maintains an innovative and responsive land tenure system.

The Cape York Heads of Agreement is one of three major land management planning and implementation initiatives of the 1990s for Cape York. The others have been CYPLUS and NHT. The participation of Indigenous people and the recognition of their native title and particular cultural affiliations to the land and surrounding seas of Cape York have been a common and central feature of all three; as has the creation of partnerships between state and commonwealth government, industry and conservation interests, and the emphasis of local community (Indigenous and non-



Indigenous) participation. There are numerous linkages between the future land use program defined by CYPLUS, the aspirations expressed under the Heads of Agreement and the implementation of practical land and sea management programs using NHT funding.

### **Environmental Planning by PBCs and Land Trusts**

A summary of the potential relationships of PBCs and land trusts with government, non-government bodies and organizations with respect to the funding, planning and execution of land and sea management is contained in Table 6 (see following).

#### **(a) Land management**

The CYLC's corporate mission is to both improve Indigenous control and management of land and to improve participation of Indigenous people in decision-making regarding land management. Balkanu also plays an important role in planning the development of Aboriginal land with a focus on economic development. The ILC is another significant player with the stated role being the provision of advice and assistance to Indigenous land holders to support them in establishing and maintaining land uses that suit their country, are sustainable in the long term and are a priority for them.

State agencies such as the EPA and QPWS are focused on strategic planning for management of Queensland's Natural and Cultural environment. The EPA also focuses on the promotion and regulation of sustainable industries. DNRM focuses on the promotion of the sustainable use of land resources, particularly waterways and native vegetation (State Forests), and the establishment of corporate land holding entities (land trusts) for Aboriginal freehold land granted under the ALA. Of interest to the present study are the DPI agencies which monitor and plan resource use and development including the Queensland Fisheries Service, and DPI Forestry.

The NHT is a significant Commonwealth Agency promoting sustainable agriculture and managing natural and cultural environments. Of particular interest to Indigenous land and cultural heritage are two programs: the Indigenous Land Management Facilitator Program and the Indigenous Protected Areas Program. The NHT aims to deliver outcomes at the community, Regional, State and Commonwealth levels.

The Cook Shire Council also asserts an interest in promoting the environmentally sustainable development of land in the region, but in the past has shown little interest or capacity to contribute to the management of Aboriginal land, beyond the imposition of shire administrative and planning requirements which are not necessarily designed to suit the remote situations characteristic of Aboriginal owned land.

#### **(b) Sea management**

The Fisheries Action Program by the NHT hopes to develop an awareness amongst all resource users and the wider community of important fisheries, develop a sense of ownership and responsibility amongst all user groups, encourage participation by the direct users of fisheries, encourage sustainable fishing practices, and integrate fisheries issues with regional planning.

The primary focus of GBRMPA is the protection and development of the Great Barrier Reef Marine Park. They have developed a 25-Year Strategic Plan through extensive consultation with a variety of interested parties. The GBRMPA established an Indigenous Cultural Liaison Unit to encourage the development of effective and mutually acceptable practices for implementation. This includes the recognition of cultural heritage and the management of fisheries that meet the needs of Indigenous interests, including use for traditional purposes.

### **Economic Planning by PBCs and Land Trusts**

There is only limited funding available from government for the establishment and operation of PBCs and land trusts (see Table 6, section 1). In the short term at least, these entities are likely to be faced with their own economic planning to ensure their survival. There are a range of government departments and agencies that may be able to assist in certain ways.

ATSIC currently plays a significant role in the economic planning of the region which is demonstrated in the impressive amounts of funding directed to the region for the purpose of economic development. Balkanu directs ATSIC funding for economic development initiatives in the region. A large portion of the ATSIC money is also spent through the CDEP program. However since January 2001, ATSIC has been regarded as a supplementary provider rather than a primary provider of funding. In this role it helps Aboriginal groups find funding from other sources. It also has an advocacy role to get other organizations to meet their responsibilities to Indigenous people.

The ILC also has a strong focus on the economic development and improved economic viability of Indigenous owned land (but also promotes environmental, cultural and social sustainability). The ILC takes an organic approach by engaging consultative and problem-solving practices with local stakeholders.

DATSIP and Cape York Partnerships are concerned with improving the standards of living for Indigenous people across Queensland. One of its eight key areas as described in the Ten Year Agreement, is economic development across the State. Partnerships goes a step further, investigating and testing alternative methods of providing government services and resources to communities.

### **The Social Planning of PBCs and Land Trusts**

Within the CYLC there is a significant amount of expertise in social planning by in-house and consultant anthropologists. There are also numerous studies and technical reports on classical and post classical land tenure and social organisation. This is an invaluable resource for understanding alternate group structure and dynamics for improved PBCs etc. Understanding the differentiation of rights and interests between sub-groups and individuals of a group in the design of Cultural Heritage management is another important planning issue.

Another related issue for social planning is the promotion of effective community government. One of the objectives of the ATSIC Regional Plan is to develop culturally appropriate ways for Indigenous people to exercise increased autonomy in local and regional government. The Queensland DATSIP has the goal of improving local community well-being by encouraging appropriate ways for governing within communities. It may be important to engage with both ATSIC and DATSIP in the development of effective PBC structures to ensure congruency and compatibility with their planning frameworks.

### **Legal Planning by PBCs and Land Trusts**

There is a need for present and future land and sea management agencies to understand the framework of legislation that impacts on the Cape York region. There are numerous acts and regulations that operate under the following departments;

#### **Commonwealth**

EA (significantly the *Environment Protection and Biodiversity Conservation Act 1999*)

NHT

NNTT and NTRB (PBC structures and functions).

Registrar of Aboriginal Corporations (the role of ACC legislation and the Registrar in the design, administration and compliance of PBCs).

GBRMPPA (ie. Zoning and Management Plans for the Great Barrier Reef Marine Park).

#### **State**

EPA and QPWS (ie. operational licensing and compliance monitoring. They are also responsible for the environmental management of mining.)

DNRM (ie. Community Management and Land Trust Body Corporate Legislation)

DPI (ie. Licensing, Queensland Boating and Fisheries Patrol)

**Table 6 The potential relationships of traditional owners and native title holders with government and NGOs concerning the establishment of land holding organisations, the funding of LSM, LSM planning and joint LSM activities.**

Categories of Relationships	Government Departments & Agencies, NGOs
<b>1. Establishment and operating of Land-holding organisations</b>	
Establishment of PBCs	CYLC
Funding of PBC's operations	ATSIC (but no current commitment)
Funding for land trust operations	DNRM, ATSI LAB grants (but currently insufficient)
<b>2. Funding Sources for LSM and Outstations</b>	
Funding for salaries and equipment (inc. vehicles)	ATSIC, CDEP
Funding for LSM office overheads and coordinator salary	NHT, Aboriginal Councils
Funding for outstation planning	ATSIC, Balkanu
Funding for outstation infrastructure	ATSIC, Balkanu
Mapping, boundary checks, land info packages	DNRM
Funds for pest plants and animals strategy	NHT, DPI
Forest development, management enterprises	Forestry (DPI)
Tourism Impacts and Tourism Management Plan	CYRAG (CYPLUS)
Nursery, land protection construction (fences, erosion prevention)	NHT, DPI
Landscape interpretation trails – funds	NHT
Economic Land Development Planning (enterprise feasibility)	Balkanu, ILC, CYRAG (CYPLUS) – beef, mining horticulture
Land purchases	ILC, Heads of Agreement/Balkanu – land for protection
<b>3. LSM Planning</b>	
Regional and sub-regional land management planning	CYLC/Balkanu/ATSIC – Land Summit, NHT, ILC-regional & sub-regional plans
Local Land Management Planning	Balkanu, ILC, DNRM, Heads of Agreement/Balkanu – Pastoral Lease planning
Control Plan for pest plants and animals	DNRM, NHT, DPI
Marine and freshwater planning	Qld Fisheries (DPI) – Fish Habitat Management, NHT – Sustainable Fisheries Plan GBRMPA
Marine and freshwater enterprise planning	GBRMPA – GBR Marine Park Sub-regional Plan, CYRAG – Fisheries Industries, Qld Fisheries (DPI) – Aquaculture & fishing industries DNRM – Water Allocation and Management Plans, Water Development and Infrastructure Plans, Waste Water Re-use Strategy.
Integrated land and water planning	DNRM, NHT – Integrated Catchment Management Plan.
Cultural Heritage Protection Plans	EPA, Heads of Agreement/Balkanu – Sites on Pastoral Leases – identification and mapping, DATSIP 10 Year Plan for integration of all gov't, GBRMPA – in GBR Marine Park CYLC
<b>4. Joint LSM Activities</b>	
Negotiation by traditional owners with other parties re LSM & control including ILUAs	CYLC
Policing, patrols, surveillance and monitoring of permitted uses, issue of permits, licence audits	GBRMPA – GBR Marine Park, EPA, DNRM – tree clearing, Qld Fisheries (DPI) – marine and freshwater fishing
Impact assessment appraisal	EPA, CSC, GBRMPA
Planning approval	EPA, CSC, DNRM

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## CHAPTER 4: THE COEN SUB-REGION CASE STUDY

### The Coen Sub-region

The Coen sub-region case study area is located on the east of Cape York and contains the small township of Coen as its regional centre, as well as a number of Aboriginal outstations. Coen is located on the Peninsula Developmental Road and is a regional service centre for both pastoralists and Aboriginal people, as well as for passing traffic and tourists. The CYLC's Coen sub-region area is divided geographically into three areas: the uppermost tributaries of the Coen River basin, the uppermost tributaries of the Archer River basin which is dissected by the Geikie Range, and the easterly flowing streams drawing from the McIlwraith Range. The Geikie Range connects, in an easterly direction to the McIlwraith Range, separating the Coen and Archer River basins.

Aboriginal people of the Coen sub-region reside in the small town of Coen (Indigenous population approx. 112 in the 1996 Census) and in some ten outstations, the largest of which is Port Stewart. Many of the traditional owners and native title holders live outside the actual Coen sub-region at such large Aboriginal communities as Lockhart River, Hopevale, and Aurukun and in the town of Cooktown.

### Areas of Land in the Coen Sub-region

The principal areas of land in the Coen sub-region, in so far as Indigenous interests are concerned, and due in many cases to their extensive areas, are outlined as follows, and keyed to the maps in Figures 9 and 11 (pp. 52 and 54).

#### 1. Birthday Mountain

A small area of Aboriginal Freehold land (granted under ALA in 1997 following a successful claim) adjoining the north-eastern boundary of Mungkan Kaanju National Park. The area was granted to the Southern Kaanju, and is held in trust by the Watharra Land Trust.

#### 2. Mungkan Kaanju National Park

The Mungkan Kaanju National Park was formerly known as Archer Bend and Rokeby National Parks which were amalgamated, in accordance with the *Nature Conservation Act 1992*. The National Park has been subject to claim under the ALA (it is not subject to any native title claim). The claim evidence was heard in 1998 and 1999 and has been the subject of a recent report by the Land Tribunal recommending a grant of two claims on the grounds of traditional affiliation as follows:

- (i) Archer Bend: Wik Mungkan and Wik Ompom people
- (ii) Rokeby: Wik Mungkan, Ayapathu and Southern Kaanju people

At the time of writing, the Minister was yet to make a decision on the Tribunal's recommendation. Once the title is handed over, the issue remains as to negotiating a joint management agreement between traditional owners and the National Parks and Wildlife Service.

#### 3. Lochinvar USL

The land is described as Lot 1 on Plan ABL4, County of Coen. It has an area of about 1540 hectares of USL land adjoining the western boundary of Lochinvar Pastoral Holding and the south-eastern corner of the Rokeby section of the Mungkan Kaanju National Park. The land is located approximately 18 kilometres west of the township of Coen. An ALA claim was made by the same Ayapathu claimants as were involved in the Munkan Kaanju claim (above). At the time of writing the report the claim was, like the Mungkan Kaanju NP awaiting a decision by the Minister.

#### 4. Coen Aboriginal Reserve

Reserve numbers R10 and R11 were transferred to the Wunthulpu Trust on 14/5/1998 and 4/6/1997 respectively. The trust is made up of representatives of the tribal groups from the Coen Region – significantly, Kaanju, Lamalama, Ayapathu and Wik Mungkan.

#### 5. Port Stewart (Yintjingga)

Aboriginal Freehold land transferred under the ALA in 1992 to the Lamalama people as grantees/trustees. Held by Yintjingga Land Trust, comprised of the Lamalama grantees. There is an established dry weather outstation on the banks of the Stewart River (established in 1984).

#### 6. Moojeeba

Old town site at or near Port Stewart that was gazetted in 1902 but never developed. Lamalama purchased some blocks at an auction in 1994, and now have a substantial outstation there, linked to the Port Stewart outstation. The remaining area of the old town site remains as USL, now surrounded almost entirely by Aboriginal freehold land granted as part of the Silver Plains ALA transfer.

#### 7. Silver Plains/McIlwraith Range aggregation

Silver Plains/McIlwraith Range aggregation includes the old Silver Plains pastoral lease, the McIlwraith Range Timber Reserve and a portion from the old Geikie pastoral lease. The purchase of the old Silver Plains pastoral lease by the Queensland Government was funded by several parties, including ILC, the State Government and the ANCA (a Commonwealth agency now called Environment Australia) on the agreement that 50% of the total land would be Aboriginal National Park and the remaining would become Aboriginal freehold.

- (a) The non-national park areas of the Silver Plains/McIlwraith aggregation were granted as Aboriginal Freehold under an ALA transfer in December 2000 to the Kulla Land Trust, comprised of Kaanju, Umpila, Lamalama and Ayapathu peoples (hence KULLA as the name of the land trust). A portion of this area was contributed by ILC (although not a direct purchase per se... see notes on this in Appendix 5). Presently, developmental activity tends to be focused around the Silver Plains homestead (in Lamalama country) and at Station Creek (Ayapathu country). There is a need for a fire management regime at Silver Plains, as well as enterprise and land management plans in general.
- (b) Most of the remaining area was to be transferred and leased back as National Park following resolution of deficiencies with the lease-back and Aboriginal joint management arrangements currently available under the ALA and NCA (Blackwood 2001).

There are two (2) active native title claims that cover the Silver Plains/McIlwraith Range area, both the proposed national park and non-national park areas (see below).

8. **Crown Land**  
Two Timber Reserves exist; the large Running Creek Reserve (abutting Silver Plains) (24) and a small reserve comprised of a rectangular parcel encapsulated within Lochinvar Holding. (25).
9. **Morris Island and Ellis Island**  
Two areas of ALA claimable USL with a combined total of 20.55 hectares and known as Morris Island (Lot 1 on Plan ABL14) and Ellis Island (Lot 1 on Plan ABL 15), are located near Cape Sidmouth on the east coast of Cape York Peninsula, about 10 kms offshore, and approximately 66 kilometres north-east of the township of Coen. ALA claims have been lodged on behalf of Umpila people over each island. It was anticipated that hearings would be held during 2002. (Blackwood 2001.)
10. **Lakefield National Park**  
Lakefield National Park is located to the south of and contiguous to Princess Charlotte Bay (see Figure 11) and is outside of the Coen Sub-region. However it is included due to it being an area with Lamalama interests near the boundary of the Coen Sub-region. The Park was claimed on behalf of traditional owners under an ALA claim. The Land Tribunal has recommended the land be granted on the grounds of traditional affiliation to a number of language groups, including Lamalama. The Claimants, including the Lamalama, are incorporated as Rirmerr Aboriginal Corporation. The Minister has agreed to grant the land, but the grant will not take place until there have been legislative changes to ALA and NCA regarding joint management and lease-back of national parks(Blackwood 2001.). Note that the Lakefield National Park does not include the Cliff Islands which are to the north of the main Park and 20 kms from the mouth of the Stewart River.
11. **Geikie Pastoral Lease**  
ILC purchased the Geikie Pastoral Lease in August 2000. The property was divested in July 2001 to a land holding body of three Southern Kaanju clan estate groups named the Geikie Aboriginal Corporation (incorporated under the *Commonwealth Aboriginal Councils and Associations Act*). This corporation holds the pastoral lease and its rules would allow it to become a PBC in the future should the traditional owners seek a native title determination over the property. The property is lacking in significant infrastructure. The ILC sees that there is limited capacity for enterprise development at this stage, although outstation development is a possibility (pers. comm. Ali Bock, ILC, 6/12/01).
12. **Lockhart River DOGIT**  
This DOGIT has recently been transferred under the ALA to two Land Trusts – one small area in the southern portion to the Creek family, and the rest of the DOGIT to a land trust comprised jointly of Umpila, Kuuku Y'au, Ulthalganu and Kaanju traditional owners. The area of the township has not been transferred and remains DOGIT held by Lockhart River Aboriginal Council. There is a native title claim over a small portion of the Lockhart DOGIT, in the far south (see below).
13. **Marina Plains**  
Marina Plains is made up of 7 large parcels of USL, as well as a small local Government Jetty Reserve and a Camping and Water Reserve (900 ha). A native title claim has been lodged over Marina Plains by the Lamalama (QC99/022).

**Figure 8 The Mungkan Kaanju National Park showing the relative location of Wik Mungkan, Southern Kaanju and Ayapathu (from Chase et al 1998).**



Figure 9 Cape York Land Council's Coen region showing four main tribal groups and major parcels of land with Aboriginal tenure or native title interests (Based on DNR (Qld) 'Mungkan, Kaanju and Ayapathu Land Claims' map, 2001. Embellishment completed by current report authors over map supplied by NNTT's Geospatial unit, 2002.)

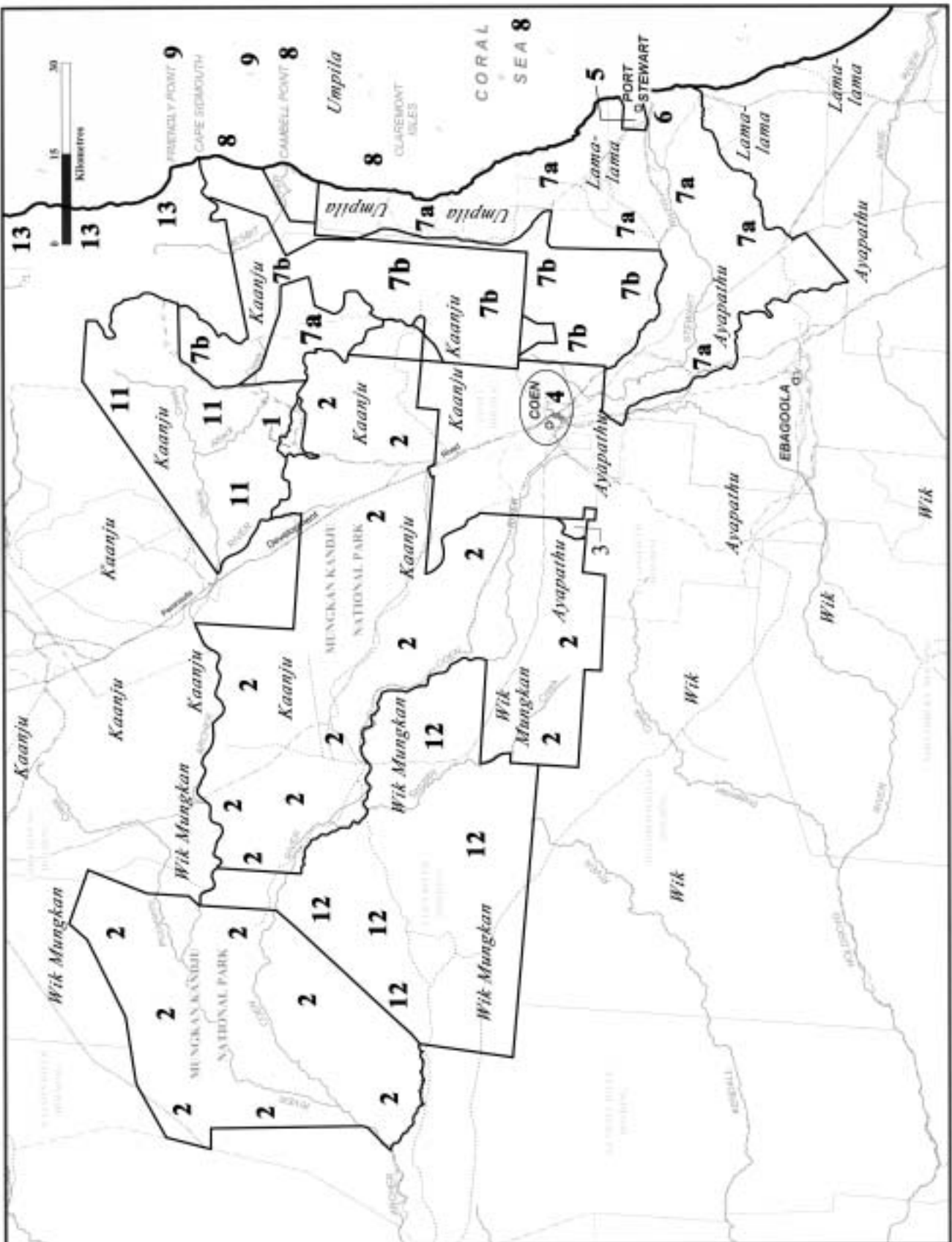


Figure 10 Native title claims in the Coen region (map produced by NNTT's Geospatial unit, 2002).

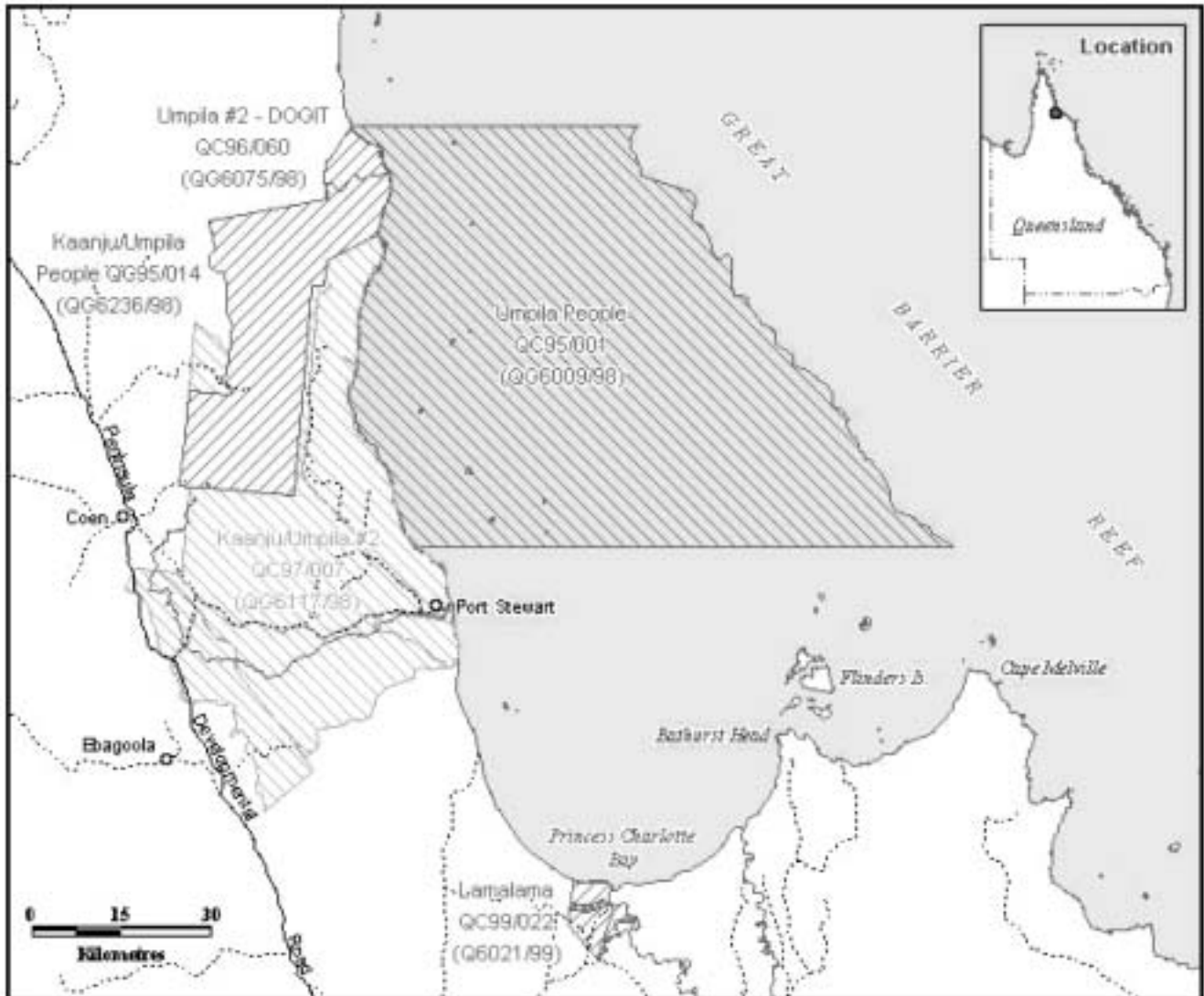
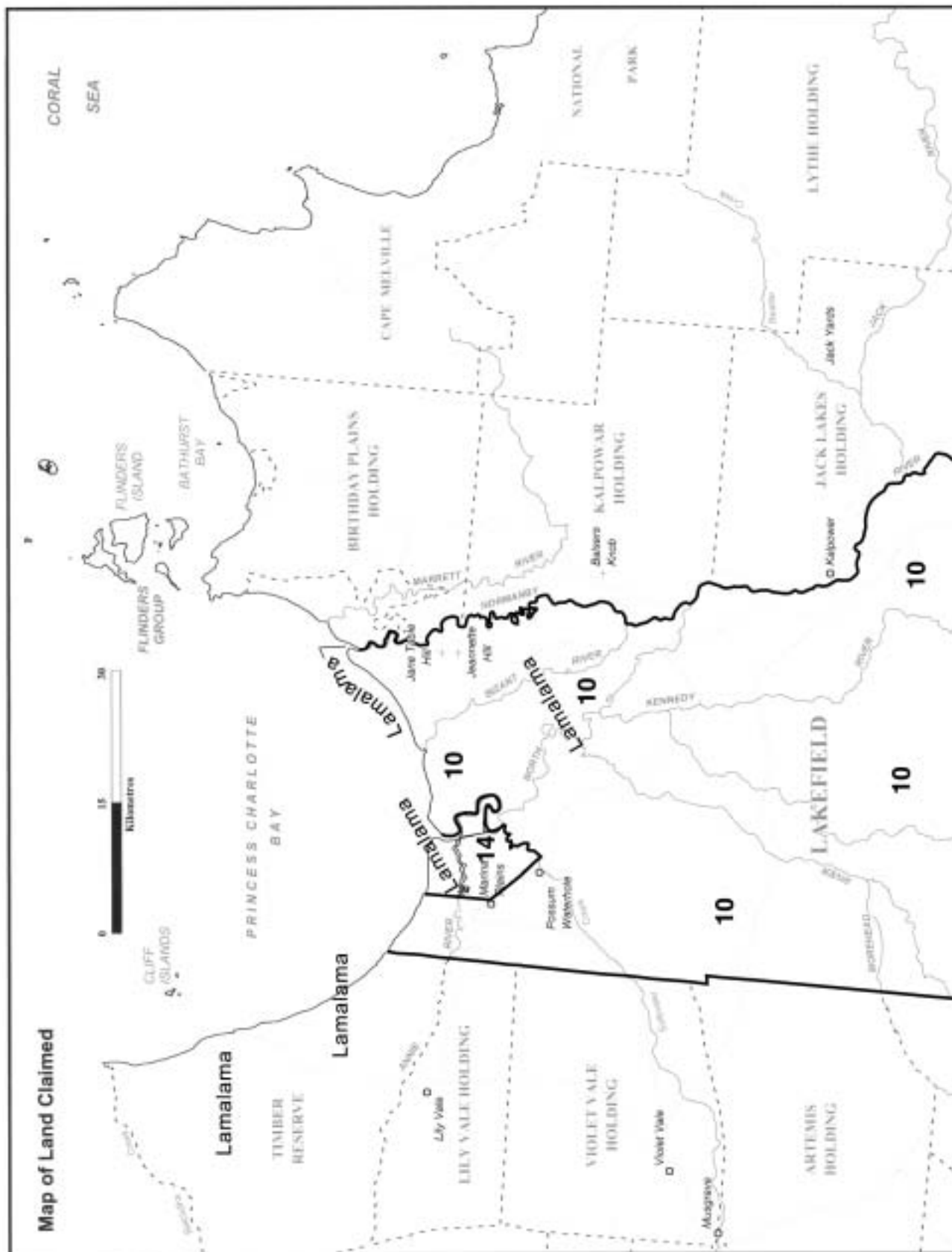


Figure 11 Lamalama interests in the Princess Charlotte Bay region (areas 10 and 14) (embellishments completed by current report authors on base map supplied by NNTT's Geospatial unit, 2002).





14. **Parcels of land currently under leasehold to non-Aboriginal pastoralists**
- (a) Lovel Holding (aka Mt Croll).
  - (b) York Downs Holding (partially within the boundaries of the Wik and Wik Way Native Title Claim).
  - (c) Wolverton Holding.
  - (d) Orchid Creek.
  - (e) Leconsfield Holding (majority within the boundaries of the Wik NT Claim).
  - (f) Alcestis Holding (aka 'Bamboo').
  - (g) Lily Vale Holding.
  - (h) Lochinvar Holding (term lease).
  - (i) Aurora (term lease).

Within the limitations of the current study the authors have not been able to investigate the nature and extent of small parcels of land, for example police and camping reserves.

The Coen Sub-Region case study comprises the following parcels of Aboriginal freehold land:

- Birthday Mountain (1) and Port Stewart (5) have been previously claimed and transferred (respectively) as Aboriginal freehold under the *Aboriginal Land Act 1991*.
- The Coen Aboriginal Reserve (4) has been transferred as freehold to a land trust under the *Aboriginal Land Act 1991*
- The majority of the old Silver Plains Lease (7a) has been transferred to a land trust under the *Aboriginal Land Act 1991*.
- The remainder of the old lease, in addition to areas of an old Timber Reserve and a USL block (collectively 7b) has been transferred as Aboriginal freehold under the *Aboriginal Land Act 1991* and is proposed to be subject to a conservation regime (remains to be finalised).
- The Lockhart DOGIT (13) (except for the township area) has been transferred to two land trusts under the *Aboriginal Land Act 1991*, one of which extends into the Coen Sub-region.
- Part of Moojeeba township (6) purchased by Lamalama in 1994 is held as freehold (not Aboriginal freehold).

At the time of writing several further areas were pending transfer or grant as Aboriginal freehold under the *Aboriginal Land Act 1991*, whilst awaiting improved outcomes for Aboriginal ownership and management of national parks to be implemented through changes to relevant legislation:

- sections of the old Silver Plains lease plus an old Timber Reserve (7b);
- Lakefield and Cliff Islands National Parks (10);
- Two parcels collectively known as Mungkan Kaanju National Park (2) and a small parcel known as the Lochinvar USL (3) have been recommended for grant as Aboriginal freehold and await only the minister's decision.

- Claims for the Morris and Ellis Islands have also been lodged under the *Aboriginal Land Act, 1991*.

There are nine areas currently under lease to non-Indigenous pastoralists. One parcel, Geikie (10), under term lease, was purchased by ILC and has been divested to the Geikie Aboriginal Corporation.

Because Merapah pastoral property is included in the Wik and Wik Way Native Title Claim, and lies within the Wik case study sub-region, it will be dealt with more exhaustively in the next chapter. However it is mentioned here as many of its traditional owners live in Coen and they may prefer to seek LSM services from Coen rather than Aurukun.

There are five native title claims within the Coen Sub-region.

### **Aboriginal Groups and Land Tenure in the Coen Region**

Aboriginal ownership of particular tracts of land is considered to be derived through traditional affiliation. The term 'Aboriginal owner' or 'traditional owner' connotes the primacy of speaking for a given tract of land and/or sea, having certain and significant spiritual connections to it, and having the responsibility for making decisions regarding the use and access of that tract (Chase et al 1998:43.). There are various mechanisms by which Aboriginal people come to be traditional owners for places or areas, a detailed analysis of which is to be found in appendix 5 for the Coen Sub-region.

In summary, across the central Cape York Peninsula region there are systems of traditional ownership that range from the anthropologically defined 'exclusive' model (also known as 'classical' land tenure, after Sutton 1998), to that which has been defined as the 'inclusive' (Chase et al 1998:35). They should be seen as existing at two ends of a continuum, with a variety of formations existing across regions and at various levels. The system is complex, fluid, dynamic and localised, thus it is difficult to define it in total at any point in time. Let us consider these two extreme models of land tenure, before examining some of the positions in the continuum taken by the Aboriginal groups of the sub-region.

#### **The Exclusive Land Tenure Model**

Chase et al (1998:35) describe the 'exclusive' model as upholding a strong ideology of patrilineal descent from an apical ancestor (which can comprise a spiritual connection or a corporeal connection or both). In recent times and in the lower generations, descent is cognatic i.e. traced through both one's mother and father. Connection is highly particularised to a certain tract of land within a wider language territory. Hence it has also been termed the 'clan-estate' model. Chase et al (1998:35) give the Umpila and Kaanju people as leaning towards this model.

In the 'exclusive' model, membership is gained through patrilineal descent, that is, one becomes a member of the clan if one's father was a member. While there is no equivalent for the English word 'clan' in the Indigenous languages of the central Cape York Peninsula, there are equivalent terms referring to groups formed through descent with specific affiliations or relations to land, and terms that reflect the relationship between individuals, groups and land. The regional landscape is understood to be made up of hundreds of named tracts, known in Aboriginal English as 'countries'. Each clan owned or claimed connection to a number of countries which together made up the clan estate. However, boundaries between countries were and remain ill-defined, and some areas of 'company land' were shared. (Chase et al 1998:37.)

The contemporary regional system has changed somewhat from the classical clan-estate model of a land-owning, patrilineal descent group to a 'family' group known in anthropological terms as a 'cognatic descent group'. These 'family' groups allow for descent from either one's mother or father. Significant elements of the 'classical' clan estate model are maintained and cognatic descent groups are commonly associated with specific tracts of country which trace back to the country of one or more significant ancestors.

### **The Inclusive Land Tenure Model**

The second model ('inclusive') is more socially encompassing and is conceptualised in terms of the family group and extends out to the language territory group. It has also been termed the 'language-named tribe' model (Chase et al 1998:35). The Mungkan and Ayapathu are groups that fit at this end of the continuum (ibid).

The term 'tribe' has historically been used by anthropologists to define a level of social structure above that of the clan and local groups, referring to all the component groups who spoke a single language. However the relevance of the term for defining a real category of social organisation has been called into question (Chase et al 1998:39). The term has been adapted in contemporary contexts to refer to language-named tribes, a concept more widely accepted in the literature on Aboriginal land claims and native title claims in northern Australia (Rumsey 1989, 1993). Language named tribes confer identity, but do not constitute real, active social groups – though this may change as a result of their importance in defining native title and traditional owner groups for land claim purposes.

Four language-named tribes on the eastern side of Cape York Peninsula are relevant to the Coen case-study area. They are the Ayapathu, Kaanju, Lamalama and Umpila. Although the precise boundaries of these four 'tribes' may be subject to change, the current authors, for the sake of planning convenience have placed nominal

boundaries on the map in Figure 9 so that hypothetical planning and legal scenarios can be constructed for the remainder of this analysis. See below for a brief discussion of the social organization and territorial boundaries of these four language-named tribes.

### **The Ayapathu**

The Ayapathu identify as the 'Ayapathu tribe'. It can be argued that the Ayapathu have probably moved the furthest in the direction of becoming the 'language-named tribe' as the land-holding group, in comparison to other language groups in the region. There is a sense among the contemporary Ayapathu that the tribe as a whole holds rights and responsibilities across Ayapathu tribal land as a whole. But it is also evident that, alongside this, older, fine-grained and more particularised associations of individuals and families to specific tracts of Ayapathu land continue to be recognised. (Chase et al 1998:41.)

The territory of the Ayapathu people comprises a large area situated to the south of Coen. This tribal land begins at the Great Northern Gully in Coen, and runs westward along the Coen River to Catfish Lagoon. From there, Ayapathu land runs south to Polappa Outstation and to the top half of Strathburn Station. On the east, Ayapathu land includes the south-western part of Silver Plains Station and runs south along the Great Dividing Range from the Klondyke area down through to just south of Fox's Lookout. (Smith and Rigsby 1997, Cape York Land Council n.d.)

### **The Kaanju**

Whilst recognising a division between southern and northern Kaanju, (as documented in Mungkan Kaanju National Park Claim and the Birthday Mountain Claim) and continuing to adhere to clan estate identities (particularly among the southern Kaanju), Kaanju people of the Coen sub-region recognise themselves as being part of a wider group of Aboriginal people who see themselves as belonging to the Kaanju language group. The classical clan-estate model is strongest among southern Kaanju, the majority of whom have been able to maintain during the post-contact period continuous connection with their country. The southern Kaanju lands can be represented as discrete, relatively bounded estates with clear links back to the original clan groups, for instance the Yikja estate, or the Watharra estate. (Qld, Aboriginal Land Tribunal 1998-99:1373.)

Kaanju territory extends from near the Jabaroo Outstation on the western boundary of the Mungkan Kaanju National Park (Rokeby section), in an eastern direction, past Coen, across to the southern point of the McIlwraith Range. In a northwards direction, the territory extends to where the Peninsula Development Road crosses the Wenlock River. (Cape York Land Council, n.d.).

### The Lamalama

The Lamalama comprise a 'language-named tribe' which has emerged over the past century out of historical processes which brought about the amalgamation of more than forty patrilclans (owning and speaking perhaps six separate Indigenous languages) and numerous local groups. (Cape York Land Council, n.d.) The tribe is today made up of over a dozen cognatic descent groups who share a common tribal identity based upon traditional cultural systems of land and sea tenure, spiritual and other beliefs, Indigenous languages, and social and economic practices dating back beyond European contact. Some recognition of the classical clan-based system remains to the extent that the contemporary cognatic descent groups and, in particular, their older members, recognise more particularised affiliations to the estates and sites of the patrilclans of their founding ancestors. (Cape York Land Council, n.d.)

The Lamalama people are traditional owners for the lower Princess Charlotte Bay country, extending from the Normanby River mouth in the south, along the coast to Port Stewart and northward to near the Massey River, where Lamalama country meets up with that of the Umpila people. Lamalama territory also extends out from the coast to include the seas, islands, reefs, seagrass beds and cays at least as far as the Great Barrier Reef. Inland, it extends back to the Great Dividing Range, where it abuts that of their inland neighbours, the Kaanju and Ayapathu peoples, running south to Fox's Lookout and Saltwater Creek.

### The Umpila

The Umpila people possess a traditional identity as a language named tribe, as well as more specialised identities based on particular tracts within the territory of the tribe. (Cape York Land Council, n.d.) Family groups (sometimes called 'clans') of Umpila are said to 'belong' to particular clan lands, or estates. Each clan

estate is associated with one of two named moiety divisions and this also gives moiety affiliation to members of the estate group through patrilineal descent (Cape York Land Council, n.d.).

The Umpila people have their traditional country in a coastal area north of Princess Charlotte Bay and extending from approximately just south of Massy Creek (locally known also as 'Massy River') northward to approximately Friendly Point. Beyond the shoreline, Umpila territory also extends seawards to include islands, cays and reefs on the inner side of the main Barrier Reef. (Cape York Land Council, n.d.)

### Native Title Claims in the Coen Sub-region

Table 7 below sets out some technical descriptive details of the five native title claims in the Coen Sub-region as of mid-2001. Note that the names of the respective claims are all in terms of the four language-based tribal identities.

There are two native title claims made by the groups comprising the KULLA Land Trust, covering the Silver Plains/McIllwraith Range area, both the proposed national park and non-national park areas (determinations yet to be made). The Kaanju/Umpila claim (QC95/014) was submitted in 1995 and includes the old Timber Reserve and the adjacent USL block (to the north), parcels where native title had not been extinguished. The Kaanju/Umpila/Ayapathu/Lamalama claim (QC97/007) was submitted in 1997 over the entirety of the Silver Plains pastoral lease.

The Umpila Native Title Sea Claim Area (QC95/001) was lodged originally in 1995. It now covers an area from coast to outer barrier reef (excluding Morris and Ellis Islands), off the coast of Silver Plains. It was lodged on behalf of the Umpila peoples, and originally included areas that have now been absorbed into other adjacent native title claims, for example #2 Umpila

**Table 7 Native title proceedings in the Coen Sub-region** (see Figure 10 on page 53)

NATIVE TITLE CLAIMS					
Tribunal number	QC97/7	QC95/14	QC95/01	QC96/60	QC99/22
Federal Court number	QG6117/98	QG6236/98	QG6009/98	QG6075/98	Q6021/99
Application name	Kaanju, Umpila, Lamalama, Ayapathu peoples #2	Kaanju/Umpila people	Umpila people	Umpila #2 – DOGIT	Lamalama
Status	Active	Active	Active	Active	Active
Approx. area size (ha)	2235.6045	>100 000	[Not Available]	354.071.95	7800
Date filed	12/03/97	30/10/95	14/12/94	21/06/96	28/07/99
RNTC status	Not Registered	Registered	Not Registered	Not Registered	Registered

QC96/060. The Cape York Land Council has since picked up the case and substantial anthropological research has been undertaken.

The #2 Umpila Native Title Claim (QC96/060) covers a relatively small area in the far south of the Lockhart DOGIT (determinations yet to be made).

A native title claim has been lodged over the former Marina Plains cattle station by the Lamalama (QC99/022). Marina Plains which is now mostly USL, is surrounded by Lakefield National Park on three sides and Princess Charlotte Bay in the north (determination yet to be made).

### Rights and interests claimed

The rights and interests being asserted in each claim are very consistent across all five claims. Each comprises an 'exclusive possession and occupation' type claim. The exception, to some extent, is the Umpila people's claim (QC95/1), which does not include the rights and interests listed as 3a and 3h below (which are encompassed by the other claims) but does include rights and interests listed as 3s and 3t (but which are not prescribed in the other claims).

The claims generally comprise the following types of rights and interests:-

- (1) The right to possession of the land, waters, and the resources and attributes of the land and waters ("resources") to the exclusion of all others; and
- (2) the right to occupation, use and enjoyment of the land, waters and resources, to the exclusion of all others; and
- (3) further or in the alternative, the right to –
  - (a) possession of the land, waters and resources;
  - (b) occupation of the land, waters and resources;
  - (c) use and enjoyment of the land, waters and resources;
  - (d) own and control information comprising and concerning the traditional laws and customs of the Kaanju, Umpila, Ayapathu and Lamalama people in relation to the land, waters and resources;
  - (e) conduct ceremonies on the land and in relation to the land, waters and resources;
  - (f) live on and erect residences and other infrastructure on the land;
  - (g) move freely about the land and waters;
  - (h) hunt and fish on and from the land and waters and otherwise collect food from the land and waters;
  - (i) take from the land and use, the resources of the land, including the plants (including forest products) and animals of the land and all other components and attributes of the land useful to people;
  - (j) take from the waters and use, the resources of the waters, including the plants and animals (including fisheries) of the waters, the water and all other components and attributes of the waters useful to people;
  - (k) dig for, take from the land and waters and use minerals and ores, and extractive minerals and quarry materials such as flints, clays, soil, sand, gravel, rock, and all like resources;
  - (l) manufacture materials, tools, and weapons from the products of the land, waters and resources;
  - (m) dispose of products of the land, water and resources, and manufactured products, by trade or exchange;
  - (n) manage, conserve, and care for the land, waters and resources;
  - (o) grant or refuse permission to any other person to do some or all or (a) to (n) either at all or subject to terms and conditions;
  - (p) inherit native title rights and interests
  - (q) bestow and acquire native title rights and interests; and
  - (r) resolve as amongst themselves any disputes concerning land, waters and resources.
  - (s) have the right to bury their dead in their country
  - (t) have the right to strictly prohibit any unauthorised use of their total environment (including air space) inconsistent with their laws and customs.

Note that because the Lamalama claim (QC99/22) is by exclusive possession, that is "the right to full and exclusive proprietary and beneficial ownership", by implication all other rights provided in the above list also apply to this claim.

### The Planning Environment in the Coen Sub-region

This section aims to set out existing characteristics of the planning environment in the Coen Sub-region from an Indigenous perspective. It outlines the identity and role of two Indigenous resource agencies in providing very basic support for outstation development, administration of grants and other project funding for outstation and other groups and carrying out land and sea management services. These two agencies are the Coen Regional Aboriginal Corporation and the Lockhart River Community Aboriginal Council. This is followed by an overview of outstations and their problems as well as perceived land and sea management problems and Indigenous aspirations for enterprises. The chapter conclusion will address how these Indigenous agencies and their multiple functions will be impacted by successful native title claims.

## Coen Regional Aboriginal Corporation (CRAC)

The Coen Regional Aboriginal Corporation (CRAC) was established in 1991, and has its administration Centre in Coen. CRAC is a non-statutory corporation, incorporated under the Commonwealth *Aboriginal Councils and Associations Act*, providing services to Coen Aboriginal community and outstations in the region. CRAC is funded by DATSIPD and ATSIC as well as receiving additional moneys for employment and service delivery through regional agencies such as Balkanu, Cape York Land Council, QPWS and NHT. CRAC administers funds/grants on behalf of Aboriginal groups in the Sub-region, received from numerous agencies and government departments including for housing, building, training and CDEP. Funding is also received under ATSIC's Community Housing Infrastructure Program (CHIP) program for housing in the Sub-region. CRAC employs 100 people on CDEP. It also administers the recently established NHT Ranger Program, a two-year grant to employ and train Indigenous rangers in the Coen area.

For the financial year 1999-2000, CDEP funding to CRAC was \$1,263,690 made up of \$99,913 capital items, \$380,711 recurrent expenditure and \$783,066 wages (ATSIC 2000:23). CRAC also received \$521,006 for housing at Port Stewart (ATSIC 2000:16).

CRAC receives a lump sum of annual funding from ATSIC for infrastructure on at least 10 outstations (see below) including for the recently established Geikie Land Trust. This represents the majority (if not the only) funding for outstations in the region. For example, in the 1999-2000 financial year, CRAC received \$180,000 for outstation development. The CRAC Board usually determines the division of the ATSIC funds between the individual outstations. This money is for infrastructure only, viz shelters, roads, septic systems, ablution structures, power generators etc. There are no specific funds provided for outstation management or running costs such as diesel for generators or for vehicles.

In mid-2001, the Natural Heritage Trust provided CRAC with a grant to employ a Land and Sea Management Co-ordinator for two years, based in Coen. The Co-ordinator is to establish a land and sea management agency, and to this end has appointed three rangers who assist her to work with traditional owners on outstations to undertake cultural site protection. This LSM agency obtains extra work from various other organizations such as Balkanu, Cape York Land Council, QPWS and ATSIC. The rangers have also been addressing problems of non-Indigenous people accessing Aboriginal land, taking and/or destroying Aboriginal resources without permission. A long-term plan for the Land and Sea Management Project is the management of the Mungkan Kaanju and proposed Silver Plains National Parks.

One of the functions of CRAC is to administer meetings of the Aboriginal land trusts responsible for at least four areas of Aboriginal freehold in the Coen Sub-region. The problems of transport to such meetings are difficult. For example the Executive members of the KULLA Land Trust, comprised of Kaanju, Umpila, Lamalama and Ayapathu peoples, are resident at Coen, Lockhart River, Port Stewart, and Cairns. There is a high cost in flying them together for trustee meetings.

CRAC has been selected as one of three community-based organizations which will be a pilot study for the Family Income Management Scheme sponsored by Balkanu and Cape York Partnerships— a credit union type financial scheme that has been designed for Indigenous communities. (The other two communities are Aurukun and Mossman.) (CS)

Under an arrangement (current at the time of writing), Cook Shire Council consults with CRAC concerning the Indigenous position on any new developments in the area. The Chairperson for CRAC, then consults separately with the relevant traditional owners about such development proposals. Cook Shire Council currently manages the Beach Protection Reserve, along the coast adjacent to Silver Plains holdings, which will be managed under the KULLA Trust in the near future. (The Council also manages a number of small lots where there is strong Aboriginal interest including: camping and old police reserves at Moojeeba and Port Stewart, and the Coen showground.)

### Outstations administered by CRAC

CRAC has provided the foundation for a dramatic increase in the 'outstation' or 'homelands' movements in the region; many more Aboriginal people are now able to use the semi-permanent camps they have established on their traditional lands. (Cape York Land Council n.d.)

- (i) Glen Garland  
Glen Garland station was purchased by ATSIC for the Olkolo people under Edmulpa Aboriginal Corporation. ATSIC have provided some funding for housing at Glen Garland. A recent problem is that Glen Garland has been granted \$63,000, but CRAC cannot receive the funds on behalf of the corporation as the former does not have Professional Indemnity Insurance (a condition of the grant) and they cannot use the grant money to get insured.
- (ii) Wenlock Outstation  
Wenlock outstation (aka 'Chula') is located just inside the Lockhart DOGIT on the Wenlock River, adjacent to the northern boundary of the Wolverton Pastoral Lease. It is occupied by the northern Kaanju. The traditional owner body is the Chula committee which is not incorporated. Funding and administration for this outstation are handled by CRAC. The outstation consists of several permanent structures, with solar power and a recently constructed airstrip
- (iii) Geikie  
Geikie Pastoral lease was purchased by the ILC in 2000 and divested to the Geikie Aboriginal Corporation in August 2001. The Corporation consists of the three traditional owner clan groups of the southern Kaanju for the lease area i.e. the clans whose territories fall within or partially within Geikie.

Administration of Geikie is by CRAC. ILC has been working with the traditional owners to develop a management plan for Geikie Station.

- (iv) **Stony Creek**  
The Stony Creek outstation is located within the boundaries of the Lockhart DOGIT. The traditional owners are members of the southern Kaanju tribal grouping.
- (v) **Langi Outstation**  
Langi outstation is within the boundaries of the Mungkan Kaanju National Park (north of Merapah). It receives minimal funding due to it being within the National Park area. There is no Aboriginal tenure over the outstation, only an ongoing informal arrangement with National Parks (QPWS). Due to the insecurity, CRAC and ATSIC have been reluctant to provide financial support. Further, QPWS has not allowed permanent structures to be erected. In the past, traditional owners have made seasonal camps at the site.
- (vi) **Port Stewart Outstation**  
This outstation was established at Port Stewart for all Lamalama people (ie. for a language-named tribe grouping rather than based on a clan estate model). A number of houses have been built at Port Stewart with funding from ATSIC and the Qld Department of Family Services. There are plans to build an airstrip at Port Stewart, this being seen as an asset for developing any tourism ventures in and around Port Stewart. This outstation and the outstation at Moojeeba have been the subject of community development planning carried out by the Centre for Appropriate Technology (CAT), Cairns.
- (vii) **Station Creek Outstation**  
This outstation is located within the Silver Plains holding on a traditional estate of the Ayapathu. Ayapathu elder Phillip Port lives here most of the time and has made some improvements on the place. He and others of his clan require funds to carry out a muster of existing cattle on the property. Currently, the only funding for the outstation has been for infrastructure. The language name for this outstation is 'Pantchamo'.
- (viii) **Silver Plains**  
This outstation is the old Silver Plains homestead on the traditional estate of the Lamalama. Senior Lamalama elder and spokesperson Sunlight Bassini is the primary caretaker. Funding for Silver Plains under the outstation movement is administered by CRAC. Some tourists have been allowed to visit and camp on the land but no permit system has been established to date although traditional owners want to see this implemented. traditional owners need money to carry out a muster of existing cattle on Silver Plains.

- (ix) **Birthday Mountain Trust**  
Birthday Mountain (aka 'Blue Mountain') is a small area of land that was the subject of an ALA land claim (granted in 1997). The trustees belong to the Watharra estate clan of the Southern Kaanju who hold the title of the land in trust (as the Watharra Land Trust) on behalf of all Southern Kaanju.
- (x) **Merapah Cattle Station.**  
(see Wik sub-region chapter for discussion on Merapah, which is part of the traditional country of the Mungkanhu (aka Wik Mungkan) people).

### Lockhart Aboriginal Council and Land and Sea Management

Lockhart River Aboriginal Council administers the Lockhart River DOGIT area and is the largest employer in the Lockhart River Community. In addition to the provision of essential services to the Community of Lockhart River, the Aboriginal Council provides support to the community for other key services, including natural, cultural and economic management initiatives, and outstation support. (LRC 2001.)

The Lockhart River Council has created, through the use of its by-laws, and continues to support a Land and Sea Management Steering Committee. The Land and Sea Management Steering Committee is a representative group consisting of elected family/clan members. The Committee is responsible for directing, monitoring and advising the Land and Sea Management Coordinator and overseeing the activities of the Ranger Service. The responsibilities of the Land and Sea Management Steering Committee include (a) discussing natural and cultural resource management aspirations and activities with wider family groups, (b) prioritising and directing on-ground activities to be conducted by the Rangers; and (c) lobbying for financial and in-kind assistance from government and non-government sources. (LRC 2001.)

In mid-2001 Lockhart River Council appointed a Homelands Land And Sea Management Coordinator for the community and DOGIT area, and adjacent sea country. This person has many responsibilities (see

**Table 8 Outstations by language group in the Coen Sub-region**

Language Group	Ayapathu	Lamalama	Umpila	Kaanju	Others
<b>Outstations</b>					
(i) Glen Garland					Olkolu
(ii) Wenlock				✓ (Northern)	
(iii) Geikie				✓ (Southern)	
(iv) Stony Creek				✓ (Southern)	
(v) Langi					Wik Mungkan
(vi) Port Stewart		✓			
(vii) Station Creek	✓				
(viii) Silver Plains		✓			
(ix) Birthday Mountain				✓ (Southern)	

Appendix 5 for full list). They generally encompass LSM planning and implementation of management strategies, work programmes for rangers, co-ordination and networking with all relevant government and non-government agencies, secretariat service to the LSM Committee, and securing funding for LSM and related activities (eg. training, equipment etc).

**Outstation problems in the Coen Sub-region**

The establishment of further outstations, bores, water tanks and other related infrastructure is seen as part of a long term plan and desire by Aboriginal people in the Coen Sub-region to re-establish permanent and semi-permanent occupation on their homelands. However there is a widely held view that current funds available for outstations are too limited both in terms of their size and with respect to their permissible application, for developing effective economic independence. Money is not always provided for insurance of homesteads (eg. at Silver Plains), nor for day-to-day management and operational costs on outstations. Traditional owners also want and need management plans but have not been able to access sufficient funding.

Two ways utilized by CRAC to generate modest (albeit insufficient) funding for management and running costs, have been:-

- i) Using additional funds available under CDEP for all people working on their country. For each CDEP participant, the resource agency can claim \$3000, some of which is used for administration and associated costs. Under this scheme workers on a property or outstation can apply to their resource agency for the remainder of these funds to be pooled to purchase items for use on stations.

- ii) ‘Chuck in accounts’ where individuals put extra money into their rent (or a similar) account for service costs.

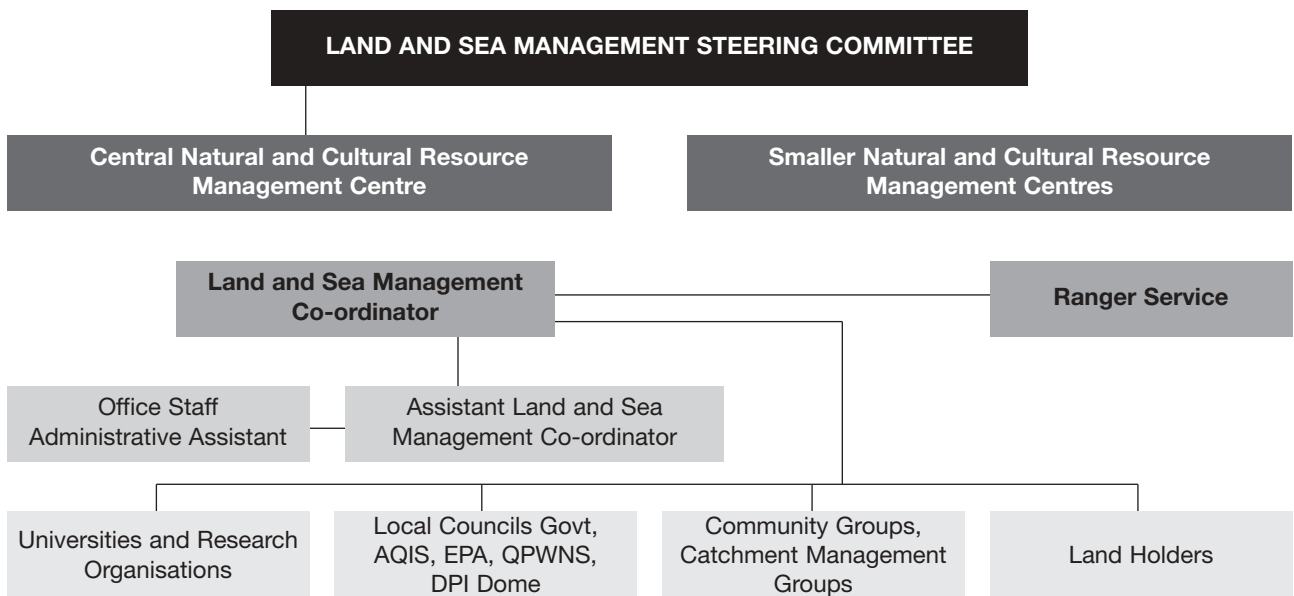
A third source of funding has been via the Indigenous Land Corporation.

- iii) Under its National Indigenous Land Strategy and its land management programme, the ILC (see Chapter 2) is assisting the Geikie Corporation, KULLA Land Trust (for Silver Plains) and Merapah traditional owners to prepare pastoral property management plans. Though Merapah Station has been dealt with in Chapter 5 (the Wik Sub-region case study), some Merapah traditional owners are interested in receiving services from Coen rather than Aurukun.

Further potential fund-raising methods for this Sub-region would be:-

- iv) Introduction of camping permits (and other sorts of access fees) for tourist activities on Aboriginal lands and seas.
- v) A long term approach to economic development, drawing on some or all of the following funding/planning sources:
  - a) ATSIIC Business Program – for individuals and corporations,
  - b) Department of Employment, Education and Training (Commonwealth),
  - c) State Development Fund (State Government) – for enterprise development, property development etc.,
  - d) DPI or other business funding eg. an aquaculture business, and
  - e) Benevolent societies.

**Figure 12 Organisational structure of Lockhart River Land and Sea Management Service** (Source: Lockhart River Aboriginal Council)



Many people have ideas for small-scale enterprise operations on their outstations, but they need assistance with appropriate planning, management, finance and other related issues. A number of Indigenous people interviewed by the authors expressed a need for greater understanding of financial issues especially in relation to running cattle, general financial planning, and small-scale tourism and taxation. Some traditional owners expressed discontent at the lack of transparency of expenditure on their outstations by CRAC, as well as the lack of clarity over the differentiation between funds that are available for infrastructure (ATSIC grant moneys) and those moneys available for running costs (from individuals' CDEP wages). Several traditional owners stated they wanted to receive regular statements showing their outstation expenditure, both the total to date and that for the current year. They also requested more consultation about how moneys are to be spent on their outstation and more information about issues of ownership of cattle and how funds from the sale of cattle could be spent (eg at Merapah station and Silver Plains).

### **Enterprise Aspirations of Traditional Owners**

Fieldwork by the authors revealed the following four aspirations of the traditional owners for enterprises in the Coen Sub-region in relation to lands in which they have or might gain rights and/or tenure through the ALA, native title or via purchases made by the ILC. These economic aspirations are for cattle herding, tourism, prawn fishing and pig farming or harvesting.

The main aspiration expressed by traditional owners for land that has been handed back (eg Silver Plains, Merapah) is to run cattle. There are several reasons this is considered the most obvious land aspiration:

- much of the land being handed back has previously been pastoral lease and already has cattle on it;
- there is pastoral knowledge and expertise held by numerous people, many of whom have worked for years on stations running cattle; and
- the cattle industry is the principle land best known industry of the region.

Of great concern to traditional owners is that the cattle which were part of the hand-back arrangement and which are now running wild on their country are being stolen and the traditional owners are helpless to deal with this. This is placing additional urgency on their wishes to begin mustering the cattle on their land. The main limitation to mustering and selling cattle is the lack of even the basic resources needed for a muster – for example, at Silver Plains (at the time of writing) there are no horses, saddles, fencing materials or rope. Under current funding for outstations there is no money available to purchase these items. A muster is seen as the first step to generating some additional income that

can be used for developing cattle or other projects on their country.

A number of traditional owners expressed an interest in establishing low-impact tourism ventures on their traditional country. This was particularly the case for those whose country is not suitable for cattle and/or where there has been some tourism occurring in the past. An example of this is on Silver Plains where tourists were permitted and encouraged to visit by the previous owners. There is an existing airstrip on Silver Plains that was used by the previous owners for bringing tourists in and out of the property and this is considered an asset for the establishment of tourist operations.

Some tourists have continued to visit Silver Plains and request permission from traditional owners for camping and fishing at waterways, but without any payment or permit system being in place. Umpila owners for the Silver Plains area expressed an interest in establishing bird watching tourism – this area being renowned for a wide variety of birds and for regular visits by bird watchers. The previous owner of Silver Plains was said to have regularly conducted bird watching tours by boat to three off-shore islands adjacent to Silver Plains.

However, while some tourists request permission from traditional owners for access to camping and fishing sites, there is considerable concern by traditional owners that other tourists go onto their Aboriginal land without asking permission, and camp where they like for as long as they like. One example of the extent to which the non-Indigenous community take liberties to access Aboriginal land without asking permission was the discovery by one of the Silver Plains' traditional owners that this area has been listed on a bird-watching internet web-site without their knowledge.

A number of people interviewed who were keen to pursue the establishment of small-scale tourist operations expressed the urgent need for education and training in all aspects of establishing and running such an operation.

An expression of interest has been made from an entrepreneurial company to establish a prawn farm on Silver Plains. The traditional owners were interested in discussing this proposal further and possibly entering into negotiations. There was also a previous but unsuccessful attempt by the Silver Plains' traditional owners to commence a pig farming/harvesting enterprise. They claim to have approached DNRM who would not agree to it. The traditional owners argued Australian pigs have been in demand since the overseas market has fallen through and they feel it was a missed opportunity for economic development.



## Land and Sea Management Issues

Land and sea management issues of concern to the traditional owners of the Coen Sub-region, at least as were able to be recorded by the current authors, can be categorized as follows.

### Cultural Heritage Protection

Ongoing sacred site protection and the return of skeletal remains were stated by a number of people interviewed to be a priority land management issue on their country. In recent years five lots of skeletal remains have been returned to Port Stewart Lamalama. These have been subsequently interred by Elders in the community. The newly established Land and Sea Management Program operating out of Coen aims to address cultural heritage issues with traditional owners on outstations.

### Fire Management

A regional fire management plan needs to be developed, although there is some limited fire management occurring, eg. on Silver Plains and Merapah. One traditional owner for Silver Plains mentioned that he had spoken to DNRM recently about the need for weed control on Silver Plains and the need to do a burn-off soon. The relationship between traditional owners and DNRM re fire and weed management on stations such as Silver Plains had not been established at the time of writing.

### The Problem of Squatters

Another problem faced by traditional owners is the informal/illegal habitation of white people in remote areas of their country, particularly to grow marijuana. Aboriginal people have been aware of this happening for some years and have alerted relevant authorities to deal with the problem but they continue to find evidence of squatters. Aboriginal people are the ones most likely to find white people living in remote parts of their land but they have little or no authority to do anything about it.

### Feral Pigs

Feral pigs are a big problem in some areas, eg. Silver Plains. Pigs dig up the road and eat traditional bushfoods such as yams, water lily bulbs and some fruits. Non-Indigenous pig shooters go on to Aboriginal land without asking permission, often to the same waterholes where Aboriginal people go fishing, and shoot indiscriminately. Furthermore, once they have shot a pig, the pig shooters often take only the tusks, leaving the rest of the pig to rot. Carcasses are polluting places where traditional owners and others camp and/or that are close to waterholes. Some traditional owners stated they want to deal with the feral pigs themselves, either by trapping them and getting money [bounty?] or killing them for human consumption and/or dog food.

## Fisheries Management

The possible over-fishing of waters by commercial and recreational fishermen along the coast near and to the north of Port Stewart is of great concern to traditional owners. The current system of issuing permits is controlled in Townsville, miles to the south, and people applying for a permit to fish are allowed to go right up and down the coast from the tip of Cape York Peninsula to Townsville. There is no consultation by State Fisheries with traditional owners whose livelihoods are being impacted upon by recreational and commercial fishing.

A problem that traditional owners have with the lack of control over commercial and recreational fishing is the placing of gill nets across inland rivers. One traditional owner counted seven gill nets that had been placed across the Massey River at one time. Non-Indigenous tourists also leave freshwater turtles, fish, and freshwater crocodiles, to rot beside inland rivers and creeks. Unwanted commercial/recreational sea catches are regularly left to rot along the coast including at Port Stewart where traditional owners are living.

When Indigenous rangers do confront white people who are disregarding rules there is little or no regard for the rangers' authority. They possess little or no power of enforcement and there is a significant lack of backing for Aboriginal rangers by relevant federal and state agencies. At present, the Department of Fisheries' ranger stations for this whole area of coastline were said to be at Thursday Island, Weipa and Cooktown. The traditional owners want involvement in the policing of their traditional waters; they want to enforce a bag limit for all fishing in the area and they want control over the issuing of permits and the places where fishing can occur.

### Access to Country

There was a general view among Indigenous people that the roads in the Coen area are not adequately maintained by the Cook Shire. Access to outstations and country for land management purposes was seen as limited especially during and after the wet season. Traditional owners want the old road along the coast linking Lockhart River and Coen reopened/remade. This route is shorter than the inland route, has less river crossings and is considered a traditional path that served to maintain links between coastal groups. It was mentioned that Lockhart River Council were considering undertaking reopening some of this road but that they would be unlikely to go beyond the boundary of the DOGIT.

Some people interviewed endorsed plans to operate a barge service in the wet season in and out of Port Stewart. Several Umpila people also stated that a barge service into Cape Sidmouth would be a good solution to the wet-season lack of transport and would facilitate greater access to their country.

Several people who were interviewed in this study defined themselves and their families as 'diaspora people' (i.e. people who have been brought up and reside outside the region, usually as a result of a parent or grand-parent having been taken away from their country under government removal policies in the past) who have been involved in land claims and who are part of a larger group whose land has been handed back. Some of the diaspora people want to move back to their country but do not have the vehicular means (a 4WD vehicle).

### **Mining Interests**

The only mining issue about which traditional owners expressed concern was the development of a quarry on Yaawun country (on the boarder of Northern and Southern Kaanju) which provided material for the Weipa airstrip. There was a perception amongst Southern Kaanju traditional owners that Northern Kaanju had been favoured in the early consultation and that more consultation was required.

### **Conclusion**

Due to historical forces, the Aboriginal system of land tenure in this Sub-region has shifted from the 'classical' patrilineal clan estate system toward that of the 'language-named tribe' as the primary mechanism by which people identify with country and around which their ownership of land is organised and conceptualised. However the extent to which these transformations have occurred in different groups varies quite widely. Patterns of land tenure, social organization and identity are not uniform, due in large part to the differential effect of European occupation and habitation on various areas and traditional groups in the Coen sub-region. At a broader level people identify with the four language territory groups or language-based 'tribes' of the Sub-region, viz Lamalama, Umpila, Ayapathu and Kaanju. There is also a common notion of 'traditional ownership' involving spiritual connections to land and sites, and a primary customary right to speak for and make decisions about the use and access to land.

In the Coen Sub-region there are at least six land trusts either established or to be established in the future under the ALA, two more claims lodged under the ALA that will likely result in land trusts, and another

three (two for Mungkan Kaanju NP and one for Silver Plains NP) land trusts that will (compulsorily under the ALA) lease-back their freehold to the Queensland Government for National Parks. This is a total of eleven existing or potential Aboriginal land trusts under the ALA. In addition there are five native title claims which will potentially result in five PBCs. The native title claims are all of the 'exclusive possession and occupation type' and each has a very 'full' set of rights and interests being asserted. There is one pastoral lease held by an Aboriginal corporation formed under the ACA Act. In addition to those areas of land with formal Aboriginal ownership or interests, there are other sizeable parcels of land in the sub-region including nine (non-Indigenous owned) pastoral leases and two timber reserves. (See Chapter 7, Table 8)

The regional planning environment includes a central Indigenous service agency (CRAC) which delivers outstation, land and sea management and CDEP administration services (amongst other services) as well as the Lockhart River Aboriginal Council which also has a LSM program with interests in the north-east corner of the Coen Sub-region. Issues to be addressed by LSM as perceived by traditional owners include cultural heritage protection, fire management, non-Indigenous squatters, feral pigs, fisheries management and poor access to country.

It can be seen from the foregoing description of the functions and activities of the Coen Regional Aboriginal Corporation and the Lockhart River Aboriginal Council that many of these functions impinge on or fundamentally relate to a range of the native title rights and interests being claimed in the region; viz with respect to (i) general use of country, (ii) occupation, and erection of residences, (iii) hunting, fishing and collecting resources, (iv) management, conservation and care for the land, and (v) the right to prohibit unauthorized use of the land.

It is clear then, that once PBCs are established as outcomes of successful native title claims, formal and complex relationships need to be established between such PBCs and the former two Indigenous agencies. How this might be achieved will be examined in Chapter 7.

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## CHAPTER 5: THE WIK SUB-REGION CASE STUDY

### The Wik Sub-region

The Wik case study Sub-region is situated on the central western side of Cape York Peninsula. It includes the coastal flood plains between the Edward River in the south, and Weipa in the north. The area stretches inland to include the forested country drained by the Archer, Kendall and Holroyd Rivers. The Wik Sub-region contains the Aurukun (Local Government) Shire (see Figure 13), the township of Aurukun, and a number of outstations. Wik people live predominantly in three small settlements situated on the fringes of their traditional lands. Approximately 900 Wik people living in Aurukun, with perhaps 200 in Pormpuraaw township (formerly the Mission Settlement of Edward River, now an Aboriginal township on a DOGIT Reserve) and a few dozen in Coen and at Napranum Community near Weipa. Small numbers of Wik people also live in other locations throughout northern Queensland.

This region is well known nationally and internationally as the site of the Wik High Court Action, *The Wik Peoples v Queensland and Ors* (B8 of 1996), in which it was found that pastoral leases do not necessarily extinguish Native Title. The Wik and Wik Way Native Title Claim is ongoing and has divided into two parts (see Figure 14) It is estimated that there are approximately 2000 persons in the Wik and Wik Way native title claimant group (D.M., pers. comm., 16/11/01).

Aspects of the Wik Sub-region relevant to the current study will be outlined in this chapter starting with an overview of the areas of constituent land in which there are strong Indigenous interests and a summary of the Indigenous traditional owner groups, their land tenure systems and their native title claims. The latter part of the chapter addresses the current planning environment in the Sub-region from an Indigenous perspective. Here there is a description of the Indigenous agencies engaged in facilitating the functions of outstation development, land and sea management and environmentally-based enterprises, all of which have an impact on the two native title claims in this Sub-region and will inevitably become the subject of complex transactions with PBCs .

### Areas of land in the Wik Sub-region

The numbering of the individual parcels of land follows those used on the Wik and Wik Way Native Title Claim map (see Figure 15). This list commences with those areas in the Wik and Wik Way Native Title Claims, followed by those additional areas that are not in the claims but still within the Wik Sub-region.

#### 1, 12, 13, 14: Aurukun Shire

An Aboriginal land lease held by Aurukun Shire Council. The Wik and Wik Way Native Title determination registered in 2000 covers this area.

#### 2, 6-10: Napranum DOGIT

DOGIT held in trust by Napranum Aboriginal Community Council and is currently on Department of Natural Resources & Mines work plan for transfer under the ALA. It constitutes part of the Wik and Wik Way Native Title Claim but no determination as yet.

#### 3 & 4: Comalco Mining Lease

An area known as the Comalco lease (ML7024). It is subject to 'Western Cape Communities Co-existence Agreement ILUA' (WCCCA) (March 01) and will be determined as a 'conforming' native title application in accordance with WCCCA. Traditional owners for this area will be members and beneficiaries of a trust to be set up to administer and distribute Comalco compensation royalties and other WCCCA benefits. The conforming application was lodged as a new application over the Mining Lease area; simultaneously, the original claim was amended to remove this area. At the time of writing, the new claim has not been registered

#### 11: Unallocated State Land (Aurukun (Ward River) Land Claim)

Approximately 2080 hectares of Unallocated State Land situated approximately 13 kilometres north of Aurukun. The 'Aurukun (Ward River) Land Claim' (also known as the 'Woola Claim') was made by a group of Aboriginal people (c1992) under the ALA. However, the claim has not been progressed due to priority given to Wik and Wik Way Native Title Claim over the same area.

#### 13 & 15: Pechiney Mining Lease

Area known as the Tipperary Corp, Billington Aluminium Aus. BV, Aluminium Pechiney P/L Bauxite lease (ML7032) since c1970. Area 13 is inside the Aurukun Shire while area 15 is outside. There is no Wik and Wik Way determination to date.

#### 16 & 17: Pormpuraaw DOGIT

DOGIT land held in trust by Pormpuraaw Community Aboriginal Council. It will eventually be transferred under the ALA, though it is not currently on DNRM workplan as far as the authors can ascertain. Area 16 has already been included in the Wik and Wik Way determination.

#### 17: Eddie Holroyd Lease

Special lease held by traditional owner Eddie Holroyd, issued the Minister for Aboriginal and Islander Advancement in 1986. This is a 30 year lease, which has run half-way through its term. It is not transferable and there is no right of renewal. The lease comprises 110,000 ha for grazing and agriculture. There is no Wik and Wik Way determination to date. The Wik and Wik Way will be able to get exclusive possession recognized through the application of Section 47 of NTA. This is not opposed by Eddie Holroyd, (also a claimant for this area) who will also be able to retain his lease.

#### 19: Watson River PL

Pastoral lease – non-Aboriginal owned.

#### 20: Sudley PL

Pastoral lease owned by Comalco. Comalco has stated publicly (December 2000 and November 2001) that it intends to handover the pastoral lease to Aboriginal owners. It has been pulled out of the original Wik and Wik Way Claim and may be re-lodged in the future as a new claim in order to get the benefit of Section 47 of NTA. Traditional owners include

Troj/Anhathangath (Wik) people (P.B.). A claim is also being asserted by Eddie Woodley on behalf of Yinwun people. Currently there is an outstation on the property.

**21 (A & B): York Downs PL (Merluna)**

Non-Aboriginal owned pastoral lease held by Merluna Cattle Station Pty Ltd, with the owners of Watson River PL (Area 19) having 50% share. It comprises two blocks adjacent to and north of the Mungkan Kaanju National Park. The Northern Kaanju hold interests in the lease with Wik Mungkan interests extending to a small area of the southern part of the lease adjacent to the Archer River.

**24: Kendall River Holding**

An area of non-Aboriginal owned pastoral lease. The area is proposed for a Kaolin mine. Right to negotiate (RTN) consultations between the company and traditional owners commenced in Pormpuraaw 25-27 June 2001.

**25: Merapah Pastoral Lease (Coen River Holding)**

Also see Coen Sub-Region analysis.

ATSIC purchased this pastoral lease in 1990. It is approximately 750sq. miles in area and under the current pastoral lease runs until circa 2012. At the time of writing, ATSIC still holds the property in trust for Wik Mungkan traditional owners. ATSIC (in conjunction with CYLC and ILC) is taking steps to divest. The traditional owners comprise four inland Wik groups, including three totemic clan groups, Mumpa (Old Man Devil), Panhtha (Sand Goanna), Nhompo (Wedge-tailed Eagle), and families for the area known as the Merapah Corridor, between the two parts of Mungkan Kaanju National Park (Martin 1996b). In terms of N.T. negotiations, connection is signed off, exclusive possession under Section 47A of the NTA is agreed, and other negotiations are to be finalized. (see Appendix 6 for an overview of the ongoing negotiations between the State, ATSIC, ILC, CYLC and traditional owners regarding the options for land management and land holding structures to divest to in light of the Wik and Wik Way Native Title Claim. Also for a discussion of the negotiations regarding a Management Plan.)

**26: Holroyd River Holding**

A non-Aboriginal owned pastoral lease that recently changed hands. Traditional owners include Ayapathu people. At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA were well progressed

**27: Southwell Holding (also known officially as Denman Holding)**

A non-Aboriginal owned pastoral lease. It contains the homestead named 'Southwell'. At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA were well progressed

**28: Strathburn PL**

A non-Aboriginal owned pastoral lease. At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA were well progressed

**29: Lecons Field PL (Crystalvale)**

A non-Aboriginal owned pastoral lease. Traditional owners include Ayapathu people. At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA were well progressed

**31, 32 & 33: Tidal Land and Sea**

At the time of writing, there were no consent determination negotiations occurring for this part of the claim because the Commonwealth was opposed to granting sea rights. Consideration was being given to making it a separate claim.

**Adjacent areas not currently in the Wik and Wik Way Claim area but part of the Wik Sub-region** (some were removed from the Claim):-

**22: Mungkan Kaanju National Park (Archer Bend side)**

An area of national park subject to an ALA Claim. It was

claimed on behalf of the Wik Mungkan and Wik Ompom people. For more information, see Coen Sub-region analysis (Ch 4).

**23: Mungkan Kaanju National Park (Rokeby side)**

An area of national park subject to an ALA Claim. It was claimed on behalf of the Southern Kaanju, Wik Mungkan and Ayapathu people. For more information, see Coen sub-region analysis (Ch 4).

**27A: Strathgordon PL**

Part of Southwell Holding (also known officially as 'Southwell', but not to be confused with area 27 – Denman, which is commonly known locally as Southwell). Strathgordon was purchased by ILC in August 1999 and divested to Poonko Strathgordon Aboriginal Corporation in August 2000. Strathgordon is subject to a Native Title claim by the Olkolo-Bakanh people (QG6127/98; QC97/01). The Wik and Wik Way Claim has been amended to remove the overlap with Olkolo-Bakanh claim area (27A). It contains the homesteads named 'Old Strathgordon' and 'New Strathgordon'. The ILC has provided financial assistance for the cattle business and infrastructure. Balkanu has also provided assistance.

From the land descriptions outlined above (and given in greater detail in Appendix 6), the Wik Sub-region case study can be seen to comprise the following tenure types:

- five areas under mining lease (3, 4, 5, 13, 15),
- eight as DOGIT land (2, 6-10, 16, 17),
- four under Aboriginal land lease (1, 12-14),
- two pastoral leases under Aboriginal ownership (17, 25) and
- eight pastoral leases under non-Aboriginal ownership (19-21, 24, 26-29).

There is also one parcel (11) claimed under the *Aboriginal Land Act 1991*, which is not currently being progressed.

There was one native title claim, which has been subdivided into two claims, the original Wik Native Title Claim (QC94/3, QG6001/98) and the Wik and Wik Way Native Title Claim (QC 01/31, Q6029/01) lodged as a conforming application under the WCCCA over the Comalco mining leases.

Pastoral leases held by non-Indigenous entities and currently subject to mediation for Stage 2 of the Wik and Wik Way determination are as follows:- Watson River, Sudley, York Downs (Merluna), Holroyd River Holding, Southwell (Denman) Holding, Kendall River Holding, Strathburn, and Leconsfield (Crystalvale).

It is recommended that Strathgordon P.L. (which is no longer part of the Wik Claim) be included in the CYLC's Pormpuraaw Sub-region for planning purposes (therefore not further dealt with herein).

The five areas under mining lease are held by Comalco (Areas 3,4,5) and Pechiney (Areas 13,15). The northern part of the region is part of the Western Cape Community Co-Existence Agreement ILUA negotiated with Comalco and the State Government (see later on this). There is also a Kaolin Mining Proposal by Gulf Clay (holding exploration permits) on the Kendall River Holding (in Area 24).

Areas 22 and 23, the Archer Bend National Park, more recently known as parts of the Mungkan Kaanju National Park, are nominally included in CYLC's Wik Sub-region (even though they are not part of the Wik and Wik Way Native Title Claim). This Park is under an interim joint management committee with QPWS, and has been discussed in Chapter 4.

## **Aboriginal Groups and Land Tenure in the Wik Sub-region**

### **Overview to the Wik Identity and Language Group**

The Aboriginal peoples whose land lies west of the Great Dividing Range in central Cape York have been referred to by anthropologists as the 'Wik tribes' or 'Wik-speaking peoples' or more recently the 'Wik' (Thomson 1936: 374, McConnel 1939:62, Sutton 1978, von Sturmer 1978, Martin, 1993, 1997b). The use of the term 'Wik peoples', refers not just to a set of related languages and dialects, but also to the fact that there are broad cultural similarities across the region. Nevertheless there are particular principles of social and political organisation, totemic and religious geography, and land tenure which differentiate the inland groups from those whose lands lie within the more heavily populated Wik regions on the western coast. In common with many other areas of Aboriginal Australia, the Wik bloc is more sharply definable in terms of its sub-groups and boundary points along the comparatively resource-rich coast, but is less clearly articulated in terms of boundaries in the interior. (Sutton and Rigsby 1982; Chase et al 1998:58-9.)

Sutton has researched the complex pattern of language distribution in the Western Wik region (1997a:33). The distribution of languages is often mosaic-like and language affiliation is often shared by clans with non-contiguous estates. Further, certain languages are not coterminous with political or social groups such as riverine groupings and regional ritual groups in a given region. Commonality in language use does not necessarily correspond to a unity of identity. "The Wik show little commitment to the notion of the 'language group' as a geopolitical unit of much salience", as compared with other Aboriginal groups in Australia (Sutton 1997a:33).

### **Linguistic Sub-groups**

Despite the linguistic complexity in this region it is relevant for the purposes of the current study to define a small number of the linguistic sub-groups whose names regularly appear in the land claim and land planning literature, particularly 'Wik Way' and 'Wik Mungkan', and the distinction between the latter term and that of 'Mungkanhu side.'

### **Wik Way**

The Wik Way territory is located in the north-west of the Wik Sub-region. It constitutes a narrow coastal strip

from Albatross Bay to south of the Archer River as derived from the perspective of contemporary Aurukun people (Sutton 1997a:36). However some Mungkan-side people (see below) consider the Wik Way languages to extend to estates further inland as well as those along the coast (Chase et al 1998:59). Wik Way people are today largely resident at Aurukun and Napranum (Weipa South).

### **Wik Mungkan**

In the classical land tenure sense, 'Wik Mungkan' is one of the Wik languages and also refers to the groups who spoke it, occupying the centre and central west of the Wik Claim Area. Dialects of Wik Mungkan (as designated by its speakers) were spoken around the middle Archer River west of Archer Bend, the sclerophyll forests in peri-coastal areas between the Archer and Kendall Rivers, and by two groups with coastal territories south of Cape Keerweer. (Chase et al 1998:58.) However the term 'Mungkan' has come to be used more broadly and loosely due to the fact that over the past 100 years Wik Mungkan has become a *lingua franca* for many Wik people. For example, in and around Coen, as in Pormpuraaw (Edward River), people from the Wik language bloc are often called 'Mungkan' or 'Mungkan-side' derived from the language, Wik Mungkan. Nevertheless, the classical Mungkan groups retain their strong localised land affiliations (Chase et al 1998:41-2).

### **Wik Ompom**

The lands of the Wik Ompom peoples lie between the Archer and Watson Rivers (Chase et al 1998:59).

### **Wik Iyanh or Mungkanhu**

On the upper reaches of the Kendall and Holroyd Rivers and mid-upper reaches of the Archer, were the territories of clans identifying as Wik Iyanh (or Mungkanhu) (Chase et al 1998:58). 'Mungkanhu' is the self-referential name given to the language, while 'Wik Iyanh' (or Wik Iiyeny) is the name used to refer to the same language by Wik people to the west (coastal and peri-coastal groups); it is a dialect of Wik Mungkan (D.Martin, pers. comm., 22/11/01).

### **Wik-Ngencherr**

The self-named Wik-Ngencherr ( or 'Kugu-Ngancharra') were southern Wik peoples who used the term 'Kugu' (= speech) to refer to their languages (Sutton 1997a:33).

### **Ayapathu**

The Ayapathu are a group who speak a Wik-type language albeit one with a distinct group identity of their own (Chase et al 1998: 58). Ayapathu people claim territory in the south-east of the Wik and Wik Way Native Title Claim area on the headwaters of the Holroyd River and its tributaries (see map in Figure 15).

### Wik Clans and Estates

The Wik clan is the land-holding unit whose membership is based on the principle of descent. It is an abstract concept, since the clan, unless it has been reduced to only a handful of people, would rarely or never be seen as a physical collection of people. Clan descent was classically calculated patrilineally and for the most part continues to be so.

A household, camp or 'band', by contrast, is an on-the-ground camping, residential, hunting, resource-utilising group or other form of social action group. Classical Wik bands were usually made up of individual members drawn from several or even many clans at any one time. Since clans were (and in principle continue to be) out-marrying or exogamous, at least two clans would normally be represented in any camp in which there was a married couple. There may also be visitors from other neighbouring estates, and those whose kin ties to the core residence group give them legitimate rights to be there. (Sutton 1997a:18; Chase et al 1998:60.)

### Small Estate Clusters

There are a range of kinds of classification for localised clusters of Wik clan estates and their traditional owner groups. Those dealt with below are 'nickname' groupings, spirit-image centre groupings, cremation countrymen groupings, and localised totemic cult groups.

### Nickname groupings

Clans with adjacent estates often share what is locally referred to in English as a 'nickname' based on a local environmental feature of one or several estates or a major local placename (Sutton 1978:126-8; 1997a:28).

### Spirit-image centre groupings

Clans who send the spirit images of their recent dead to a common image-centre can also be categorized as small clusters of groups with adjacent estates (Sutton 1997a:29).

### Cremation countrymen groupings

Sets of clans with adjacent estates whose members were cremated in common cremation grounds, prior to the introduction of burial as a result of mission influence, constitute sets of 'countrymen' at a certain localised level (Sutton 1978: 128, Map 12; Sutton 1997a:29).

### Localised totemic cult groups

The clan members of some small clusters of estates share a localised totemic cult affiliation, such as Shark in the lower Kirke River area and Dog in the lower Knox River area (Sutton 1978: 140; Map 11; 1997a:29).

### Outstation groups

In the contemporary context, the clans holding the estates closest to a particular outstation may also form clusters for whom the name of the outstation has "become a common badge of identity" (Sutton 1997a:29).

### Large Estate Clusters

Sutton identifies two principal forms of large estate clusters – 'riverine identity groups' and 'ceremonial groups'. These are larger units than the previous types of clusters and, as such are the most eligible forms of social structure on which to base the broad basis for a PBC membership structure.

### Riverine Identity Groups

'Riverine identity groups' comprise affiliated clans whose estates lie on the same drainage basin. They often had close ties of intermarriage, political alliance and common identity (Sutton 1997a:29-30). (See Appendix 6 for a listing of the active Riverine identity groups listed by Sutton 1997a.)

### Ceremonial groups

This mode of classification is today more commonly employed by the people who have their estates in the Aurukun Shire and the area immediately to the south. The members of each of the five ceremonial groups share common affiliations to a particular ceremonial tradition and occupy a particular sub-region of the Wik area. They are locally referred to as the 'five tribes' of Aurukun (Sutton 1997a:31). They are the Shivirri, the Winchanam, the Apelech, the Puch and the Wanam. (See Appendix 6 for more information regarding these ceremonial groups and also Sutton 1997a:31.)

### Inland/Coast Division

Sutton has stated that "The broadest and most powerful internal geopolitical distinction among the Wik is the coast/hinterland division (often referred to locally as 'bottomside/topside people', 'saltwater/freshwater side' etc.)." (Sutton 1997a:32).

It is important to note that membership in these larger groupings described above, if contested, will usually involve tracing back by descent or adoption to clan membership. The clan estate is thus the building block of the customary land tenure system (see Sutton 1997a:34).

As a final point, kinship is one aspect of social organization that does not translate readily into territorial patterning but nevertheless permeates political alliances in the Wik universe to the extent that it will inevitably impact on the PBC operations. As Chase et al have stated (1998:60), "the web of kin ties, traced bilaterally, was and is much more important in mundane life, however, than is clan solidarity, which is realised mainly in such events as major conflicts, and in mortuary rituals." There has in recent times been an increase in the significance of cognatic descent and the emergence of 'families' as the locus of interest in relation to land and particularly to Outstations.

## The Wik and Wik Way Native Title Claims

Table 9 below sets out some technical descriptive details of the two Native Title Claims in the Wik Sub-region as of mid-2001. Read in conjunction with Figure 14.

**Table 9 Native title proceedings in the Wik Sub-region**

NATIVE TITLE CLAIMS		
Tribunal number	QC94/03	QC01/31
Federal Court number	QG6001/98	Q6029/01
Application name	Wik and Wik Way Peoples	Wik and Wik Way Peoples
Status	Active	Active
Approx Area Size	6, 136 sq kms determined, 17, 690 sq kms still under claim (exec. sea)	1, 611 sq kms
Date filed	24/03/94	14/09/2001
RNTC status	Registered	Not Registered

### Rights and interests claimed

The native title rights and interests claimed by the Wik and Wik Way in their original claim (QC94/03) are as follows:-

- The nature and extent of the native title rights and interests in relation to the determination area are that they confer possession, occupation, use and enjoyment of the determination area on the native title holders and, in particular, include rights, duties and responsibilities to do the following:
- (a) speak for, on behalf of and authoritatively about the determination area and assert proprietary and possessory claims over the determination area;
  - (b) inherit and transmit the native title rights and interests;
  - (c) give or refuse, and determine the terms of any, permission to enter, remain on, use or occupy the determination area by others;
  - (d) as between Aboriginal people:
    - (i) resolve disputes about who is or who is not a Wik person or a Wik Way person;
    - (ii) determine as between native title holders what are the particular native title rights and interests that are held by particular native title holders in relation to particular parts of the determination area;
    - (iii) exclude particular native title holders from the exercise of particular native title rights and interests in relation to particular parts of the determination area;
    - (iv) resolve disputes between Aboriginal people concerning native title rights and interests in

- relation to the determination area, with the assistance of native title holders of adjoining areas where such assistance is necessary;
- (v) uphold, regulate, monitor and enforce the customary laws of the native title holders in relation to the native title rights and interests in the determination area;
- (e) make use of the determination area by:
  - (i) engaging in a way of life consistent with the traditional connection of the native title holders to the determination area;
  - (ii) physically occupying, using and enjoying the determination area;
  - (iii) living on and erecting residences and other infrastructure on the determination area;
  - (iv) protecting, managing and using the determination area;
  - (v) being buried on, and burying native title holders on, the determination area;
- (f) take, use and enjoy the natural resources from the determination area for the purposes of:
  - (i) manufacturing artefacts, objects and other products;
  - (ii) disposing of those natural resources and manufactured items, by trade, exchange or gift save that the right of disposal of natural resources taken from the waterways (as that term is defined in the Fisheries Act 1994 (Qld) as at the date of this determination) of the determination area is only a right to do so for non-commercial purposes;
- (g) maintain and protect places of importance under traditional laws, customs and practices in the determination area;
- (h) be acknowledged as the traditional Aboriginal owners of the land and waters within the determination area;
- (i) use and enjoy the determination area and its natural resources for the purposes of teaching, determining, maintaining, communicating and expanding cultural, social, natural, environmental, spiritual, cosmological and other knowledge, traditions, beliefs, customs, relationships, practices and institutions in relation to the determination area so as to ensure the continuing vitality of the culture and well-being of the native title holders, and also include those rights, duties and responsibilities that are necessary for or ancillary to the full exercise and enjoyment of the native title and the native title rights and interests.

Ebsworth & Ebsworth Lawyers have acted for the Wik and Wik Way claimants, but the Cape York Land Council has also been a party to the claim and has funded the claimants from its ATSIC NTRB allocation. On the basis of a connection report prepared for the

State in 1997, a determination of native title was made by consent on 3 October 2000 for a proportion of the Wik and Wik Way Claim area that covered what was termed Aboriginal Land. In conjunction with this determination (Stage 1 of the claim), the Federal Court ordered that a PBC be established and nominated by late 2003.

It is the remainder of the claim area (Stage 2) that the CYLC and Ebsworth and Ebsworth were attempting to progress at the time of writing. The State accepted supplementary connection material over the area of the claim covered by Pastoral Leases. CYLC was attempting to negotiate with a number of pastoralists a form of land use and access ILUA which would govern both parties' access over the land and also lead to those pastoralists consenting to a determination of native title over the areas of the claim which included their pastoral leases. Some of those negotiations have proceeded quite productively. There are other pastoralists who have been less willing to negotiate with the Wik until such time as they have themselves (independently of the State) sighted the connection material. (Hayes 2001.)

At the time of writing, subjects of negotiation by traditional owners with non-Indigenous pastoral lessees in the Wik and Wik Way Claim area included:-

- Rights to hunt, fish and camp.
- Rights to visit Aboriginal sites of cultural significance.
- In one case, the setting up of an outstation.

Pastoralists in turn were raising the following types of issues in these negotiations:-

- Should there be time limits to access periods?
- Protocols of visitation, eg giving notice.
- Special rules re bringing feral animals or plants, pets, alcohol on to leases.
- Rights of pastoralists to have visitors, business associates etc. (pers. comm., P.B. 19/9/01.)

Another issue raised by these pastoralists was whether the Wik people would have some sort of insurance (eg public liability) to protect them (and possibly the pastoralists) against any legal actions that may be brought, arising from accidents or the like, as a consequence of the recognition and exercise of native title rights on their leases. It seems there is a necessity for both the PBC and the pastoralists to carry public liability insurance to provide mutual protection from actions arising from one another, or visitors or the public who may be passing through. (pers. comm., P.B. 19/09/01.)

There are two mining companies that have significant mining interests over portions of the claim area, viz Comalco and the Pechiney Group. An agreement was signed with Comalco on 14 March 2001 called the 'Western Cape Communities Co-Existence Agreement' (WCCCA) which pertains to those areas of the Wik and Wik Way Claim that are Comalco mining leases

(includes Areas 3, 4, 5). The WCCCA required the Wik and Wik Way to amend their original native title application so that it became a conforming application by September 2001. This was achieved by submitting a new application, certified by CYLC (a requirement of the WCCCA), over the ILUA area of the Comalco leases, and simultaneously amending the original Wik and Wik Way Claim to remove these same areas. (Hayes 2001.)

This historic agreement is founded on mutual recognition and support of native title and mining operations on Western Cape York Peninsula. Key points of the agreement include:

- annual payments of about \$4 million per year to fund investment and development initiatives, including a \$1.5 million Queensland Government contribution;
- an additional \$500,000 per annum for Aboriginal employment and training;
- establishment of a Trust comprised of traditional owners, and community representatives to administer the compensation royalties and other funds;
- relinquishment of parts of the Comalco leases which are no longer required for mining;
- establishment of a Co-ordinating Committee to manage the day-to-day aspects of the agreement;
- support for traditional owner Groups and their claims for Native Title;
- cultural heritage protection of Aboriginal sites; and
- cultural awareness training for all Comalco staff and principal contractors in Weipa.

The signatories of the Western Cape Communities Co-Existence Agreement comprise: (i) Representatives of 11 traditional owner groups (Alngith, Ananthangaythm, Ankamuthi, Peppan, Taepadhighi, Thanikwithi, Tjungundji, Warranggu, Wathayn, Wik & Wik Way, Yupungathi); (ii) Aboriginal Councils of Western Cape York (Aurukun Shire Council, Marpuna Corporation, Napranum Community Council, New Mapoon Council); (iii) Comalco; (iv) Cape York Land Council; (v) Queensland Government. (Comalco 2001.) (The signatories include many traditional owner groups whose territories lie outside of and to the north of the Wik and Wik Way Native Title Claim and the Wik Sub-region).

The Pechiney Mining company also has mining interests in the claim area but is not actively mining. Pechiney is a party to the Wik and Wik Way Claim and negotiations for a consent determination have been commenced.

Stage 2 of the Wik and Wik Way Claim also includes a number of parcels of land to which Section 47 and 47A of the NTA apply. These are areas which are currently held or held in trust for Wik and/or Wik Way



traditional owners and for which, in consequence, any previous leases over the land are deemed not have had an extinguishing effect on native title. The areas include the ATSIC-owned Merapah pastoral lease (25), the Eddie Holroyd special lease (17), some parts of the Napranum and Pormpuraaw DOGITs (2, 6-10, 16, 17).

A draft set of rules for a PBC has been agreed to by the Registrar of Aboriginal Corporations. Membership is open to all claimants, with election to the governing committee restricted to two representatives of each of eight sub-groups. This structure is described further in Chapter 7.

### **The Planning Environment in the Wik Sub-region**

This section aims to set out existing characteristics of the planning environment in the Wik Sub-region from an Indigenous perspective. It outlines the identity and role of the principal Indigenous resource agency, the Aurukun Shire Council, in providing basic support for outstation development, administration of funding and other income and land and sea management services in the sub-region. This is followed by an overview of outstations and their problems as well as perceived land and sea management problems and Indigenous aspirations for improved control and management as well as for enterprises. The chapter conclusion will address how these Indigenous agencies and their multiple functions will be impacted by successful native title claims.

Although the Aurukun Shire Council is the principal Indigenous resource agency for the Wik Sub-region, its planning mandate is currently confined to the Aurukun Shire which takes up most of the western part of the Sub-region (areas 1, 12-14). However there are a number of other agencies with land and sea management interests in other parts of the sub-region.

The Cook Shire Council has planning responsibilities for the eastern part of the sub-Region. This area comprises pastoral and mining leases. An outline of some of the broad planning goals of the Cook Shire Council is to be found in Chapter 3. The Council has a branch office at Coen, just outside the eastern border of the sub-Region. It has no jurisdiction on the Aurukun Shire lease lands or the DOGITs, which collectively comprise a large proportion of the case study area.

The Pormpuraaw Community Aboriginal Council has planning responsibilities for Areas, 16, 17 and 18 in the southern portion of the sub-Region; these areas lie within the Pormpuraaw DOGIT. The Napranum Community Aboriginal Council has planning responsibilities for Areas 2 and 6 to 10 in the north-

western part of the sub-region; these areas lie within the Napranum DOGIT.

The Queensland National Parks and Wildlife Service has planning and management responsibilities for the Mungkan-Kaanju National Park. The western part of this Park (Archer Bend) lies on the eastern side of the Wik Sub-region. Traditional owners are currently waiting on the Queensland Government to implement a joint management agreement.

### **Outstation development in the Wik Region**

A strong desire by Wik people to maintain connections with their traditional country has manifested since the 1970s in a regional 'outstation' or 'homeland' movement. However, the number of people living on outstations has fluctuated. In the mid 1990s, the poor state of road access limited peoples' access to outstations. Successive Queensland governments have been reluctant to provide support for the outstation movement at Aurukun and prior to recent years the Shire Council had a policy of infrastructure centralisation (O'Faircheallaigh 1996: 39.).

The existence of the Comalco lease has been in the past a barrier for the establishment of outstations in the northern Wik sub-region, because there have been no legal mechanisms to stop tourists or other residents using, settling on or entering the outstation resources and land (O'Faircheallaigh 1996:40). There continue to be security problems of this type but it is expected that the new cooperative protocols between Comalco, local Aboriginal communities and traditional owners introduced under the WCCCA will assist to address many of these problems.

At the time of writing, the Aurukun Shire Council employed the following funding principle concerning outstation development: that only when people moved to their outstations and made some sort of contribution of effort or resources to their own outstation development, would the Council then reciprocate with support, ie equity of input is needed from both sides. An ongoing issue related to this approach is young people's reluctance to take the first initiative to move away from the community to their family outstation site. At a public meeting at Aurukun (25/07/01) strong concern was voiced at the increased apathy of young adults concerning their failure in this regard since the advent of the canteen.

Nevertheless there have been at least 24 outstations established in the area between Amban and Thuuk River over the last 30 years (see Table 10).

**Table 10 Outstations established in the Wik Sub-region with years of establishment**

1971	Aayk (lower Kirke River)
1976	Ti Tree (upper Kirke River)
1976	Watha-nhiin (Peret) (Small Lake)
1976	Uthuk Aweyn (Big Lake, seasonal only)
1976	Kencherrang (middle Kirke)
1977	Kuchenteypenh ('North Kendall')
1977	Kuli-aynchan ('South Kendall')
1978	Weten (Dish Yard) (middle Kendall)
1978	Moomancham (later moved to Thaangkunhnhiiin, north of Knox River)
1978	Pu'an (Thuuk River)
c.1980-81	Am (Bullyard) (Knox River)
c.1981	Mukiy (Small Archer River)
c. 1985	Wiip-aw (lower Kirke River, moved later to Kawkey)
c.1988	Munth (Love River Mouth)
c.1988	Amban (False Pera Head)
c.1989	Mulpa'el-nhiin ('New Aayk', lower Kirke River)
c.1989	Kawkey (lower Kirke River)
c.1989	Thaangkunh-nhiin (north of Knox River)
c. 1989	Koken (Stoney Crossing, middle Archer River)
1990	Wal-ngal (top of Knox River)
c.1990	Tha'-Achemp (Emu Foot, upper Love River)
c.1990	Ochangan-Thathenh (Hagen Lagoon, upper Love River)
1990s	Ngakayengka (Holroyd River)
1990s	Ku'-aw (Running Creek) (Source: Sutton 1997a:48-9.)

A survey in 1994 and O'Faircheallaigh's subsequent research (1996) have demonstrated a strong and continuing commitment by Wik people to living on their homelands, but many people have felt inhibited by the lack of services and facilities (O'Faircheallaigh 1996:40). After a persistent demand in the community for a dedicated homeland support agency (O'Faircheallaigh 1996:40, 43) it finally came to fruition in the early 2000s in the form of the Aurukun Shire Council's Land and Sea Management Agency or Unit.

### **Aurukun Shire Council and Land and Sea Management**

The Aurukun Shire Council (ASC) has planning responsibility for the Aurukun Shire in the western part

of the Wik Sub-region. The Council is responsible for most public service delivery in Aurukun (excluding health, education and police). In the past, it has focused primarily on 'physical' services. For the financial year 1999-2000, CDEP funding to the Aurukun Shire Council was \$5,280,091, made up of \$220,3000 capital items, \$930,820 recurrent expenditure and \$4,128,971 wages (ATSIC 2000:23). Funding for outstation development for that same financial year was \$100,000 (ATSIC 2000:16)

At the time of writing the Aurukun Shire Council (ASC) maintained a land and sea management (LSM) program under the direction of a Co-ordinator. The defined work area for the program was the Aurukun Shire; there was no mandate to work outside this boundary in areas which nevertheless were the subject of the Wik and Wik Way Native Title Claims. (R.B., ASC, 09/07/01.)

The LSM's Co-ordinator's salary and overheads were paid by the ASC from the Commonwealth Natural Heritage Trust (NHT) funds. There were two years of funding worth about \$110,000 per year. The Co-ordinator had a three-year contract and it was anticipated the Council (if necessary) would take up the funding at the end of this period, from its untied grants. The ASC contributed office facilities and some administration overheads. The following staff and participants were working under this program at the time of report compilation:-

- There were a total of 10 rangers, employed on CDEP, including a Chief Ranger and two Assistant Rangers.
- Four CDEP workers were engaged at timber cutting at the sawmill, including a ganger (team supervisor). This team fulfilled any timber orders (eg 4 inch x 2 inch) for miscellaneous small jobs, timber for local construction, bush poles and posts for outstations. They also cleared large fallen trees across roads in the Shire. There was a vacancy for a Timber Coordinator.
- Nine CDEP workers (including a team supervisor and two assistants) ran a market garden and were to develop a town nursery
- Three CDEP workers were employed on outstation support.
- There were 70 people drawing on CDEP income for outstation living and maintenance. One of these people obtained top-up funding as Assistant Outstations Coordinator. (R.B., pers. comm., 09/07/01.)

Council provided two vehicles for the rangers, one for outstation servicing, and one for the timber team, as well as various tractors, trailers and dinghies. The Council also operated a barge across the river estuary (Archer Bay) to transport vehicles from town to get access to the southern part of the shire. The Council

had a Sea Air Rescue boat which was used for limited special services (eg ethnobiologist and his informants), but it was expensive to operate.

The rangers had not been selected on the basis of different cultural groups, but simply on their expressed interest in doing this kind of work.

The Land and Sea Management Coordinator indicated that he regularly received substantial correspondence via the Aurukun Shire Council office, which contains matters directly concerned with or impacting on native title. He made specific mention of incoming correspondence and requests from: the Environmental Protection Authority, the Department of Primary Industries (re. fisheries), the Department of Natural Resources and Mining (re. weed and feral animal issues, pigs), the Australian Quarantine Inspection Services (AQIS) (but most of their issues not relevant to Shire eg foot and mouth disease, banana disease, pig herd policies etc.), Cook Shire Council (weed and feral animal program), and the Rural Fire Services of Department of Emergency Services (conducting aerial burning programme with traditional owners). Drafts and formal replies are prepared by the Coordinator to go out under the signatures of the ASC's CEO or the Mayor, in which case the ASC secretaries type and dispatch such correspondence without cost. The Coordinator therefore has a minimal administration system at present, relying on support from the main Council administration.

In 2001, a number of programmes were being planned/undertaken by ASC in response to the wishes of traditional owners (pers. comm., R.B., 09/07/01), viz:-

- (i) A fire management programme.
- (ii) Contract to compare customary burning patterns with the actual distribution of current burning within the Shire.
- (iii) Contract with Queensland Parks and Wildlife Service to conduct a bird survey at 100 sites.
- (iv) Development and implementation of a Visitor Access and Camping Policy of Aurukun Shire Council so that traditional owner Rights could be protected and maintained.
- (v) Funding for a Weed and Feral Animal Eradication Strategy was being negotiated through the N.H.T.
- (vi) An Ethnobiological study was being conducted by an outside researcher with traditional owners.

#### **Land Management Issues, Aspirations and Concerns for Wik and Wik Way in general**

The following is a list of identified issues, aspirations and concerns held by the Wik and Wik Way regarding the management of their land and sea:-

1. Control over natural resources and environment  
Increased control would help protect against the misappropriation and disrespect of the natural environment by outsiders. This includes the problems of unauthorised fishermen coming into estuaries, rivers and creeks; the killing of dugongs and crocodiles in fishermen's nets; people taking more fish or game than they require, and then discarding what they do not need on the beach; damage to coastal dunes as a result of people driving through them in 4WD vehicles; littering of camping places with piles of beer bottles and other waste. Traditional owners want greater control over the management of coastal and riverine fisheries.
2. Control over other resources  
Theft and damage to property is a constant source of concern for Wik traditional owners. It acts as a disincentive to the establishment of outstations, and temporary camps for hunting and fishing. Traditional owners have had tents, tractor parts, radio equipment, boats, outboard motors, solar panels and other items stolen from outstations, involving goods to the value of thousands of dollars in some cases. Damage to outstation facilities, has included an airstrip by the use of 4WD vehicles. Traditional owners are also concerned about tourists building semi-permanent structures at coastal campsites.
3. Control over cultural heritage  
This concerns damage, caused inadvertently or otherwise, to important cultural sites.
4. Mapping country and maintaining a site register  
Anthropologists such as Sutton and von Sturmer, working in the south-east of the case study area since the 1970s, have received requests from Aboriginal people in Coen regarding the desire to have their knowledge and histories recorded. Of specific concern is the need for the protection and marking of Aboriginal graves and birth trees. Mapping of country is an ongoing process that requires attention across the region. There is a need for ongoing mapping of Indigenous perceptions of the landscape as a precursor to planning. The associated problem of maintaining a central archive or keeping place for important documentation on behalf of the community is aggravated by frequent staff changes. A major issue with any initiative to establish a site register is the capacity of the community to sustain it in the long term.
5. Need for improved infrastructure and access  
There is an identified lack of transport infrastructure to the Wik areas outside the Shire boundary, especially in the south. The need for an effective Aurukun Shire transport system (roads, vehicles, buses, barges, wet weather contingencies, etc) to facilitate access to country for land management services and outstation usage. According to the Coordinator, the outstation barge which transports vehicles across Archer Bay (estuary of the Archer River), is not of sufficient

capacity to travel along the coast eg down to the Kendall River. Relating to the issue of access, the occupation from time to time of prime camping and fishing locations by outside visitors prevents access by Wik people.

6. Disrespect for tradition and traditional owners  
This includes the failure of outsiders to accord Wik and Wik Way people (and their country) appropriate recognition and respect as traditional owners, eg use of European names and incorrect Aboriginal names for specific locations (O'Faircheallaigh 1996:50, 51.). On the Comalco lease, outsiders have responded to traditional owners with abuse and violence and questioned the right of Aboriginal people to be there.
7. Improved economic engagement with regional interests  
This was most acutely expressed through the negotiation process for the WCCCA and includes traditional owners aspirations for increased employment and opportunities for commercial ventures.

#### **Wik and Wik Way Land Management Strategies**

The following list includes a mix of proposed and existing strategic solutions towards the above mentioned issues, aspirations and concerns:-

- Establishment of permanent outstations so that residents will be in a much better position to prevent theft and damage to country and to sites and to deter illegal camping.
- A properly-equipped Aboriginal ranger agency operating in the region, with traditional owners being employed to ensure that their country is properly cared for.
- Use of Aboriginal rangers in environmental monitoring.
- Construction of Ranger Stations at strategic points to monitor traffic into the region. (Possibly combined with commercial outlets for Aboriginal arts and crafts).
- A permit system under which traditional owners would provide consent to access their lands by tourists; used as a source of revenue, and also as a means for controlling numbers of visitors, the areas they visit and the activities they undertake. (This has been implemented by Aurukun Shire Council for the Shire and needs to be expanded for all of the Wik Sub-region.)
- Establishment of appropriate forums to ensure traditional owner participation in decisions which have significant environmental implications.
- An effective site protection regime to be installed.
- The development of a central archive or keeping place for important documentation such as a site register may involve a partnership with a tertiary institution, combining on-line servicing from a regional centre.

#### **Planned Land Management Centres in the Wik Region (ASC 2001)**

There are two proposed Land and Sea Management Centres for the Wik region, both in advanced stages of planning by the Aurukun Shire Council, but neither had been built at the time of writing. The two centres were seen as essential to the development and implementation of land and sea management programs across Wik traditional owners' lands. One Land Management Research Centre was proposed 80 kms to the north of the Aurukun community at 'Beagle Camp' (or 'North Camp') in Wik Way country.

This centre was to focus on land management and tourism activities across Wik Way lands, and provide a base for research into the environmental impacts of mining, and post-mining rehabilitation. This research would aim primarily at generating real options for Indigenous people to gain economic and employment opportunities from lands impacted by bauxite mining. Research based at the Centre would be undertaken across the region on mining leases affecting the communities with short-term employment benefits and long-term economic opportunities.

Additional needs of the Wik Way people were to protect sacred sites, manage tourism activities, control feral animals and weeds, and to ensure conservation of key coastal and wetland habitats. The project proposal provided for administrative and research facilities, kitchen and ablution spaces, and accommodation for scientists, maintenance and land management staff. The proposal also minimised costs through the incorporation of existing workshop facilities. Development of this centre would greatly assist the Wik Way people to give effect to the provisions of the Western Cape Communities Co-Existence Agreement.

An application had also been made to the NHT for funding to construct a second Land and Sea Management Centre to the south-east of Aurukun at Blue Lagoon. The Blue Lagoon project aimed to provide a focus for land and sea management on Wik lands and help facilitate traditional owners' access to, and occupation of, their traditional lands. The Centre was also to become a hub for training of a skilled Indigenous workforce that will build land management capacity across all Cape York communities.

Without the construction of the two proposed Land and Sea Management Research Centres, the ability of Aurukun Shire Council to provide meaningful land management services to traditional owners will be significantly compromised. Additionally, the inability to attract and service meaningful research projects aimed at traditional owners gaining economic benefit and employment from natural resources following mining will be severely impaired. (ASC 2001.)

## Conclusion

The Wik people comprise a broad division of the Paman language grouping (after the word 'pama' = person), sharing a range of broad cultural similarities. The building block of their land tenure system is the clan estate. Such estates can be aggregated in various configurations to form a number of 'local estate cluster' identity systems. Further aggregation generates two 'large estate cluster' identity systems, viz riverine groups and ceremonial groups. Thus, like other Australian Aboriginal peoples, the Wik have multiple forms of socio-spatial identity. They choose to activate a particular identity mode in response to the context of day-to-day decision-making and in relation to who may be affected by such. In the context of a Wik PBC structure, it is the larger-scale units of riverine groups and ceremonial groups that appear the most useful on which to base a corporate structure. However customary decision-making may be deferred to any of the smaller groupings until the level of the clan and family is reached. This will be re-examined in Chapter 7.

The Wik Planning Sub-Region of the CYLC mainly comprises that area which is the subject of the Wik and Wik Way Native Title Claim. Within this claim area, lawyers have distinguished at least 33 parcels of land and sea. These include parcels of DOGIT land, Aboriginal land lease, pastoral leases under both Aboriginal and non-Aboriginal ownership, and areas under mining leases. In addition to the Wik and Wik Way Native Title Claim, the westernmost portions of the Mungkan Kaanju National Park are included within the Wik Sub-Region.

Planning authorities in this region include such regional agencies as Aurukun Shire Council, Pormpuraaw Community Aboriginal Council, Napranum Community Aboriginal Council, and the Cook Shire Council. In addition there is the wide range of government and Indigenous agencies and departments that have jurisdiction over the wider Cape York region and which are outlined in Chapter 3 (including National Parks). Forms of planning agreements under development include Wik and Wik Way Native Title ILUAs and the Western Cape Communities Co-Existence Agreement.

A mature outstation movement exists with some 24 or more outstations but it is mainly confined to the western part of the sub-region and particularly within the Aurukun Shire from where it is administered and funded, partly with CDEP salaries. There are some dysfunctional outstations on Merapah which are nominally serviced by CRAC. There is a strong demand from those Wik clans whose countries are not in the Aurukun Shire, for outstations to be established on

their lands and an outstation resource service equal to that within the Shire, particularly in the southern part of the Sub-region.

The Aurukun Shire Council also has established an active land and sea management program which is integrated with the outstation movement and CDEP. Rangers are administering a new permit system for camping visitors to the Shire. Two decentralized LSM centres are envisaged in the near future. Planned future mining is a potential source of funding for traditional owners and for these particular services (LSM, outstations). There is tension with Wik traditional owners outside of the Shire who wish to recruit LSM services from ASC, but are not readily able to at present.

LSM problems, as perceived by the traditional owners, include over-fishing, fishing industry impact on dugongs and crocodiles, lack of coastal management, dune damage, poor road access to country, cultural heritage protection, impacts of visitors to country including theft and vandalism at outstations and littering.

The Wik and Wik Way Native Title Claim has a very 'full' set of native title rights and interests which are framed as an 'exclusive possession' type claim, asserting "proprietary and possessory" rights, and a right to give or refuse permission to enter or use the claim area by others. Whereas 'exclusive possession' of this type has been agreed by a number of the parties in the N.T. negotiations (eg Aurukun Shire Council, Merapah pastoral lease group), it will clearly not be the subject of some of the negotiations (eg some non-Indigenous pastoral lessees). There is thus an extensive range of rights and interests that may form part of the requirements of land and sea management functions but their extent of application will be variable throughout the different land tenures reflecting the diversity of ILUA contents negotiated.

It can be seen from the foregoing description of the functions and activities of the Aurukun Shire Council LSM Agency that many of its functions impinge on or fundamentally relate to a range of the native title rights and interests being claimed in the region; viz with respect to (i) general use of country, (ii) occupation, and erection of residences and other infrastructure, (iii) hunting, fishing and collecting resources, (iv) management, conservation and care for the land and places of importance (v) the right to prohibit unauthorized use of the land, and (vi) burials.

It is clear then, that once PBCs are established as outcomes of successful native title claims, formal and complex relationships need to be established between such PBCs and this Indigenous agency. How this might be achieved will be examined in Chapter 7.

Figure 13 Map of the Wik region showing the Aurukun Shire with outstations in relation to the Mungkan-Kaanju National Park (formerly Archer Bend/Rokeby-Croll) and Merepah Pastoral Lease (reproduced from Martin 1997:8-11)

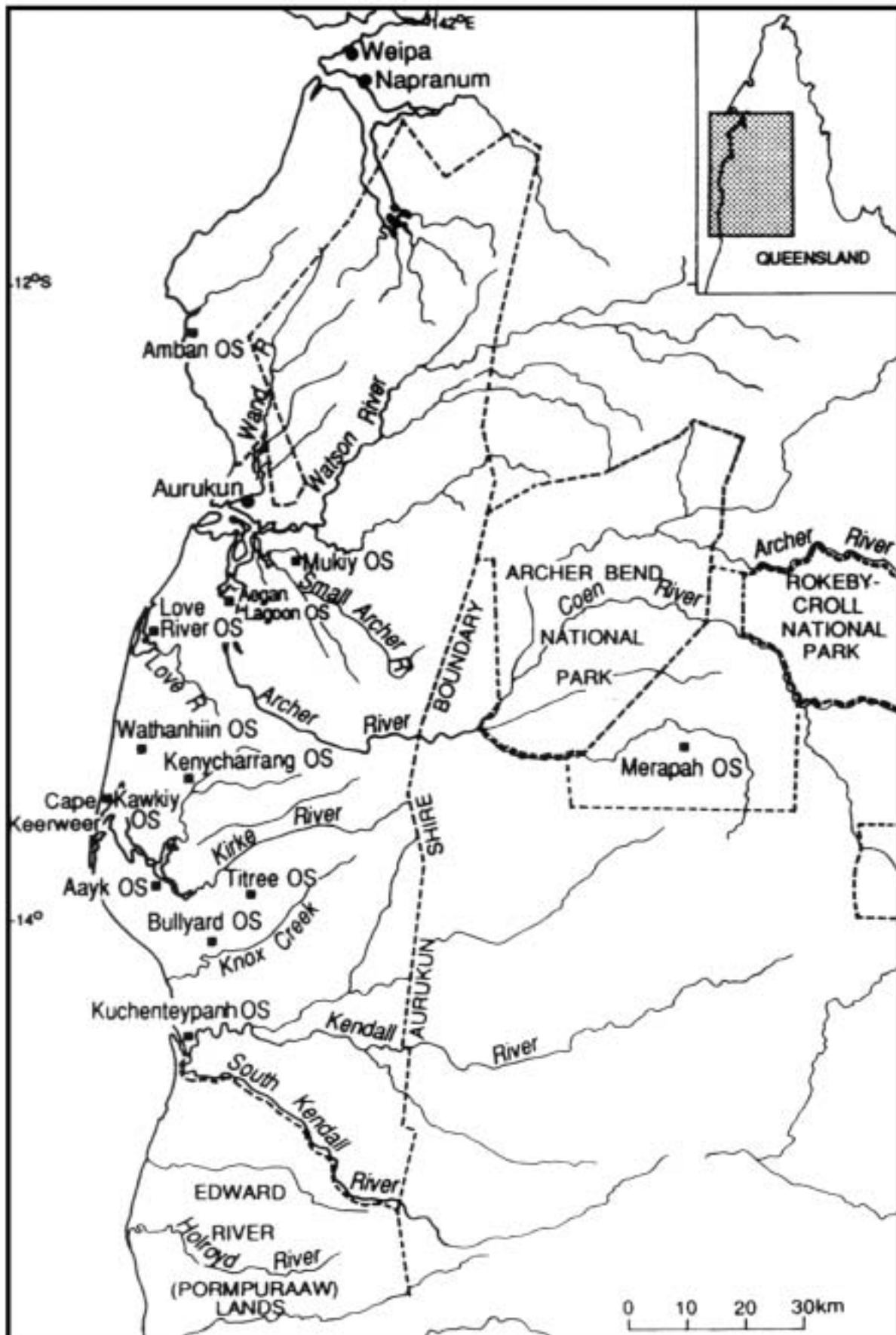


Figure 14 Native title claims in the Wik region (map produced by NNTT's Geospatial Unit, 2002)

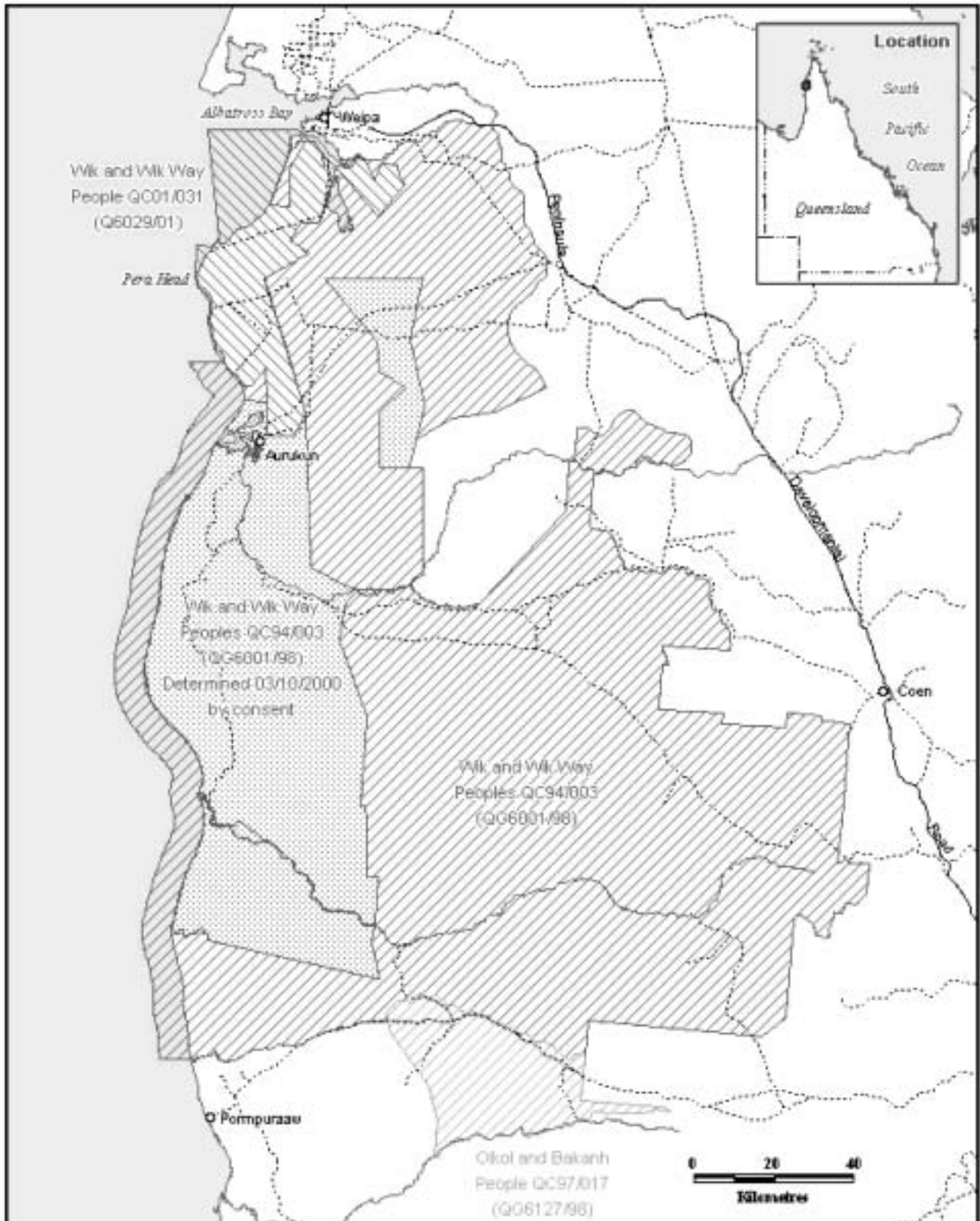
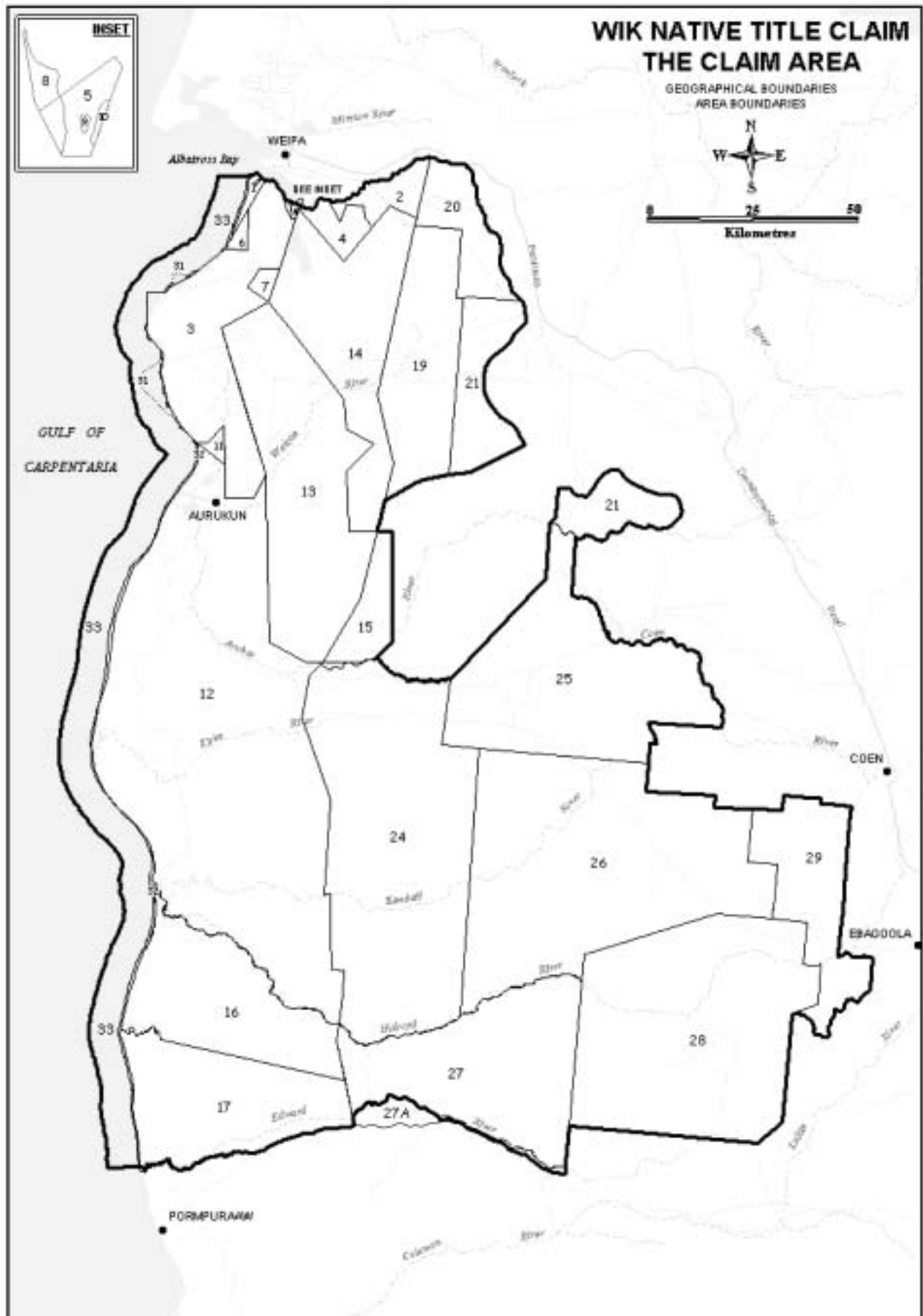


Figure 15 Wik native title claim area showing the composition of the constituent parcels of land indicated by numeric referencing (map produced by NNTT's Geospatial Unit, 2002, using Auslig data)





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## CHAPTER 6: PBC DESIGN ISSUES AND PROPOSED MODELS

### Introduction

This chapter describes two potential PBC constructs, namely the active PBC and the passive PBC. The chapter sets out the issues relevant to the design of PBCs recognising that the diversity of circumstances is likely to produce many hybrids of the two constructs, as has already occurred in the draft Wik PBC<sup>1</sup> rules (which are contained in full in Appendix 1).

Some of the key issues which those involved in the formation of PBCs should consider before finalising the organisational structure and rules of a PBC include:

1. Legal and policy constraints of the PBC regime;
2. The nature of the native title group and desired decision-making processes;
3. Administration and financial arrangements; and
4. Potential external relations of the PBC.

A consideration of these four issues may assist native title holders in deciding what type of PBC structure will best meet their needs. Each will be examined in turn. A summary table of PBC design questions arising from these issues appears at the end of this overview (Table 11).

### Legal and policy constraints of the PBC regime

#### Legal Requirements

The scope for the flexible design of PBCs is limited by the existing state of the law as set out in the NTA, ACAA and PBC Regulations. Some of the inadequacies and problems created by these prescriptive laws have been discussed in Chapter 2, which also contains a table setting out the minimum requirements for PBC incorporation. Notwithstanding these constraints, opportunities exist for native title groups to design PBCs featuring decision-making structures that are tailor-made to the needs of their particular group<sup>2</sup>.

#### Policy Intent of the PBC Regime – Friction between traditional and corporate decision-making

There is a clear need for a process whereby the decisions of native title holders can be identified and given effect within the Australian legal system. One of the policy imperatives of the existing PBC regime is to enable dealings on native title land to occur with the relative speed and certainty desired by government and industry, but also no doubt in many cases by Indigenous groups themselves. However, as noted by Hayes (2000:1), the existing regime favours the needs of non-Indigenous sectors:

The primary advantage of an incorporated body is one really bestowed on non-Indigenous parties. It makes it easier for outsiders to deal with the native title holders...Australian law has now said it will recognise native title but the native title holders in return must agree to engage in our system of doing business. To this end we want certainty and you must incorporate.

There is a tension between the need to accommodate the demands for efficiency dictated by government and industry and the need to accommodate the complex dynamics of traditional decision-making. The problem with the PBC regime is that it attempts to deal with this tension by potentially undermining traditional decision-making processes<sup>3</sup>. If native title is predicated on the legal recognition of the traditional laws and customs of Aboriginal people, it follows that there should be a corresponding practical and legal accommodation of the often complex process of decision-making integral to the maintenance of the recognised system of laws and customs. For unless the authority of those decision-making processes is respected and supported, the system of laws and customs underpinning the native title may itself be at risk.

Thus one of the major challenges for native title holders would appear to be maintaining the integrity of traditional decision-making processes whilst responding to the legal and administrative requirements of the PBC regime and the pressures of dealing with external parties. Accordingly, decision-making structures for PBCs need to find a balance that is capable of meeting the requirements of both traditional decision-making and the demands created by the globalised world's need for transactional speed and efficiency.

#### The Challenges of Corporatisation

Some of the difficulties arising out of the requirement that a body corporate be determined with respect to each native title determination are caused by the creation of separate entities including:

- (a) the body corporate (PBC);
- (b) the native title holders; and
- (c) the members of the body corporate.

Prior to a determination of native title, there is simply one entity involved in the 'management' of the native title, that is, the common law native title holders. Following a determination of native title under the NTA, two new entities are brought into the equation, namely the PBC and its members. Members of the body corporate must be regarded as separate entities to the

native title holders because they:

- will almost never be coterminous in number; and
- members of PBCs hold contractual and statutory interests arising out of their status under the ACAA that non-member native title holders do not hold.

The concerns that flow from this include the potential for the creation of different classes of native title holder, namely those who hold special interests as PBC members (such as the power to call special general meetings), and those whose interests are limited to being a common law native title holder. Further there is potential for traditional decision-making to be eclipsed by corporate decision-making. For example traditional decision-making may include the following features and variations, which are inconsistent with the western democratic principles normally underpinning corporate governance (such as decision-making by majority vote):

- A Council of Elders sitting in a collective exclusive authority;
- Consensus decision-making amongst a general meeting of native title holders;
- Consensus decision-making amongst family/descent groups; and
- The exclusive authority of individual “holders of country”.

Concern has therefore been expressed about the potential for corporate governance to interfere with and/or undermine the traditional decision-making processes of the native title group. This may be a real source of concern to native title holders or it may not. It may be that some native title holders are comfortable with corporate decision-making provided that some ‘traditional’ features are incorporated into the process. In such circumstances, care needs to be taken in identifying and appropriately articulating the key ‘traditional’ features in relation to authority and decision-making such that they can be adequately included within the PBC decision-making framework.

Therefore to operate a PBC in a way which best protects the interests of the native title holders and the integrity of traditional decision-making processes, care should be taken to limit the importance of PBC membership and corporate decision-making under the ACAA in the operations of the PBC. (As noted below however, this will be difficult to achieve). Alternatively, some native title holding groups may elect to comprehensively embrace corporate decision-making and yet others may seek to make adaptations to reflect their traditional approaches to decision-making. Regardless of which end of the spectrum native title holders decide to position their decision-making structure, they need to be aware of the impacts and opportunities created by the imposition of the corporate governance model in the existing PBC regime.

## **The nature of the native title group and desired decision-making processes**

### **Size of the native title group**

The size and composition of the native title group is obviously a critical determinant in the design of a PBC. A PBC consisting of only one ‘descent group’ comprising twenty or so people is likely to require less complexity of design than a large composite group featuring distinctions between members based on language, ceremony and/or descent. Such issues may also be relevant to the potential for dispute within the group and the consequent need for workable dispute resolution processes to be incorporated into the PBC rules. As noted below the size of the group will also affect the administrative and financial requirements of the PBC and thus its design.

### **Aspirations of the native title group – Objects of the PBC**

If the *Native Title Act 1993* regime is to deliver meaningful outcomes to native title holders, it is critically important that PBCs acknowledge, if not address, the aspirations of the native title group not just simply in the design of the PBC but also in the manner in which the PBC is operated. A PBC, as an incorporated body under the ACAA is able to pursue the objects provided for in its rules. Such objects need not be limited to the mandatory minimum requirement of performing the functions of a PBC. Thus, if desired by the native title group, a PBC could pursue other objects beyond dealing with native title interests in land. For example there is no impediment to the PBC establishing itself as vehicle for implementing customary law in relation to say child adoption, ownership of cultural property etc.

At the time of writing however, the difficulties faced by native title holders in simply establishing a PBC is likely to preclude the realisation of many of the aspirations of native title holders. Simply becoming part of the land title and management framework will be a challenge in itself. Further there are good arguments for limiting the purposes of the PBC to non-profit functions. These include to take advantage of any tax benefits enjoyed by not-for-profit organisations and to protect the non-native title assets of the PBC in the event of insolvency.

### **Participatory or Representative Membership**

‘Participatory corporate membership’ aims to ensure that as many of the native title holders as possible are members of the PBC such that the membership of the native title group and the PBC are as close as possible. By using the participatory membership model the aim is to avoid the potential creation of different ‘classes’ of native title holder. Such classes could evolve where the status of holding membership of the PBC somehow afforded greater benefits than to native title holders

who, for whatever reason, were not members of the PBC. A native title group that is small in number may be able to secure sufficient PBC membership to adopt a participatory model.

In contrast, one version of ‘representative membership’ involves limiting the membership of the corporation to a small number of people who are then each elected to the Governing Committee. Such a scheme is used under the ALR(NT)A in the Northern Territory (see Figure 16). The ALA land trust model is a further example of representative membership, as membership is limited to the trustees appointed by the Minister as opposed to being open to the entire Aboriginal group with interests in the land. Similarly to the participatory model, the purpose of this model is to limit the importance of any statutory interests held by virtue of membership and to focus attention on the relationship between the Governing Committee and the native title group. Difficulties with implementing this model in practice include the ACAA requirement that corporations (of the PBC kind) have at least 25 members. This may prove to be an unwieldy size for a Governing Committee.

As is the case with the draft Wik PBC rules, in practice most PBCs will probably aim for a participatory membership model by attempting to secure membership from as many members of the group as possible. It is unlikely though that full coverage of the group will be achieved and to this extent such PBCs will be ‘representative’ of the group. To maximise rates of membership it would be desirable that PBC rules do not contain any impediments to membership such as yearly membership fees etc and that expulsion and or disqualification from membership be limited as much as possible.

### **PBC Decision-making**

Under the PBC Regulations, decisions of PBCs will be categorised as either ‘native title decisions’ or a ‘non-native title decisions’.

As discussed in Chapter 2, ‘native title decisions’ are those that are capable of affecting native title. The Regulations provide for special consultation and consent procedures prior to the making of a native title decision by a PBC. Agreements of a PBC that are not made in accordance with these consent procedures are taken to have “no effect to the extent that it applies to a native title decision”. The important consequences that can flow from a defective decision-making process raise the question as to whether the PBC will require assistance (e.g. from the NTRB) in:

- identifying what is a native title decision; and
- meeting the requirements of consent and consultation procedures.

All non-native title decisions of the PBC are able to be made by the Governing Committee in its capacity as

the day-to-day manager of the corporation. Therefore unless the rules of the PBC otherwise provide, other decisions which are potentially of as much consequence as native title decisions, can be made without recourse to the consent and consultation provisions. The PBC is charged with functions that extend beyond merely the making of native title decisions and include such things as holding and investing money. Therefore by way of example, a decision by the PBC about the investment of funds will not be a native title decision and could be decided by the PBC in accordance with its rules. If the rules are silent on such matters, the Governing Committee, Chairperson or Executive Officer could make such a decision.

It is noted that the draft Wik PBC rules appear to attempt to afford protection of the native title holders’ right to be involved in such non-native title decisions. The rules do so by including the words *as directed by the native title holders*<sup>4</sup>. If greater protection was desired, the rules could provide for a specific process to be followed for certain non-native title decisions. Introducing a higher threshold of decision-making for non-native title decisions however would have potential cost implications in undertaking the extensive decision-making process. On the other hand it is interesting to note, that approximately one year following the making of the Wik and Wik Way determination, there had been no native title decisions arising within the Wik and Wik Way native determination area (pers. comm., PH 12/11/01). This suggests that in some cases the consultation and consent requirements may only be triggered periodically, thus making it feasible to implement the process for some ‘non native title decisions’ without creating an unsustainable decision-making load.

Also falling into the category of non native title decisions will be decisions about the use of native title land by native title holders. Provided that the use is supported by a native title right and is not inconsistent with the continued use and enjoyment of native title, than the use will not constitute an act affecting native title and any decision in relation to the use would not fall within the definition of a native title decision. This raises the question about how the PBC and/or the native title holders will determine how native title land is utilised by native title holders. That is, what role, if any, is the PBC going to play in the internal operations of the traditional law and customs of the native title holders?

### **Traditional Decision-making**

The PBC Regulations provide for the making of native title decisions in accordance with a *particular process of decision-making that, under the Aboriginal and Torres Strait Islander traditional laws and customs of the common law holders must be followed*<sup>5</sup>. Identifying the exact nature of, and then following the mandatory processes of traditional decision-making may be an extremely

difficult and expensive task. It is also likely that there will be various opinions within the native title group as to the requirements of such processes. Recent case law dealing with the authorisation of native title claims suggests that the Courts will insist on a high standard of proof to establish compliance with traditional decision-making processes.<sup>6</sup>

As discussed elsewhere in this report, the use of the traditional decision-making process need not be limited to the making of *native title decisions* as provided for in the PBC Regulations and could be extended to other important decisions such as those on the distribution of resources etc. In order to sufficiently protect the interests of native title holders and to avoid confusion and delays, it may be prudent for the drafters of PBC rules to prescribe the minimum mandatory requirements for such traditional decision-making processes. As a matter of practice the settling of such rules would no doubt require extensive workshopping amongst the native title holders, particularly in the case of larger groups of claimants comprised of multiple sub-groups. However it should be noted that the traditional process as described and accepted by the native title group at the time of drafting such rules may not coincide with any process that is determined to exist at law. To this extent compliance with the rules would not necessarily guarantee compliance with the PBC Regulations.

The following ethnographic notes have been drawn from the two case study Sub-regions to exemplify something of the nature of traditional decision-making and its socio-political context.

### Traditional Decision-making in the Coen Sub-region

In the Coen Sub-region there clearly exists ethnographic evidence of regional gatherings for ceremony, which were generated by, and maintained shared constructs of law and custom. For example, the Southern Kaanju had two major forms of ceremonial gatherings according to Chase et al (1998): -

“For the Southern Kaanju, the major male initiation ceremony was *Muungka*. The ceremony was associated with the presence of spiritual forces, and the grounds where these ceremonies were performed are treated as *kincha*, or spiritually powerful and restricted in terms of access. Another ceremony was *Piipa*, a mourning ceremony connected with final disposal of the corpse, at which grudges, accusations of sorcery, etc, were settled by fighting.” (Chase et al 1998:103.)

Rigsby and Chase have commented on the traditions of larger-scale ceremonial gatherings amongst the central eastern groups of Cape York: -

“Thomson (1933) described many features of classical Umpila, Utaalnganu and Kuuku Ya’u religious belief and practice, but he focused on

Kuuku Ya’u beliefs and practices of the hero cult complex centring on Iwayi ‘Old Man Crocodile’. He also described similar ceremonies which he witnessed at Port Stewart in late 1928. More recently, Laade (1970) and Chase (1980) outlined related ceremonial complexes for the Utaalnganu and Umpila. Throughout the east coast of the Peninsula, people call these ceremonies ‘Bora’ and say they have to do with ‘inside business’, i.e. restricted esoteric knowledge and practice. Thomson proposed that the cult provided the basis for tribal integration, but we believe it better to speak of regional integration here.... The complex is more widely distributed than just among the Sandbeach People, and it drew together men and women from different clans and language groups over the wider region.” (Rigsby and Chase 1998:202.)

The important customary role of public or semi-public meetings and the right to ‘talk for country’ is clearly embedded in the ethnographic literature.

“A fundamental right that the claimants have under Aboriginal tradition is the right to speak for their country and the places on it with which they have particular associations. Such rights can manifest themselves for example in publicly asserting ownership of their country, in stating how their country should be looked after or managed, and how it should be utilised.... The exercise of this right to speak for country can be seen as a primary entitlement of their ownership of country. It can be seen as literally the ‘title deed’ in a society in which oral forms still play a major role, the action through which connections to land are asserted and validated within the regional Aboriginal political system. This right of course is not uniformly distributed amongst the claimants. Factors such as seniority and knowledge are important, and particular individuals and groups have the right to speak for particular locales or regions...As previously explained though, such rights are rarely exclusive, and are a part of a layering of rights and interests in specific sites, areas or regions which are held by individuals and groups.” (Chase et al 1998:73-74.)

The current authors would concur with this position. It means that to conform to customary decision-making, it is necessary to facilitate public or semi-public meetings for traditional owner groups. Writing on the groups from both the Wik and Coen Regions, and drawing partly from Sutton’s work, Smith and Rigsby (1997) state the following concerning the ongoing system of Indigenous law and custom.

“...the senior Elders of one tribe exercise authority to identify and confirm the status of Elders of the other tribes, as well as to identify the land holdings or territories of themselves and others. In other words, it is the senior Elders of the regional society who identify and confirm the beneficial titles

(Sutton 1996 calls these 'proximate titles') of its constituent tribal units and smaller segments."

The following views from the Coen Sub-region leaders on the need for meetings on country were recorded by the authors, and are consistent with their customary approach.

- "Like to go back to traditional way of sitting down on the country with all the people including young people and Elders and talking the issues out."
- "We want more meetings here in Coen and out on our country so Elders can get involved."
- "When we sit inside for meetings we feel all cooped up and we don't talk much. Better to have meetings outside."

### **Traditional Decision-making in the Wik Sub-region**

In terms of larger-scale traditional political decision-making activity concerning country, only one type of exemplar situation was put forward, and only by several Wik and Wik Way Elders, albeit independently of one another. Customary gatherings of people were said to occur for 'bora' at which the various ceremonial cult dances were performed, viz Apelech, Winchenam, Puch, Wanam, etc. It was at such gatherings that political debates would occur amongst old people ("people worry for country") and where necessary, decision-making according to the customary law, at times resulted in punishments. (Ralph Peinkinna 24/07/01, Arthur Pembigan 10/07/01, Silas Wolmby, 07/01.) For example at the Winchenam meeting at Aurukun (24/07/01), it was stated that the "small Archer, main Archer and Watson families all talk the same language, all in one. The main people are here to talk together. Great-grandfathers always talk in same way."

The traditional occurrence of such larger-scale decision-making events is supported by certain evidence from previous anthropological studies. For example, consider the following passages on customary decision-making amongst the Wik Mungkan and Pucha: -

"...at least into the 1940s and 1950s, Rokeby Station was a major location for social interaction, trade, and ceremony for Mungkan and related people of the extensive region between the Edward and Archer rivers. By then most were living in or around the missions of Aurukun and Edward River, although (as the archival records show) there were still small numbers living out bush along the Archer and in the upstream regions of the Kendall and Holroyd Rivers. Older claimants speak of large camps of people at Gilligans Lagoon, most probably into the late 1940s or early 1950s, who included people who had walked in from south and west of Rokeby for tobacco and food...in return for work around the camp. Often, the old people would be living at Gilligans or along the rivers while their

sons were working for the station." (Chase et al 1998:53.)

"These large gatherings also served important social and ceremonial purposes. Older claimants recall large gatherings being held at Gilligans Lagoon involving the performance of both 'Island dance' (originally introduced to the Cape by men who had worked on pearling and trochus shell luggers in the Torres Straits) and 'corroboree', including Pucha from the mouth of the Kendall River... These large gatherings were also the occasion where news was exchanged, marriages arranged, extramarital affairs conducted and grievances prosecuted. Held with the tacit approval of the Rokeby cattlemen, they provided significant occasions for the maintenance of distinctive Aboriginal values and modes of behaviour away from the surveillance of the police and of the missions..." (Chase et al 1998:53).

Meetings of ceremonial groups on country are thus seen to be the mechanism for customary decision-making affecting aggregates of clans and their clan estates.

A more detailed description of a traditional decision-making process for Aboriginal groups within Cape York appears in Appendix 8 (prepared by CYLC). The fluid and complex nature of the consensus based decision-making has implications for the time and cost associated with following the consent and consultation procedures and therefore also the number of native title decisions that can be made in any given period. It raises the question as to whether the PBC should utilise its annual general meeting process as an avenue for the making of major decisions (be they 'native title decisions' or otherwise). There is potential for such annual general meetings to be conducted "out on country" in the same style as (but at a much lesser scale than) the CYLC Annual Land Summits. At such meetings directions could be given to the PBC and/or Land and Sea Management Agency on the major issues confronting the PBC for the year ahead and specific decisions about the management of native title.

### **The Governing Committee**

One of the major effects of the requirement that the PBC be incorporated under the ACAA is the requirement to form a Governing Committee charged with the day-to-day management of the corporation. As discussed earlier, unless otherwise specified in the rules, the Governing Committee will be responsible for all PBC decisions except those requiring the consultation and consent procedures (i.e. native title decisions). It is possible to make rules which would further restrict the decision-making role of the Governing Committee. For example provision could be made for decisions involving expenditure over say \$50,000 to be referred to the native title holders rather than the Governing Committee.

As noted in Chapter 1, the appointment of Chairpersons to Aboriginal organisations has led in some instances to the abuse of the position to the detriment of the members' interests. One means of dealing with such concerns would be to design rules which do not provide for a Chairperson (e.g. as in the draft Wik PBC rules – see below). Further, the rules could provide that decisions of the Governing Committee are to be reached by consensus. Positioning the Governing Committee in the design of the decision-making structures of the PBC is therefore critical.

### Reflecting the Internal Differentiation of the Native Title Group in the Governing Committee

Given the power accorded to the Governing Committee in the operation of a PBC, the issue arises as to potential and desirability of attempting to accommodate the differing rights and interests of particular sub-groups (be they based on clans, families, ceremony or language groups) by representation on the Governing Committee. There have been several attempts at designing rules under the ACAA to reflect internal differentiation of sub-group rights and interests which have in the past been rejected by the Registrar for Aboriginal Corporations on the basis that they are 'unreasonable or inequitable'. The existing draft of the Wik PBC rules provides for Representative Groups nominating Governing Committee members. It is anticipated this will be accepted by the Registrar who, at the time of writing, had indicated that the draft rules are satisfactory.

If however the decisions that are left to the Governing Committee are limited to non-native title decisions, then the scope of decision-making may be such that the need for differentiated representation on the Governing Committee will be limited. The traditional decision-making process to be followed in satisfying the 'consent and consultation' requirements should in theory accommodate the internal differentiation of the native title group by enabling all groups to participate.

There are other issues raised by attempting to design a Governing Committee with formulaic representation of sub-groups. There may be dangers in attempting to replicate traditional decision-making within the confines of the Governing Committee. Such dangers may include the creation of a false sense of authority in the Governing Committee and the undermining of the traditional decision-making process.

### Administration and financial arrangements

One of the most significant existing determinants of the structure recommended for PBCs is the negligible funding readily available to them for operational expenses. The costs associated with operating a PBC will of course vary from case to case but at a minimum would include expenses arising from:

Audit charges,  
Annual General Meetings,  
Maintaining a Registered Office,  
Giving notices to Members and Native Title Holders,  
Receiving notices including notifications of future acts,  
Conducting consultation and consent procedures for making of native title decisions,  
Travel Expenses,  
Administration,  
Public Liability Insurance,  
Stationery.

At this stage there is no program within ATSIC catering for the establishment and ongoing operations of PBCs<sup>7</sup>. Accordingly, the potential sources of funding would appear to be:

- ATSIC Regional Council grants;
- Utilisation of existing resources within Aboriginal land holding systems, for example use of NTRBs<sup>8</sup>, land trust infrastructure, Aboriginal Councils and Local Governments;
- Compensation and/or benefits under resource exploitation ILUAs; and
- Other State and Federal Government grants.

The administrative and financial burden upon PBCs will be affected by:

- the size of the determination area;
- the number of identified native title holders;
- the number of localities in which the native title holders reside;
- the level of existing/potential development in the area;
- the prospect of accessing compensation from past/future development;
- the costs of holding meetings for the making of native title decisions;
- the costs of managing/maintaining the determination area;
- the availability of communications and transport facilities;
- the availability of alternative sources of funding e.g. Federal environmental funds for World Heritage Area; and
- the demands for administration and professional support e.g. in responding to notifications and future act negotiations etc.

The capacity of a PBC to take on these administrative duties in an environment of negligible funding is therefore an important factor to consider in the establishment of the PBC and the design of its decision-making structures.

## Potential external relations of the PBC

As noted elsewhere in this report (see Chapters 3 and 7), PBCs in Cape York are likely to hold relationships with various external parties and agencies. In some cases, the PBC may be reliant on the other parties for administrative and financial support. These relationships may be relevant to the design of the PBC and may need to be formalised to some extent, either in the rules of the PBC itself or by way of agreement.

## Relationship between the PBC and its NTRB

The Native Title Representative Body (NTRB) for the region under consideration is the Cape York Land Council. NTRBs are statutory bodies with prescribed functions. NTRB functions relevant to Prescribed Bodies Corporate include:

### Facilitation and Assistance

An NTRB is required under the NTA to facilitate and assist NTRBs in the following ways:

*“to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:*

- (i) *native title applications;*
- (ii) *future acts;*
- (iii) *indigenous land use agreements and other agreements in relation to native title;*
- (iv) *rights of access conferred under this Act or otherwise;*
- (v) *any other matters relating to native title or the operation of this Act.*<sup>9</sup>

An NTRB's facilitation and assistance functions however are exercisable only on request by the PBC. Accordingly if the PBC does not wish the NTRB to perform these functions in relation to a particular matter, then it is able to carry out these tasks on its own behalf. As discussed elsewhere in this report, funding constraints will usually prevent PBCs from exercising autonomy over the performance of these functions as the NTRB will likely be the only source of legal and other professional advice available to PBCs.

## Demarcation of functions between the NTRB and the contracted land management agency

In practice the performance of the function of the day-to-day management of native title is likely to be shared between the CYLC (the NTRB for Cape York) and any land management agency contracted by the PBC to perform certain management services. Difficulties may arise in determining what is a function for the management agency and what is an issue requiring the professional services of the NTRB. For example, a Land Management Agency may be able to represent a PBC in the development of a Management Plan for a National

Park on native title land. A demarcation dispute may arise where issues requiring legal assistance from the NTRB are entwined with land management issues.

It is suggested that a tripartite agreement between the PBC, NTRB and Land Management Agency be entered into, so as to clearly establish (a) the role of each entity, and (b), a process for initiating the involvement of each party in any matter.

## Dispute Resolution

Cape York Land Council as NTRB is also charged with the following functions in relation to dispute resolution:

- (a) *to assist in promoting agreement between its constituents about:*
  - (i) *the making of native title applications; or*
  - (ii) *the conduct of consultations, mediations, negotiations or proceedings about native title applications, future acts, indigenous land use agreements, rights of access conferred under this Act or otherwise or about any other matter relating to native title or the operation of this Act; and*
- (b) *to mediate between its constituents about the making of such applications or the conduct of such consultations, mediations, negotiations or proceedings.*<sup>10</sup>

There does not appear to be any requirement that such functions only be exercised upon the request of the PBC. Therefore it would seem that the NTRB is able to mediate between members of the PBC as well as non-member native title holders at any time. It is noted that the draft PBC rules provide for a dispute between the PBC and its members, and between the PBC and native title holders to be referred to the NTRB for mediation or conciliation if such a dispute has not been able to be resolved internally within three months.

A difficulty may arise out of the perceived conflict of interest between the performance of the facilitation and assistance functions and the dispute resolution functions. For example if a NTRB has been involved in the negotiation of an agreement about a development on native title land, it may be perceived by a particular section of the group opposed to the development as being partisan and therefore unable to objectively perform its dispute resolution functions. In such circumstances the NTRB could brief out its dispute resolution task.

## Outsourcing of PBC Functions to NTRB

It is noted that the draft Wik PBC rules provide for the effective outsourcing of functions to the NTRB or to “an appropriately qualified consultant”. The rules do not contemplate this as a delegation of the corporation's authority (which would probably be unlawful), but rather specifically provide for these entities assisting the PBC in meeting its responsibilities and performing its functions. The outsourcing provisions effectively empower the NTRB or consultant to perform all of the

functions of the PBC provided that a report about the performance of such functions is prepared by the NTRB/consultant and ratified by the PBC.<sup>11</sup>

In some cases, PBCs may have agreements in place with industry which provide for payments of compensation and/or other benefits to native title holders. In these cases, access to the compensation for administration and professional costs may enable the PBC to take a more autonomous role in the provision of services to native title holders and lead to less reliance on the professional services of the NTRB or other service providing consultants.

In the majority of cases, at least in the short term, it appears that the PBC will be reliant on NTRBs for the provision of various forms of assistance, facilitation, dispute resolution and possibly also the conduct of the

consultation and consent procedures for the making of native title decisions.

### **Relations between the PBC and Land Management Agencies**

Native title holders may wish for their PBCs to delegate certain functions and decisions to Land Management Agencies. For example, the PBC may wish to outsource the function to “manage the native title rights and interests” to a land management agency, whilst retaining all of the other functions bestowed upon a PBC by the PBC Regulations. Alternatively, depending on whether the native title holders desire a passive or active PBC, further functions of the PBC could be outsourced to the Land and Sea Management Agency such that it acts in a similar capacity to that of the Land Council under the Northern Territory model (Figure 16).

**Table 11 Sample of PBC design questions for the native title group**

1. What is the traditional process to be followed for making decisions?
2. Has the process been adequately articulated in order to determine compliance with it?
3. Should the traditional process be used in making all decisions or should there be a different process for ‘minor’ and ‘major’ decisions?
4. At the moment the PBC Regulations use the definition of ‘native title decision’ to distinguish between major and minor decisions. Does the native title group agree with this distinction or do they wish to create their own requirements and thresholds for standards of decision-making?
5. Is the native title group prepared to entrust a Governing Committee to make certain classes of decisions? If so, what sort of decisions should they be allowed/not be allowed to make?
6. Who should be on the Governing Committee?
7. How should it be elected?
8. Should there be equal representation of subgroups on the Committee?
9. Should the Governing Committee attempt to replicate or follow traditional law when making decisions?
10. Should there be a Chairperson or should decisions be by consensus only?
11. How should disputes within the native title group be resolved?
12. Do native title holders want their PBC to be actively involved in the management of traditional lands? If so what is the PBC’s capacity to do so?
13. Are there any objects that the PBC should also pursue or be prevented from pursuing?
14. How should compensation be distributed/applied?
15. What financial and other resources are available to support the administration and operations of the PBC?
16. Are there any prospects of accessing compensation for past or future impairment/extinguishment of native title that could be applied to the administrative support of the PBC?



## Two Design Models – the Passive PBC versus the Active PBC

### The Passive PBC

The agency PBC construct is better adapted to the 'passive' PBC model because in this model the native title is held by the native title holders as principals who direct the agency PBC according to their wishes, thereby minimizing the decision-making capacities of the PBC. Membership of the PBC could be limited to what is necessary to fulfil the requirements of the ACAA; however this would, at least in theory, be of no consequence to the outcomes of decisions which would be made by the native title holders. The PBC Governing Committee could be comprised of representatives drawing on any sub-groupings. However Governing Committee representation would be largely symbolic as the PBC would merely be the communicator of decisions made by the native title holders.

This model is very similar to the tripartite structure in the Northern Territory established under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* ... see Figure 16. Under that model a land trust performs the perfunctory role of implementing the decisions of unincorporated traditional owners as communicated and directed by a Land Council. As such the land trusts are figureheads of authority, but the real dynamics of decision-making occur within the traditional owner domain.

The success of the Northern Territory model would seem to be in large part due to the administrative and political strength of the Land Councils<sup>12</sup>. Whilst the Cape York Land Council has quickly grown into a comparable political force within Queensland, there may be other reasons why the tripartite model may not work as effectively within the current ACAA dominated PBC regime.

The difficulty in achieving a passive PBC will be in restricting the role of corporate governance that threatens to creep into the administration of the PBC by virtue merely of the PBC's incorporation under the ACAA. This danger will be heightened in the following three situations.

(i) Where there is a distinction between 'native title decisions' and 'non native title decisions' such that the latter are dealt with by the PBC Governing Committee or a duly authorised executive. Under the existing definition of native title decision, such matters could be restricted to a relatively small number of decisions. Other decisions which may be of equal or greater importance such as the distribution of compensation held 'on trust' for the native title holders could (unless otherwise provided for in the rules) be left to the general corporate governance of the PBC.

This problem could be overcome potentially by providing in the rules that certain classes of decision (wider than native title decisions) are to

be referred to the native title holders. The PBC rules could also provide that the objects of the PBC are limited to providing a 'passive' agency role for the native title holders. Therefore any attempts to take on broader functions would be beyond the authority provided by the ACAA and vulnerable to *ultra vires* challenges. Also a decision of a PBC Governing Committee that a particular decision is not a native title decision, and therefore not to be referred to the native title holders, could be challenged by relying on the rules.

(ii) A second problem is that issues requiring a decision of the PBC may well over time increase, such that not all decisions can practically be referred to traditional owners due to the time and expense involved in facilitating meetings of the native title holders. In such instances pressure will be brought to bear on the PBC governance structures to make 'executive' decisions. Further there may be other problems generated by placing an excessive decision-making load upon the native title holders. Consultation and decision-making 'fatigue' is common amongst native title groups actively engaged in the management of lands. The necessary involvement of elders as holders of authority within native title groups typically places demands on the limited human resources of these groups that ultimately may be unsustainable. In fact the convening of too many meetings of native title holders to make decisions about matters considered to be of insufficient gravity, may only serve to reduce the level of participation and to undermine the authority of the decisions made at such meetings.

To deal with these problems, it could be possible to 'outsource' certain of the PBC's functions to another agency such as a NTRB or Land and Sea Management Agency. This is the approach taken in the draft Wik PBC rules, where such decisions can be effectively delegated to the agency and ratified by the PBC Governing Committee. However again, the very involvement of the PBC Governing Committee, even in this relatively limited way, will necessarily entrench its role in the politicisation of decision-making.

(iii) Where a PBC holds resources such as compensation or funding for employment and capital acquisition, the gaining of access to these resources is likely to become a major focal point of politics within the native title group. Regardless of whether such politics are played out within the corporate governance structure of the Governing Committee or are left to the more fluid and informal dynamics of the native title group, ultimately the administrative decisions about the application of PBC resources will be subjected to the scrutiny of the ACAA reporting and auditing provisions. Again this is an issue for which the Governing

Committee of the PBC will necessarily be required to take responsibility. Members of the PBC aggrieved by any such resource decision may decide to pursue rights under the ACAA/PBC rules e.g. by the calling of special general meetings of PBC members (as opposed to members of the native title group) to seek to direct the PBC Governing Committee to implement their preferred outcome.

### The Active PBC

Those interested in adopting the trustee PBC construct may favour the 'active' PBC model, as the native title will vest in the trustee PBC for the benefit of the native title holder beneficiaries. As such, the PBC acting as trustee will be able to, subject to the consultation and consent provisions of the PBC Regulations, make decisions on behalf of the beneficiaries. Whilst the PBC as trustee would owe a fiduciary duty to the native title holders, and be subject to the consultation and consent provisions of the PBC Regulations, the Governing Committee would become the focal point for the making of decisions and would hold a discretion to manage the native title.

Under this model, great importance may be placed upon the composition of the Governing Committee to ensure that it is adequately representative of the various groups comprising the native title holders. The issue arises as to whether the Governing Committee of an active PBC should attempt to replicate traditional law in the operations of the Governing Committee. Such attempts can sometimes unwittingly occur where the Governing Committee is 'representative' of the sub-groups comprising the native title holders. Where decisions are made by the representatives of the sub-groups on the Governing Committee there may be a temptation to describe such decisions as being made in accordance with the traditional laws and customs of the native title holders. Of course whether this is the case will be a question of fact in each particular scenario. For example in some situations it may well be in accordance with traditional laws and customs to have such decisions made by the nominated representatives of the subgroups sitting 'in council'. In such cases it may raise the question "Is it possible to marry the governing committee governance structure with traditional laws and customs for decision-making?"

### Summary Note

It would therefore seem that whilst the PBC regime requires the administration of land and financial assets by a PBC to occur under the auspices of the ACAA, corporate governance structures cannot be prevented from at least influencing the making of decisions concerning the interests of native title holders. This will be the case regardless of whether a passive or active PBC model is adopted.

### Review of the Draft Wik PBC Model

The authors have been provided with progressive drafts of the Wik PBC rules and various correspondence between the Wik legal representatives and the Registrar of Aboriginal Corporations. The version of the rules dated 18 March 2002 (see Appendix 1) has been considered by the Registrar to be satisfactory and is the subject of analysis in this report.

The Wik PBC model can be viewed as a mixture of the passive and active PBC types. It includes 'passive' features such as the agency relationship, limited executive and limited objects (and therefore powers). On the other hand it features participatory representation providing for widespread PBC membership and a representative Governing Committee. The latter characteristics may support the growth of corporate governance culture within the native title group, possibly causing the PBC to take on an 'active' role in decision-making.

As described in correspondence to the Registrar by the Wik and Wik Way claimants legal representatives, the draft Wik PBC rules aim to create a PBC that:

(a) *Is a non-trustee prescribed body corporate.*

The decision to elect a non-trustee (or agency type) PBC reflects the preference of most native title holders in Cape York to directly hold their native title. It is noted that it is not proposed to enter into any agency agreement between the PBC and the native title holders (pers. comm., P.H. 12/11/01). The question arises as to who would sign such an agreement on behalf of native title holders.

(b) *Is a minimalist corporation, due to existing funding limitations for these bodies.*

The explanation that the limitation of funding is a major determinant of the minimalist nature of the corporation suggests that if more funding were available the corporation may take on a greater role. As currently drafted, the rules appear to adequately provide for sufficient flexibility to enable the capacity of the corporation to grow with increased access to resources. For example, the rules presently provide for a major role being played by the NTRB or a consultant acceptable to the native title holders, which could be the Aurukun Shire Council for example. However, this role is optional and the corporation retains the ability to perform all of its functions in the event that it is able to do so.

(c) *Has broad membership open to all adult Wik and Wik Way native title holders with a representational group structure retained for appointment to the Governing Committee for terms of three years.*

An earlier version of the Wik PBC rules provided for coterminous membership of the corporation and Governing Committee. The purpose of this was apparently to minimize any impacts resulting from

corporate governance problems, such as disputes between the Governing Committee and members of the corporation. The latest version of the rules now provides for open membership to all adult native title holders. Traditional representation structures have been incorporated into the composition of the Governing Committee. This is achieved by limiting the committee to sixteen persons comprised of two members each of the eight representative Wik and Wik Way sub-groups. The change from a representative membership model to a participatory model results from concerns regarding costs and efficiency as opposed to any particular concerns of the Registrar or native title holders (pers. comm. P.H. 12/11/01).

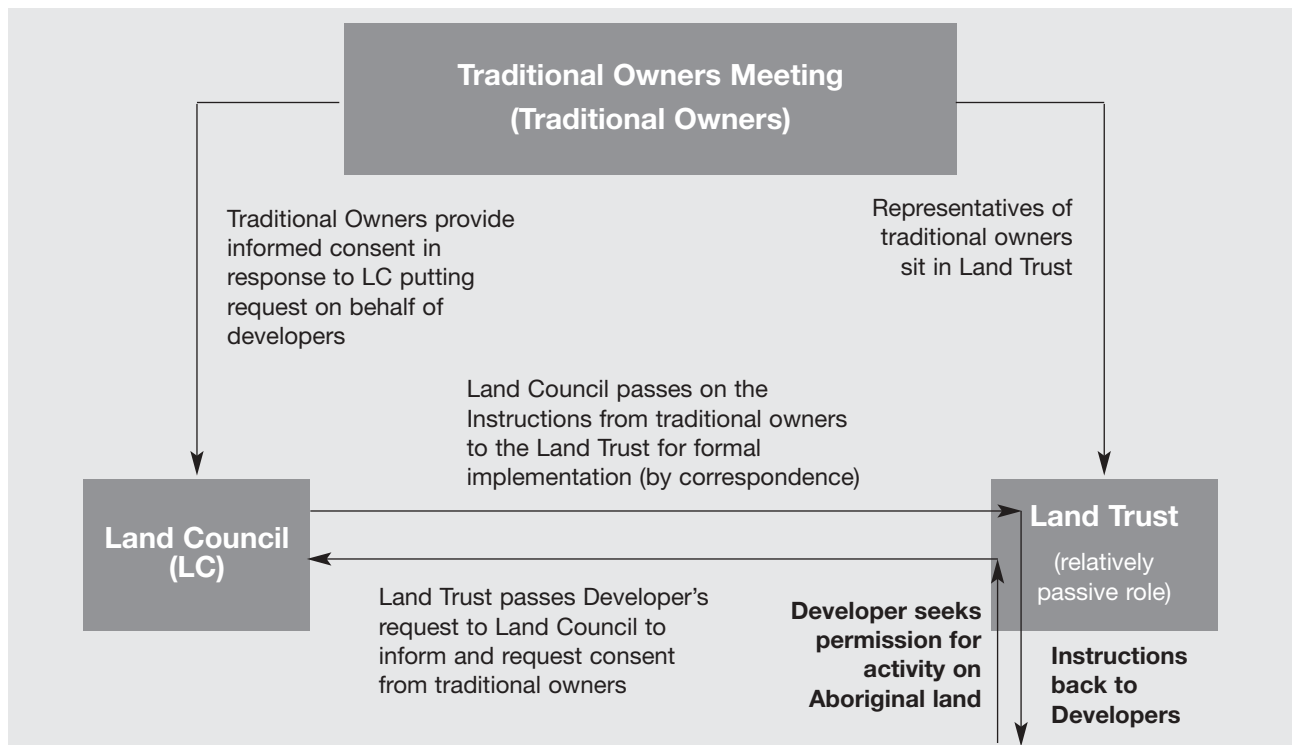
(d) *Has minimal autonomous decision-making authority beyond the making of native title decisions.*

The Wik PBC, as provided for in the PBC Regulations, cannot make any native title decision without following the consultation and consent procedures. However the corporation is to maintain ‘autonomous decision-making authority’ over ‘non native title’ decisions made and powers exercised in furtherance of the following objects:

- to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;
- to invest or otherwise apply any money held in trust as directed by the native title holders;...

- to perform any other functions in relation to the native title rights and interests as directed by the native title holders; and
- perform any other functions that are ancillary to but not inconsistent with the performance of the functions of a registered native title body corporate.”
- protect the native title rights and interests of the native title holders;
- promote the recognition of the native title rights and interests of the native title holders;
- advance the cultural, social, political, economic and legal interests of the native title holders, including by establishing appropriate legal entities to achieve these objects;
- relieve the poverty, misfortune, disadvantage and suffering of the native title holders;
- take advantage of investment and commercial opportunities that arise or relate to the native title holders and to exploit those opportunities to generate assets and funds for charitable purposes and employment opportunities for the native title holders and
- perform any other functions that are ancillary or incidental to but not inconsistent with the performance of the functions of a registered native title body corporate.

**Figure 16 The Tripartite Structure in the Northern Territory established under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (essentially a representative structure on the Land Trust)**



Note: In the current authors’ model for Cape York: -

- The PBC corresponds to the Land Trust,
- The PBC’s Secretariat (LSM Agency) corresponds to the Land Council, and
- The native title holders correspond to the traditional owners.

Therefore important “non-native title decisions” such as the distribution of compensation amongst native title holders, may be made by the corporation in furtherance of these objects without following the consent and consultation procedures. The breadth of the objects of the Wik PBC means that rather than holding “minimal autonomous decision-making authority” it possesses a wide scope for decision making without reference to the native title holders.

(e) *Is as professional and apolitical as possible.*

Office Bearers: It is worthy of note that the draft Wik PBC rules provide for only one office bearer, being a Secretary appointed on a yearly basis by the annual general meeting as opposed to being elected by the Governing Committee as is often the case. This would appear to be a wise means of avoiding the politicisation of the PBC that can result from the yearly election of a Chairperson. However it is noted that the most recent draft of the Rules has provided for the delegation of the Committee’s powers to a group comprising four committee members. This raises the prospect of “executive” decision making. It is noted though that such delegated powers may be revoked at any time by the Governing Committee.

(f) *Maintains accountability to native title holders through strict consultation requirements, broad membership and a general meeting open to all native title holders.*

It is possible that greater accountability to native title holders could be achieved by extending the application of the consent and consultation procedures beyond merely the making of native title decisions to include other decisions such as those about compensation and holding and investing money.

## Conclusion

Overwhelmingly, the key decisions on PBC design need to be made by native title holders on a case-by-case basis. Rigidly applying models, such as the passive and active PBC types identified in this chapter, is unlikely to be successful, as the circumstances confronting the formation and operation of each PBC will vary markedly. Indeed it is likely that many native title holders will prefer a hybrid of the models to meet their particular requirements. The ‘tri-partite model’ adopted in the Northern Territory would appear to be an attractive option. Its central advantageous feature is a passive PBC. However, when applied to PBCs this model is undermined by the corporate governance issues inherent in the mandatory use of the ACAA.

Aside from problems caused by the ACAA, other potentially major design challenges for native title holders include:

- maintaining the integrity of traditional decision-making processes whilst responding to the legal and administrative requirements of the PBC regime;
- pressures of dealing with timeframes imposed by external parties;
- juridification of laws and customs;
- the demography of the membership of the PBC;
- politicization and power politics within the native title group; and
- the logistical demands of maintaining traditional decision-making processes.

One of the key determinants for PBC design is the availability of funding for administration. Unless and until adequate funding is allocated toward the establishment and maintenance of PBCs, these entities are likely to suffer the same fate as that of land trusts established under the ALA, where compliance with minimum standards is already at very low levels. Poor funding is also likely to lead to poor levels of consultation with the native title holders and substandard decision-making. This in turn increases the likelihood for dispute amongst native title holders. Of course some PBCs may be fortunate enough to have resource agreements in place providing a ready source of funding for the administration of the PBC. Such organisations will have greater flexibility in designing decision-making structures that protect the interests of the native title holders and yet are able to be implemented effectively.

Whilst it is expected that future legislative reviews will lead to a more user-friendly PBC regime, such outcomes may be many years away. In the meantime PBCs must be designed in order that they are:

- accountable to, and respected by, native title holders as legitimate vehicles of native title management;
- able to meet the requirements of the Registrar of Aboriginal Corporations;
- flexible enough to respond to future reforms;
- simple enough not to lead to the juridification of laws and customs and rights and interests; and
- efficient enough to survive in an environment of negligible funding.

## Endnotes

- <sup>1</sup> “Wik PBC” and “Wik PBC rules” are used throughout to refer to the proposed Ngan Aak-Kunych Aboriginal Corporation, proposed to be incorporated under the ACAA and registered as the PBC of the Wik and Wik Way native title holders in relation to their existing and future native title determinations.
- <sup>2</sup> See Hayes (2000:1).
- <sup>3</sup> For example, PBC Regulation 9 deems consent to be given upon certification by five members of the PBC, see Chapter 2.
- <sup>4</sup> See Appendix 1.
- <sup>5</sup> PBC Reg 8.
- <sup>6</sup> Johnson in the matter of Lawson v Lawson [2001] FCA 894, Moran v Minister for Land and Water Conservation for the State of NSW [1999] FCA 1637, Ridgway.
- <sup>7</sup> NTC pp287-8.
- <sup>8</sup> Although it is noted that existing grants to NTRBs do not include components for PBCs.
- <sup>9</sup> NTA s203BB(1)(b).
- <sup>10</sup> NTA s203BF(1).
- <sup>11</sup> Rule 9.2 Draft Wik Rules.
- <sup>12</sup> Hayes (2000:2).

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## **CHAPTER 7: OPERATIONAL MODELS FOR LAND USE AND MANAGEMENT IN THE CASE STUDY SUB-REGIONS**

### **Introduction**

From the previous understanding of the planning environments in the two case study sub-regions, the following sets of relations can be generated as a result of the likelihood of ongoing successful claims by the native title holders and their legal and pragmatic needs that flow from their native title rights and interests.

1. Negotiating funding for LSM agency recurrent costs.
2. Negotiating funding for PBC administration.
3. Negotiating over land and sea uses with local government, mining companies, pastoral holdings, others.
4. Obtaining funding for LSM projects and functions for traditional owners.
5. Obtaining funding for land-based and sea-based enterprises for traditional owners.
6. The structuring or re-structuring of Indigenous LSM agencies to be formally linked to and directed through PBCs.
7. Negotiating co-operative relations between PBCs (representing native title holders) and relevant government authorities for a joint role in regulating bye-laws and rules governing environmental usage (eg. Fisheries Inspectors, Park Rangers, quarantine inspection, fire regulations).
8. Negotiating joint management of National Parks between traditional owners and QPWS.
9. Negotiating over future purchases of cattle stations and other leases and freehold land for traditional owners.
10. Obtaining funding and advice to prepare Management and Enterprise Plans for cattle stations and other acquired land.

This chapter addresses how structures to operationalize these sets of relations could be established on behalf of Traditional Owners. Taking the findings of the foregoing chapters, it is possible to design hypothetical operational environments for land management in the Coen and Wik sub-regions. For each of these sub-regions a proposal will be presented covering the relation of PBCs and land trusts to Indigenous land and sea management functions, taking into account native title holder rights and decision-making processes, administration needs and the economic sustainability of the proposal. These models are based on only limited consultation with Traditional Owners and cannot be regarded as being substantially resolved. Indeed to develop the types of planning models that are required for these sub-regions will require a good deal more effort by CYLC and associated Indigenous agencies. However these preliminary models will serve as useful vehicles for

the purposes of the current project by demonstrating a range of design problems and issues, as well as generating two diverse solutions to local Indigenous planning needs.

### **The Coen Sub-region Proposal**

At a project planning workshop at CYLC in November 2001, after a consideration of the nature of the Coen sub-region, a desirable specification for a corporate structure for this sub-region was outlined as follows: -

- (1) An overarching corporate structure must bring traditional owner and native title groups from the sub-region together to form a decision-making committee for common purposes: -
  - (a) Financial administration,
  - (b) Land and sea management at the sub-regional level,
  - (c) Obtaining grants for outstations and other support, and
  - (d) Liaising with National Parks Boards of Management.
- (2) Within this wider structure, separate traditional owner and native title group decision-making committees should be feasible, which
  - (a) act as trustees for local areas of land
  - (b) make decisions about budget allocations for their own groups,
  - (c) make decisions about local assets, businesses etc.,
  - (d) make PBC and land trust relevant decisions, and
  - (e) oversee land and sea management contracts on the group's traditional land.

From the above specification, the structure outlined in the following pages and illustrated in Figures 17 to 20, has evolved and been rationalized. As a way of initially focusing on the Coen sub-region, it was most useful to consult with the KULLA Land Trust, as it comprises representatives from all of the four language groups in the sub-region.

### **Establishing the views of the Constituent Groups**

Consultation with the traditional owners of the Coen sub-region was not as extensive as for the Wik. Nevertheless at a meeting of the KULLA Land Trust (for Silver Plains) held to discuss the current project, the proposition was put as to whether all land-related business could pass through one organization for the Coen sub-region. People agreed that it was acceptable to all work together and that any outside agencies wanting to talk with traditional owners should go through KULLA. However, when people were interviewed individually, there was a strong view that

KULLA should not have been set up on behalf of the four groups, and that right from the start they wanted to have separate trusts and that this is the way they would like to go in the future. There was no apparent animosity in the meeting between groups, and people also said they would stay with KULLA for the time being. Various people from several groups expressed the need for both Elders and young people to sit down all together and talk about land issues. The results of these separate interviews with language group representatives are as follows.

(a) The Umpila Position

The Umpila expressed a strong desire for an 'Umpila only' organisation. They already have established the Umpila Aboriginal Corporation at Lockhart River (in late 1990). The Umpila see themselves as very distinct from Kuku Ya'o, the coastal group to the north, but as being close to the Lamalama with whom they border in the south and have family ties. The Lamalama were the only neighbouring group with whom the Umpila were comfortable in joining together for attaining some land aspirations, eg. tourism.

(b) The Lamalama Position

Members of the Lamalama who were present at the Coen Meeting, expressed a strong desire to go their own way for country but also to work in with the Umpila mob who, like them, are 'Sandbeach People', and with whom they have close kinship ties. At present the focal point of the Lamalama homelands movement is Port Stewart under the leadership of Sunlight Bassini. Given the proximity of Port Stewart to Coen, Coen is undisputedly the preferred centre for Lamalama land and sea business at present. However it is possible that this situation could change in the future. Already the Lamalama, together with other groups further to the south, have gained a favourable determination from the ALT to land in the Lakefield National Park, though the handback is incomplete. Activity by Aboriginal rangers in this Park is administered through the Rirmerr Aboriginal Corporation in Cooktown. A number of Lamalama families reside in Cooktown and at Hopevale, a 45 minute drive to the north of Cooktown. The Lamalama also currently have a native title claim over the former Marina Plains Pastoral Lease, Claim QC99/022 (see map in Figure 11). If outstation opportunities thus developed in the more southerly part of Lamalama territory, there may be future pressure to move the centre for land and sea management to Cooktown or even Laura (pers. comm., P.B. 19/9/01).

(c) The Kaanju Position

The Kaanju of the Coen sub-region identify collectively variously as either Kaanju or, when wishing or needing to distinguish themselves from

their northern Kaanju neighbours, as southern Kaanju. As well as this major division into southern and northern Kaanju (noted above in Chapter 6) there appears to be a strong differentiation into clan groups or clusters of clan groups, rather than as a constituent identity of one Kaanju language group claiming the whole of Kaanju lands. Two examples of this differentiation are (a) the three southern Kaanju clan estate groups joining together for the Geikie Trust, and (b) the Birthday Mountain Land Trust which comprises a single family – but holds the land on behalf of all southern Kaanju. On the other hand the whole of the southern Kaanju joined together for the Mungkan-Kaanju National Park claim which was claimed on behalf of the whole group, even though it only covers the country of some of the southern Kaanju clans. Some southern Kaanju are also involved with the transfer of the Lockhart DOGIT, and one or two of the Silver Plains native title claims.

References to Kaanju in this section refer to Kaanju people and sub-groups (clans, families) from the Coen sub-region, who in other contexts have identified collectively as southern Kaanju. It is apparent that the Coen sub-region Kaanju are not completely comfortable in working through one corporation in all contexts and situations.

(d) The Ayapathu Position

The main person speaking for the Ayapathu was Phillip Port who was most concerned about the lack of any funds to run his outstation. However no clear indication was received from Ayapathu as to their preferred structure for a corporation.

### Summary

Although it is clear that further consultation is required on these matters, especially with the Kaanju and Ayapathu, the need for independent corporate vehicles for each of the four language-named tribes is generally emphasized, combined with a central agency for the Coen sub-region that will provide those necessary administration functions common to all four groups.

### Interim PBC and Land Trust Model for the Coen Sub-region

There are currently five native title claims in the Coen sub-region. Of these, two are Umpila, one is Lamalama, one is Kaanju/Umpila and one is comprised of all four groups. The normal situation is to have one PBC for each native title claim, irrespective of whether a claim is made by one or multiple language groups. In addition there are 13 existing or proposed land trusts under the ALA. Given the poorly resourced nature of these groups and the lack of viable income for Indigenous people in this sub-region, any methods that can reduce the administration costs of both PBCs and land trusts must be seriously considered.

**Medium to Long-term model:-**

According to findings in Chapter 2, PBCs and land trusts should be able to either amalgamate their operations or coordinate them as closely as possible. How this can hypothetically occur was outlined in Chapter 2. Let us now examine this case study.

The table below sets out the pattern of complexity concerning the existing and the proposed land trusts and PBCs in the Coen sub-region and their distribution between the different language groups. There are a total of 29 relationships between specific language groups attached to specific areas within or just outside the

**Table 12 Existing or proposed land trusts and PBCs for the Coen Sub-region indicating identities of traditional owner language groups**

Language Groups	Ayapathu	Lamalama	Umpila	Kaanju	Others
<b>Land Trusts and Aboriginal Corporations</b>					
(e) Watharra LT (Birthday Mountain)				✓	
(f) Wunthulpu LT (Coen Reserve)	✓			✓	
(g) Yintningga LT (Port Stewart)		✓			
(h) Moojeeba (Outstation, Silver Plains)		✓			
(i) KULLA (Silver Plains)	✓	✓	✓	✓	
(j) Archer Bend NP (yet to be granted)					Wik Mungkan
(k) Rokeby NP (yet to be granted)	✓			✓	Wik Mungkan
(l) Lochinvar USL (yet to be granted)	✓				
(m) Lockhart River South				✓	
(n) Lockhart River North			✓	✓	Kuuku Ya'u Ulthalganu
(o) Morris and Ellis Islands (claim yet to be heard)			✓		
(p) Geikie AC				✓	
(q) Rirmerr AC (Lakefield NP, yet to be granted)		✓			Kuuku Thaypan and a number of other clan/language groups to the south of Lamalama
<b>Future PBCs to be created for...</b>					
1. NT Claim QC97/07 (Silver Plains)	✓	✓	✓	✓	
2. NT Claim QC95/14			✓	✓	
3. NT Claim QC95/01			✓		
4. NT Claim QC96/60			✓		
5. NT Claim QC99/22 (Marina Plains)		✓			

sub-region. This implies that if there was an agency providing administrative services to these groups, handling incoming communications with traditional owners and native title holders from government and industry, there are a potential of 29 sets of transactions which may have to occur with separate legal entities on a recurring basis. This undoubtedly would place great strain on such an agency.

If we take the simplest example, the Ayapathu interests, their claims can be summarized as follows:-

(a) Name: Silver Plains

Status: KULLA Land Trust for Silver Plains. Joint ILC, Qld and Clth Govs Purchase  
Also includes: Lamalama, Umpila, Kaanju

(b) Name: Rokeby NP

Status: ALA claim recommended for grant by ALT

but yet to be granted to a land trust  
Also includes: Kaanju, Wik Mungkan

- (c) Name: Lochinvar USL  
Status: ALA claim recommended for grant by ALT  
but yet to be granted to a land trust  
Also includes: Nil other
- (d) Name: NT Claim QC97/07  
Status: Not registered  
Also includes: Lamalama, Umpila, Kaanju

The legal procedure for amalgamating these claims would be as follows:-

- (a) Design a proposed Ayapathu PBC for QC97/07, but to also eventually be appointed as a trustee of the three land trust areas. Note that in the case of Silver Plains and Rokeby there will be additional trustees from the other groups (preferably PBCs).
- (b) File one native title claim over the Ayapathu areas within the three land trust areas on behalf of Ayapathu.
- (c) Apply to court to have all of the four native title claims merged and seek one determination.
- (d) Determination of native title occurs and the PBC is appointed.
- (e) Ayapathu grantees for existing Land Trust areas withdraw and are replaced by the PBC as trustee.
- (f) All four areas have their title in the name of the Ayapathu PBC.

The amalgamation of areas in the above manner is illustrated in Figures 17-20 and is clearly a medium to long-term solution over at least several years. This simplified methodological approach depends on the capacity to separate the respective land interests of the Ayapathu and their neighbours (viz the Lamalama, Umpila, and Kaanju). An added complexity arises if there is not a clear-cut boundary between the territories of adjoining groups, but rather areas of shared or overlapping interest between groups. The planning options are here constrained by the Native Title Act which prescribes that there can only be one PBC for each determination. The resultant three options are set out in Figure 18, and it can be seen that despite which option is chosen, it is inevitable that the PBC for the overlap area must incorporate both groups.

Another straightforward example of potential amalgamation would be to have one PBC for the two Umpila claims QC95/1 and QC96/60.

#### **Native Title Consultation in the Coen Sub-region**

There would be a need for each of the four language groups (Lamalama, Umpila, Kaanju, Ayapathu) to have a capacity to meet by themselves on occasions, to make decisions in a customary manner and in accordance with traditional law about critical events affecting native title in their respective territories. The ethnographic evidence in support of this customary

form of decision-making was outlined in Chapter 6.

There would also be an ongoing need in the Coen sub-region for some assistance to facilitate such meetings to make decisions that affect native title. Such assistance would also involve meeting planning and notification, arranging transport, keeping minutes, and mailing outcomes to affected parties. This raises the issue of PBC administration.

#### **PBC Administration in the Coen Sub-region**

There are a number of persuasive arguments as to why there should be one central agency for the Coen Sub-region as a point of contact with outside agencies, government departments, industry groups, etc. One is to achieve economies of scale. Another is that it is already a requirement of certain funding agencies. For example ATSIC will not fund individuals or clan groups directly for outstations; it will only fund through a regional organisation; and it is not prepared to administer many separate, small grants. At present all ATSIC grants have to go through CRAC. The position of the State Government in relation to Aboriginal land resourcing is believed to be similar (pers. comm., K. M. 25/05/01).

The most plausible and efficient method of providing an administrative service to the various PBCs is for them to contract to one service provider which the authors shall, for the time being, give the hypothetical name 'Coen Region Land and Sea Management Agency'. By using one agency it will simplify the complexity of transactions, given that for the foreseeable future there is likely to be a number of PBCs and land trusts for any one language group and also PBCs and/or land trusts for multiple language groups.

The obvious contender to fill the role of this LSM Agency is CRAC, as it is already existing and operational and to some extent already performing this role. However, in the view of the current authors, CRAC should not automatically assume this role, but rather a mandate needs to be obtained separately from the four constituent language groups. If there are any grievances with the current mode of operation or structure of CRAC, reforms may have to be put in place before CRAC can take on this role.

The minimal administration services required from the Coen LSM agency would most likely be as follows:-

- The receipt and dispatch of correspondence;
- Drafting of correspondence at the direction of the PBCs;
- Holding bank account documents, meeting minutes, legal documents, etc;
- Calling meetings of the PBCs as required;
- Calling meetings of individual groups of native title holders;
- Providing feedback on matters affecting native title to native title holders, by way of correspondence,



- meetings and communal newsletter;
- Representing the PBC at meetings with representatives of development companies, government departments and authorities, etc;
- Taking on the role of applying for or raising funds for the PBCs, particularly for (a) the cost of the administration services, (b) the cost of travel for meetings especially delegates from Cooktown, Laura, Lockhart River, Cairns and Aurukun.

There would be a potential for the LSM agency to provide a far broader set of services than the minimal administration 'package' as outlined above, viz those of managing the native title rights and interests as raised at the end of the last chapter. However the Traditional Owners in this particular sub-region were not of this persuasion.

### **Proposal for Land and Sea Management Services**

Key outcomes of the consultation at Coen and Lockhart River with the traditional owners were that the four tribal groups (Lamalama, Umpila, Ayapathu, Kaanju) wanted:-

- (a) to conduct their land and sea management under the separate land corporations for each group.
- (b) to establish a base in their own country for that group only (particularly stressed by Umpila people living in the Lockhart River Community which is outside of their country).

Therefore, in addition to the PBC having a service agreement with the 'Coen Region Land and Sea Management Agency' for administration services, it is envisaged that it will eventually contract a range of land and sea management services on behalf of the native title holders to other Aboriginal Corporations which have been or will be established on behalf of each of the four tribal groups. We shall for the time being refer to these Corporations as follows:-

- Umpila Aboriginal Corporation (already formed)
- Lamalama Aboriginal Corporation
- Kaanju Aboriginal Corporation
- Ayapathu Aboriginal Corporation

Those services to be carried out by these Corporations would most likely comprise some or all of the following:-

- Carry out land and sea management planning
- Provision of outstation services
- Provision of rangers to monitor country and carry out management projects in country
- Negotiate with developers of various sorts including mining companies and tourism operators
- Carry out cultural heritage assessments and socio-economic impact studies prior to development
- Employ native title holders in CDEP who in turn will participate in the range of land and sea management activities

Note that it is expected that negotiations would have to be carried out with the Lockhart River Aboriginal Council and the Cook Shire Council concerning the provision of services for the PBCs in their respective local authority areas. Something of the above arrangements are indicated in Figures 19 and 20.

### **Economic Planning**

The Coen sub-region is economically 'poor' from the Indigenous perspective. There are no viable commercial enterprises in active operation, nor are there any prospective mining projects from which cash flows are imminent. Nevertheless potentially viable prospects for tourism, cattle herding and prawn farming have been identified and form part of Traditional Owner aspirations. The under-resourced nature of the sub-region is reflected in the frustrated comments of the Indigenous leaders with whom the authors consulted.

- "We have the wisdom to help our young people but no resources to do it."
- "We want to know according to what criteria the government will be prepared to give us funding."
- "We are in prison with the monetary cycle- there are no benefits for us to get out."
- "There are plenty of dollars for talk."
- "For eight years I have been sitting down talking. I still haven't got a 4wd to get me back to my country. I have asked all government departments for ex-vehicles, charities for help, everyone. We talk about it all a lot but we never get any results from these meetings. The government is setting us up for failure."
- "We are still here after all these years of talking. Why can't we go and do something, we don't have time any more to sit here and talk about things."

### **Development Prospects**

Across Australia, a standard procedure in conformity with cultural heritage legislation is for development companies to contract Indigenous groups to carry out cultural heritage surveys to protect sites. Mining and other development companies may also be legislatively obliged to carry out a social and environmental impact assessment in relation to their projects. Such assessments look at the positive and negative effects of development and make recommendations to prevent and ameliorate the negative effects. Through such studies a range of economic activities can often be designed in which Indigenous people can engage and which can 'piggy-back' on the main project. If native title rights or interests are extinguished or impaired by such development then some compensation may be negotiated and received for such (eg loss of resource collection area, damage to a sacred site etc). The proposed Chevron gas pipeline (from PNG to Gladstone) constitutes a project of this type which could provide substantial positive impacts for

Indigenous people in the Coen sub-region, if and when it eventuates.

### Consideration of Alternate Models

During consultations for this project there was some discussion about the two alternative trustee and agency PBC models. Although there were no firm outcomes, the agency type model appeared more attractive for use in the sub-region.

### Further Planning Issues in the Coen Sub-region

There are a range of important problems and issues that would require ongoing investigation and resolution to refine the Coen sub-region's strategic proposal. In summary they can be listed as follows:-

- (a) Relation to Lockhart River Aboriginal Council and the former DOGIT Area (now a Land Trust).
  - The role of Lockhart River LSM Agency in the north-east of the Coen sub-region.
  - The relation to Umpila Sea Claim areas and their future PBCs.
  - The relation to Lockhart River/Umpila area and its PBC.
- (b) Relation to Mungkan Kaanju National Park
 

During the authors' consultation, the Wik Mungkan, Kaanju and Ayapathu traditional owners were very frustrated at the lack of progress by the Queensland Government in establishing a joint management regime for this park. The last meeting with National Parks for Mungkan Kaanju had been in August 2000. The traditional owners were of the view that Aboriginal people should make a 'big umbrella' (i.e. all three groups coming together), as was done for the land claim, and all sit together to talk to National Parks. The traditional owners have requested an administration centre for the Mungkan Kaanju National Park in Coen.
- (c) The relation to the Southern Lamalama Area
 

Mention was made earlier of this issue. Should it be included in the Coen sub-region so that all Lamalama land and sea interests are administered through the one LSM Agency?
- (d) The position of the Merapah group
 

This is discussed under the Wik sub-region in the next part of this chapter.

It has not been possible to thoroughly address all of these issues within the time constraints of the consultancy.

### The Wik Sub-region Proposal

Consultation by the authors at Aurukun was more extensive than at Coen/Lockhart River (two trips to Aurukun whilst only one to the latter) with particular emphasis on the formulation of PBC proposals for the Wik and Wik Way Native Title Claim. At the conclusion of a community meeting at Aurukun

(25/07/01, see Appendix 2 for details of attendance), there was general agreement on the following points:-

- (i) There was consistent unity of having all Wik people represented on the one PBC ("All Wik people have spoken as one").
- (ii) People were pleased to have their representation on the PBC to be generally based on a structure of five ceremonial groups as regional groupings:- Shivrri, Apelech, Winchanum, Puch, and Wanam. The exception was a sixth grouping, Wik Iyanh/Ayapathu, which was on the basis of language groups from the south-east of the claim area rather than ceremonial affiliation.
- (iii) There was an agreement that there was an ongoing need to consult further with the families from 'inside country' (specifically the south-east and north-east parts of the claim area), and with Pormpuraaw, Coen and Napranum representatives to confirm this structure.
- (iv) Once this consultation was taken further by the lawyers for the Wik and Wik Way Native Title Claim, an additional three groups were added and the first group was given a more complex description as follows.

### The Wik PBC Model

The Wik PBC model is of the agency type and comprised of two persons having native title rights and interests from each of the following eight representative groups (total 16 persons):-

1. The Shivrri ceremonial group; or the native title holders for the Ward River, Norman Creek, Pera Head, Mbang, Moingam, Hey River, Embley River or Marmoss River regions; or the Alngith or any other Wik Way language groups.
2. The Winchanam ceremonial group.
3. The Apelech ceremonial group.
4. The Puch ceremonial group.
5. The Wanam ceremonial group.
6. The native title holders for the lower (bottom-side) Holroyd River, Christmas Creek or Edward River (as those rivers are known locally) regions.
7. The Mungkanhu or the Wik-Iyanh language group.
8. The Ayapathu language group.

Within this structure the authors consider there is an additional need to ensure that some of the representatives reside in each of Coen, Napranum and Pormpuraaw communities, to ensure adequate representation of native title holders in these communities, for the purpose of communication and feedback. Further details of the internal rules of the PBC have already been outlined in Chapter 6.

### Individual representatives on the PBC

There were mixed views about the categories of individuals who should be nominated to serve on the

PBC. Three categories were elicited: (i) Elders/law leaders, (ii) younger adults with political experience or potential to negotiate with non-Aboriginal Australians, or (iii) a mixture of Elders and younger adults to enable younger adults to be trained by the Elders. For example Ralph Peinkinna said the PBC members should be 'law carriers, Kaypanbin,' aged in their 50s or 60s. Stanley Ahlers spoke of a 'Council of Elders'. On the other hand, Gladys Tybingoompa said "half Elders, half young people, so young people learn and are trained." At the Winchanam group meeting, this latter perspective was similarly adopted. "Old people wise; give ideas to young people so they can carry on."

### The name of the PBC

The community meeting at Aurukun of 25/07/01 agreed that the name of the PBC should be 'Ngan Aak Kunych Aboriginal Corporation' (after a suggestion by Wik Elder Robert Holroyd). This name literally means 'We (not you), the owners of this Country'.

### Native Title Consultation in the Wik Sub-region

There would be a need for each of the above eight groups to have a capacity to meet by themselves on occasions in accordance with customary methods of decision-making (as discussed in Chapter 6), to make decisions about critical events affecting native title in their respective regions. This is a most critical aspect of the model, necessary to ensure that Wik and Wik Way law and custom are incorporated into decision-making on land and sea issues.

However, it is also a vulnerable aspect of the model, with the following potential problems

- The difficulty of individual groups having a viable meeting when key personnel may be residing in dispersed centres (eg, Aurukun, Coen, Pormpuraaw).
- Having available funds to facilitate transport will be a prerequisite for adequate consultation.
- Aurukun Elders complained about apathy to attend meetings amongst their people.

It should also be noted that decision-making within each of these groups may still have to devolve to the clan or extended family level, before being brought back to the group level, as the anthropologist D. Martin points out (pers. comm. February 2002).

"It is absolutely crucial to note that the ..... ceremonial groups constantly talked about in Aurukun are not land holding units, nor are they units of political, social, or economic action. Possible partial exceptions are Shivrri (which basically equates to Wik-way), and Pucha, which covers the groups in the lower Kendall region, but even here the appellation does not correspond to corporate units within Wik society which are particularly relevant to the operations of native

title.....The basic appropriate groupings in which such discussions would be held are ... 'families' within regional associations.

It is not proposed that any of the above eight groups be separately incorporated for business activities (as was the case for the four language-named tribes of the Coen sub-region). On the contrary, there is some concern about the likelihood of 'fissioning' or the subdivision of such corporations if they were formed, as it is a commonplace feature of the political dynamics in the Wik universe, both socially and corporately. An alternative would be to have a central Wik and Wik Way enterprise corporation. (pers. comm., D. Martin 16/11/01.) However, it is noted that the Merapah group, while not opposed to being part of the wider Wik PBC, has expressed the wish to maintain a separate corporation as a vehicle for the ownership of the pastoral lease and their future cattle enterprise.

Despite this apparent problem, it is essential for the eight groups to have a capacity to meet. A realistic position is that some of the groups will need to have their meetings facilitated. (This will be discussed further later in the chapter.)

### PBC Administration

The most plausible and efficient method of providing the PBC with an administration facility would appear to be for the PBC to contract the Aurukun Shire Council (ASC) as a service provider through its Land and Sea Management (LSM) Unit (which in turn could draw on wider ASC resources by internal arrangements). The ASC has confirmed to the authors that it would be prepared to provide the PBC with secretarial and administrative services.

The minimal administration services required of such a secretariat on behalf of the PBC would most likely be similar to the Coen sub-region, viz, the preparation, receipt and transmittal of correspondence, holding legal documents, calling meetings for decision-making and information dissemination, providing feedback to native title holders, and raising funds to fulfil such services.

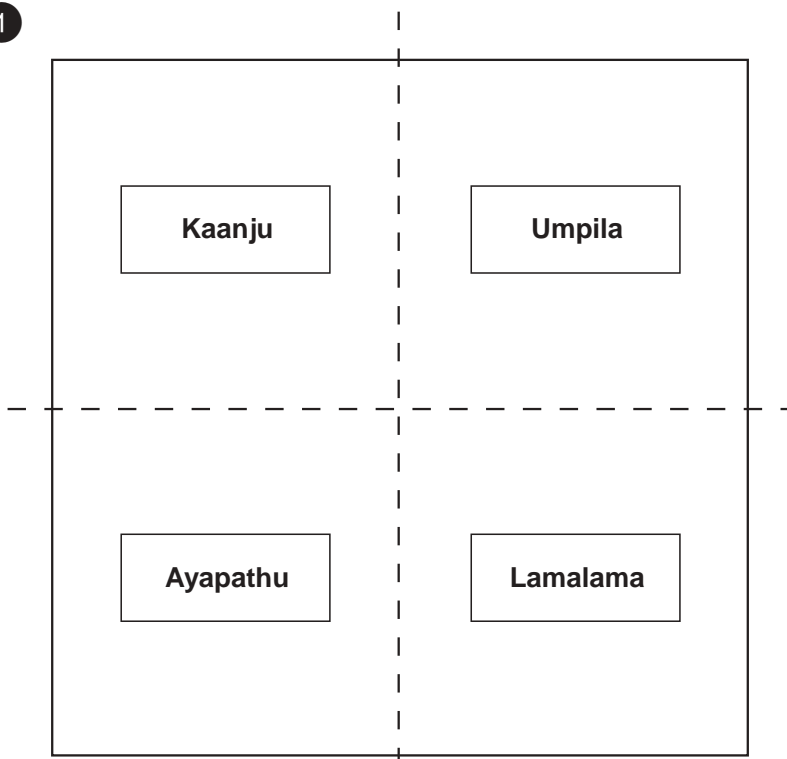
The advantages of the ASC taking on the administration role are:

- (a) avoiding duplication of bureaucracies,
- (b) due to the lack of establishment funds for the PBC,
- (c) the centrality of Aurukun in the Wik sub-region, and
- (d) the willingness of ASC to take on this role.

However there is a potential disadvantage of conflict of interest in so much as the ASC is a party to the Wik and Wik Way Native Title Claim and there may well be future dealings between the ASC and the Wik PBC in which the PBC's secretariat (being based in the ASC), finds itself ethically compromised. There would therefore have to be some written protocols in place concerning agreed procedures in such a case.

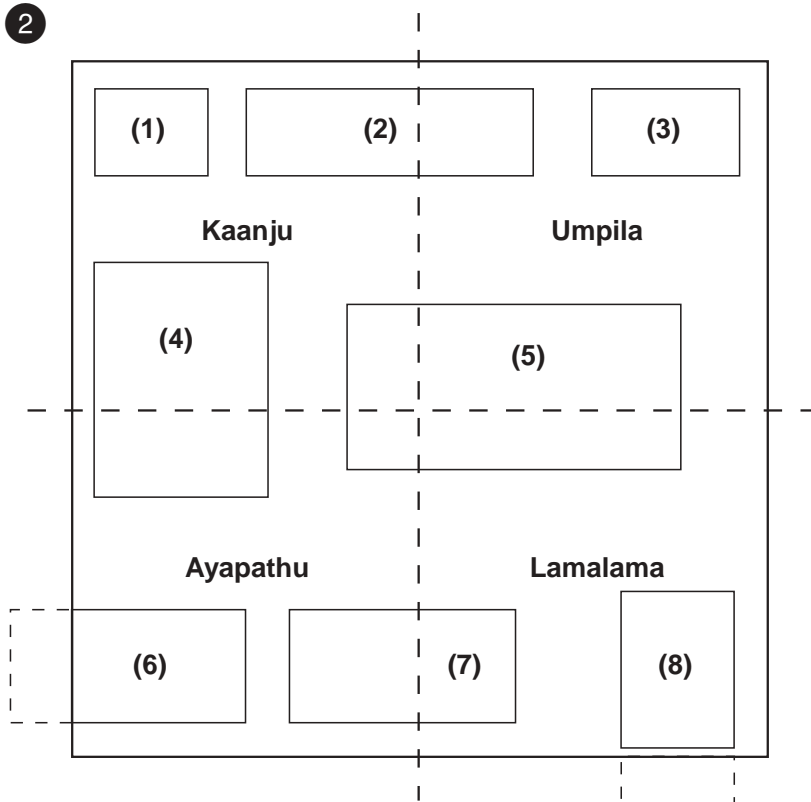
**Figure 17 A conceptualisation of the planning for the Coen Sub-region**  
 (figure continued on the following two pages).

1



Schematic map of the Coen sub-region showing the four language-named tribes and their territories.

2



The various pieces of land being claimed under the ALA & NT Acts overlap between different groups and their areas.

Figure 17 cont.

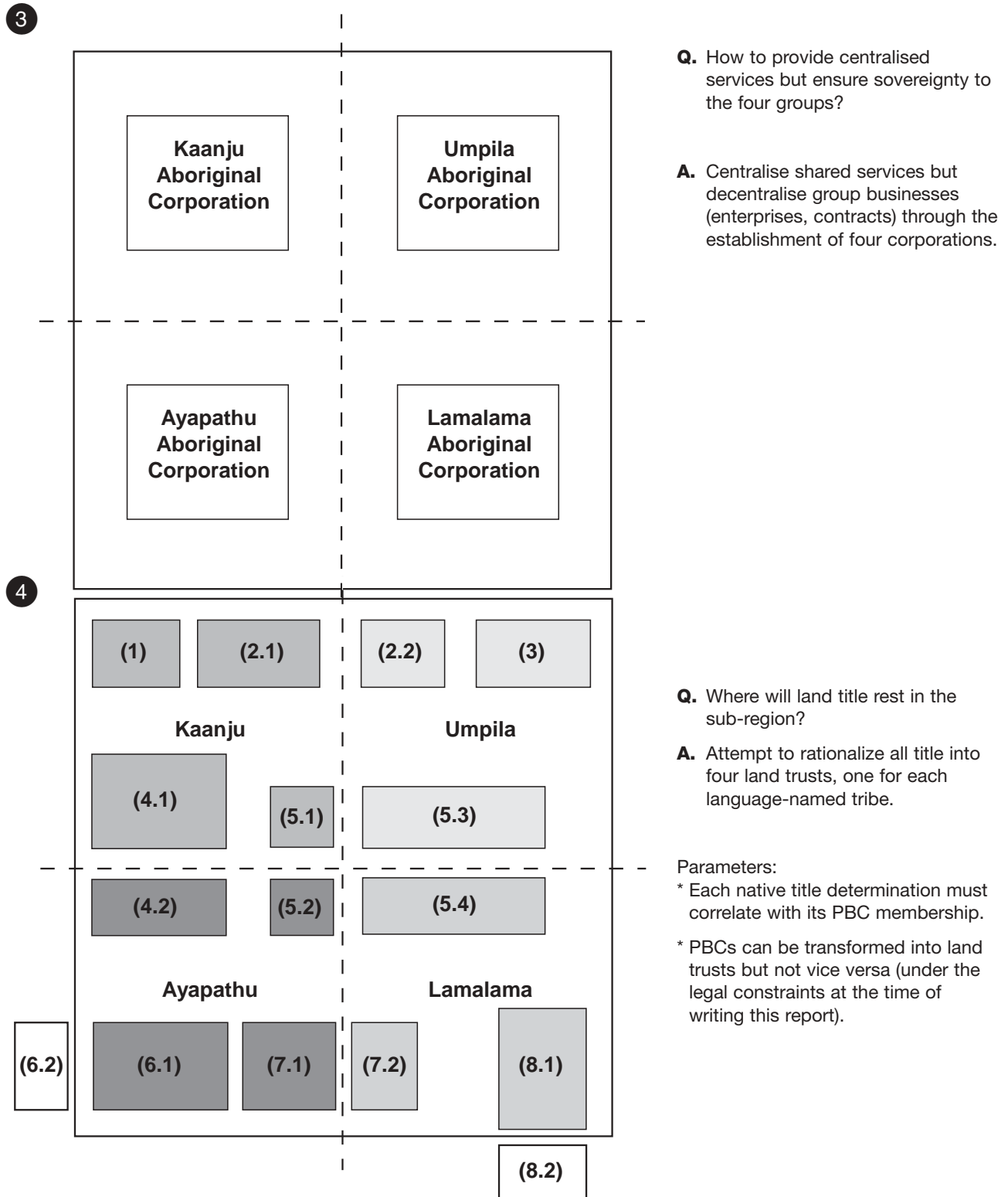
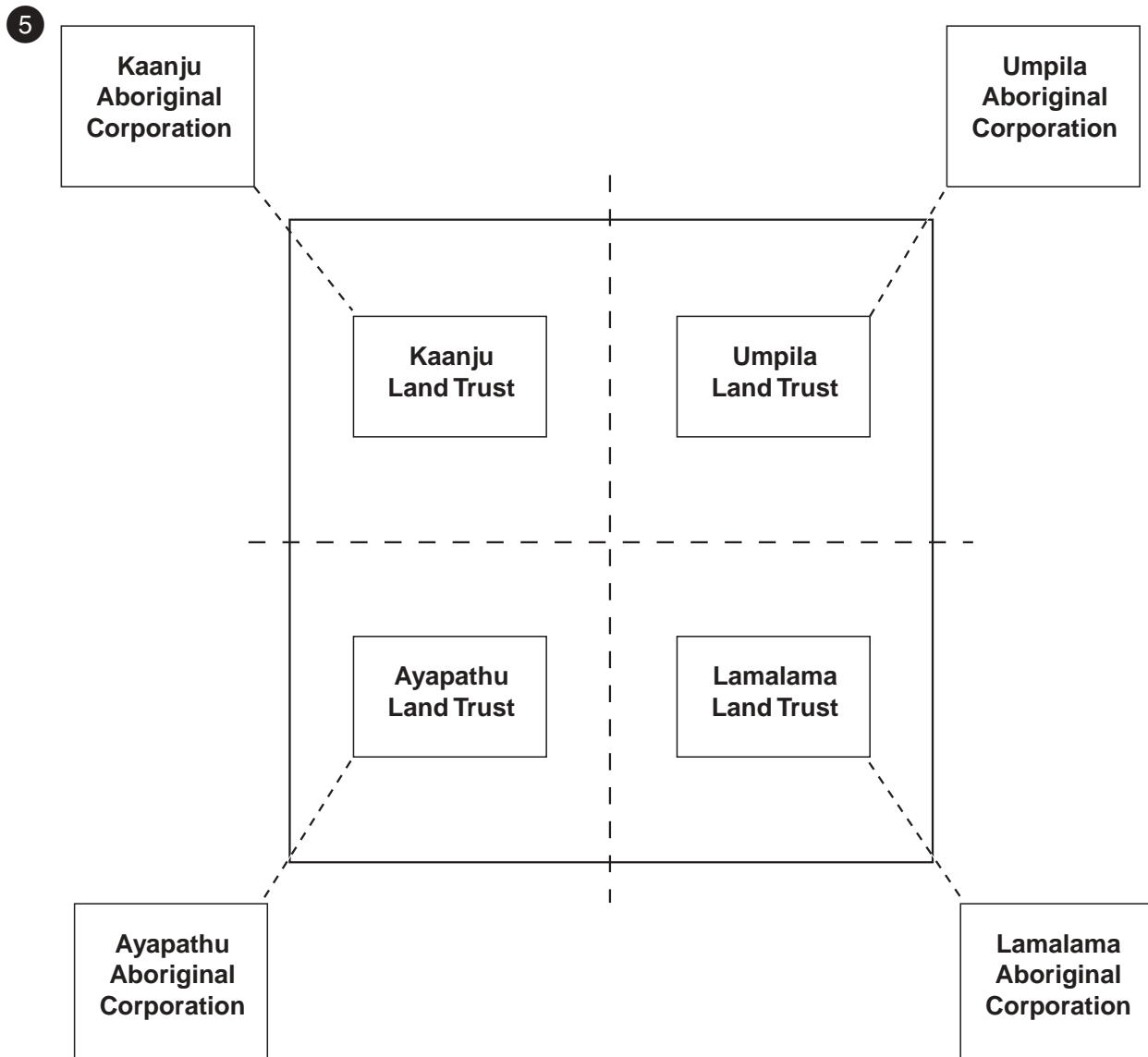
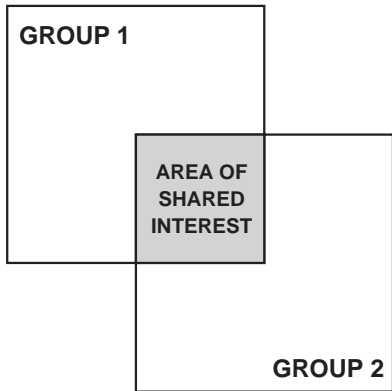


Figure 17 cont.



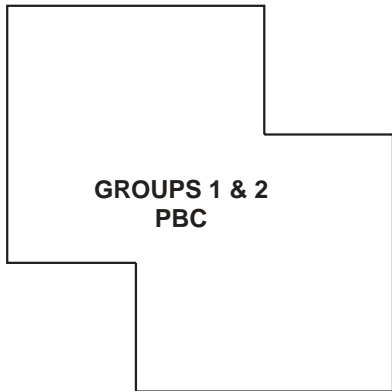
- Q.** How will land title control and asset control relate?
- A.** Legally separate the two to protect the title.

**Figure 18 Diagrammatic analysis of how overlapping native title claims may be resolved in terms of possible determinations and PBCs**



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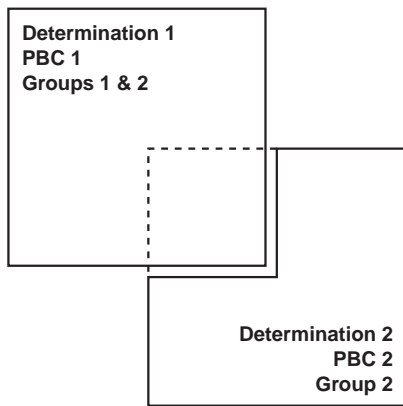
If two groups making a Native Title claim to a common overlapping area wish to establish PBCs, they are constrained by the following options.



**OPTION 1**

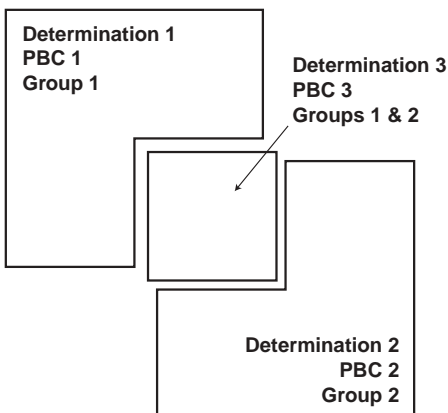
One Determination and one PBC.

**Note** that in both Options 1 and 2, care needs to be taken in designing PBC structures that reflect the extent and limitation of decision-making within each part of the claim area (shared versus unshared areas).



**OPTION 2**

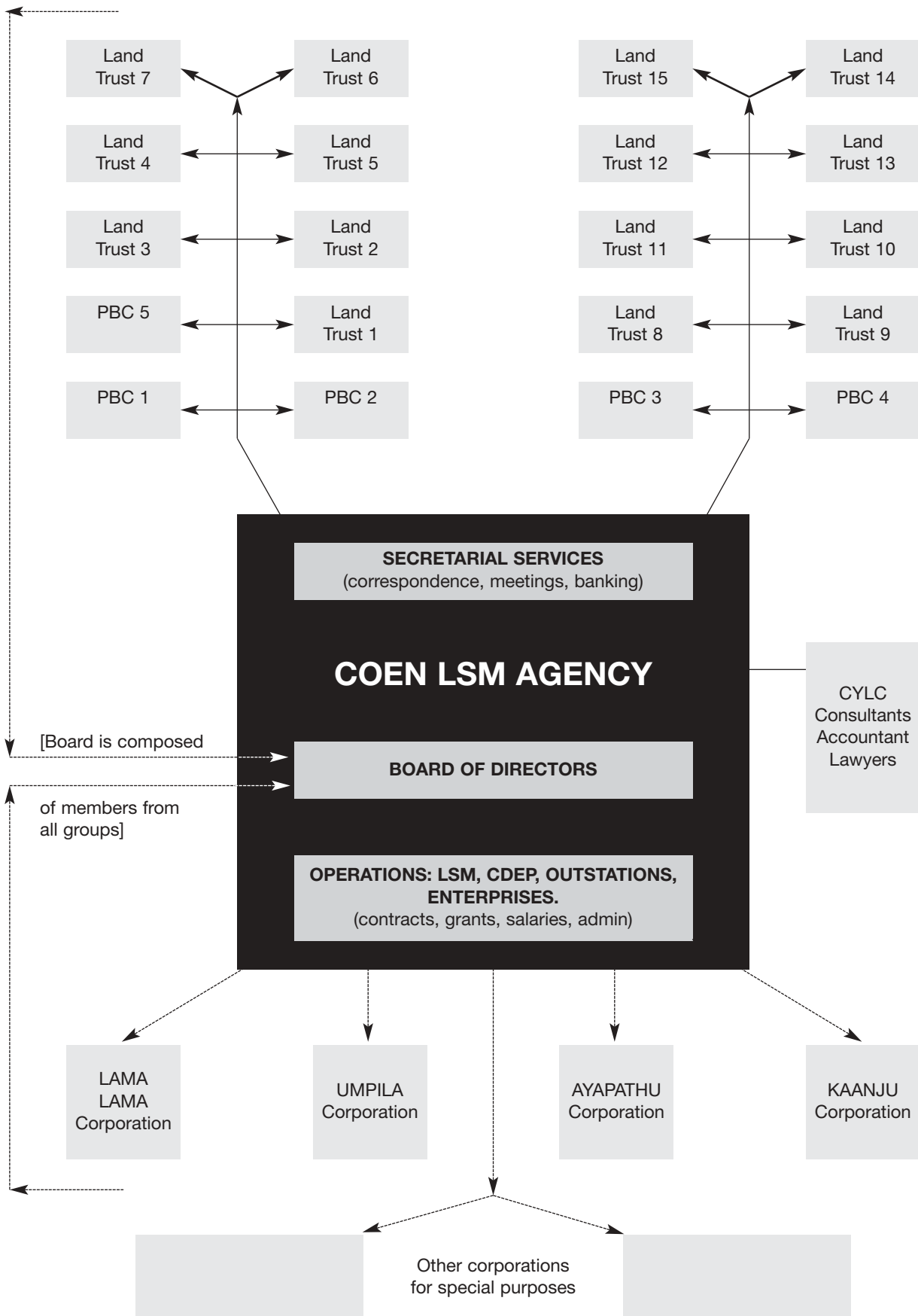
Two determinations and two PBCs, albeit with one of the PBCs having dual membership.



**OPTION 3**

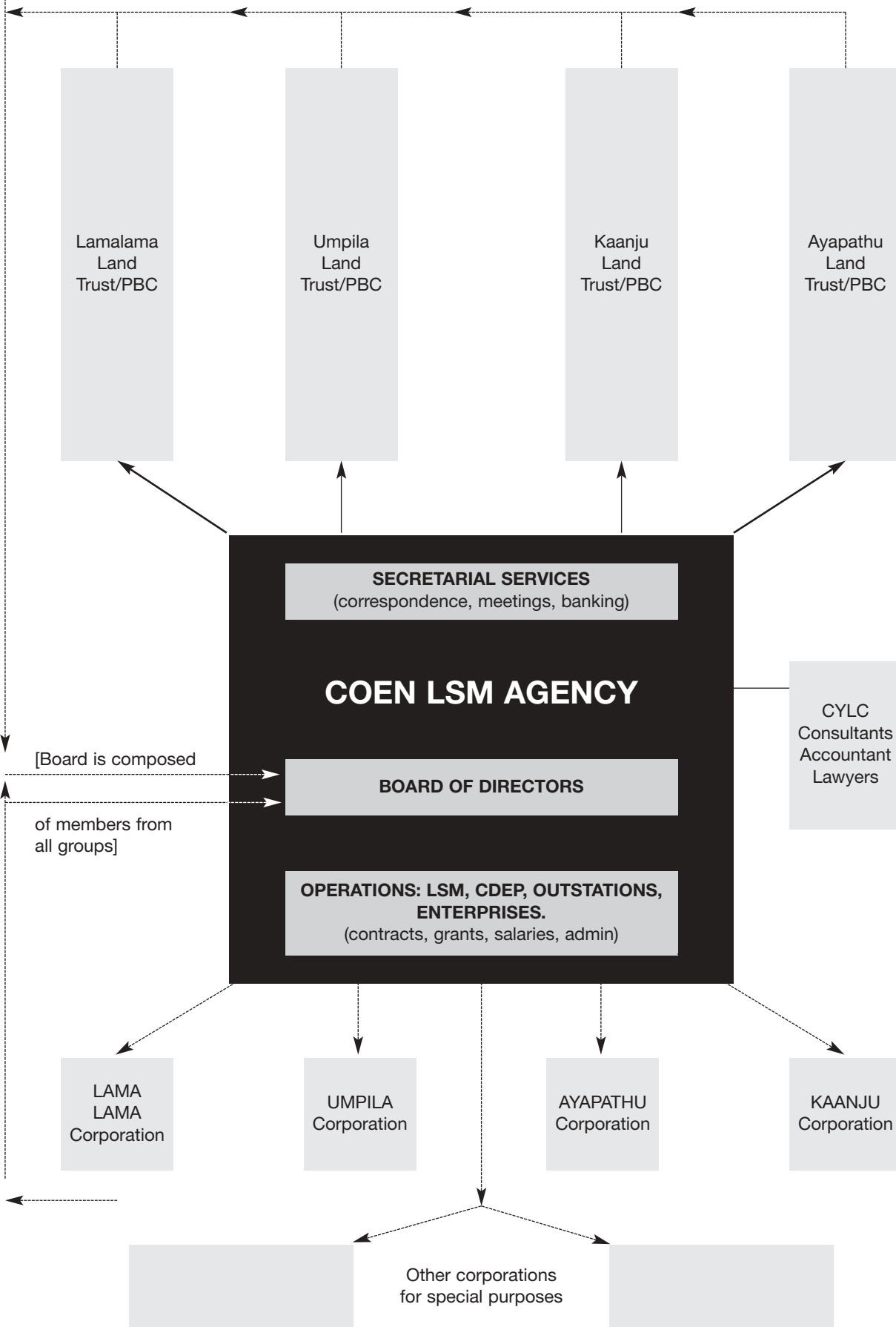
Three separate determinations and PBCs.

**Figure 19** Diagram illustrating the proposed structural relation of the Coen LSM Agency, the many PBCs and land trusts, and a future set of tribal corporations for day-to-day business in the Coen Sub-region. This should be achievable in the relative short-term.





**Figure 20** Diagram illustrating a possible long-term structural relation of the Coen LSM Agency, a hypothetical set of tribal land trusts which also serve as PBCs for each tribe, and a future set of four tribal corporations for day-to-day business in the Coen Sub-region. This would result after an amalgamation and rationalisation of all existing PBCs and land trusts.



The services of the secretariat must be of a high professional standard to ensure transparency for the PBC and to negate the efforts of any members who may attempt to usurp corporate power and ignore the interests of native title holders.

### Land and Sea Management Services

In addition to the PBC having a service agreement with the ASC Land and Sea Management Unit for administration services, it is envisaged that the ASC Land and Sea Management Unit will eventually contract out a range of land and sea management services on behalf of the native title holders in order to manage certain of their native title rights and interests (see Figure 21). This was supported by all the traditional owners who were consulted, despite one of the authors (PM) mooted concepts for alternate structures. The LSM services would most likely comprise some or all of the following:-

- Carry out land and sea management planning;
- Provision of outstation services;
- Provision of rangers to monitor country and carry out management projects in country;
- Negotiate with developers of various sorts, including mining companies and tourism operators;
- Carry out cultural heritage assessments and socio-economic impact studies prior to development;
- Employ native title holders in CDEP to in turn participate in the range of land and sea management activities.

Since services will be eventually required for all of the Wik and Wik Way area, both inside and outside of the Aurukun Shire, it is expected that negotiations will have to be carried out by the ASC's LSM agency on behalf of the PBC with the Pormpuraaw Aboriginal Council, the Napranum Aboriginal Council and the Cook Shire Council concerning the provision of services in their respective local government areas. At a Meeting with several representatives of the Aurukun Shire Council on 24/07/01, Mayor Jacob Wolmby agreed that the Aurukun Council was prepared to extend the Shire's services to cover other Wik and Wik Way people living outside the Shire boundaries.

An Aurukun-centric aspect of agreement amongst those interviewed at Aurukun was that the 'head office' of the Wik PBC be located at Aurukun, and that people from the peripheral centres should 'fly in' to the office for meetings. Aurukun seems a sensible location for such an office given that the majority of claimants reside there, but there also needs to be adequate consultation and communication with sub-groups at Pormpuraaw, Coen and Napranum. There also need to be lateral agreements negotiated with the LSM agencies at these places to define the boundaries and protocols of their respective regions of interest.

### Economic Planning

Given the total absence (at the time of writing) of any anticipated or proposed funding for the PBC from the Commonwealth, similar critical questions emerged concerning economic viability as for the Coen sub-region :-

- From where can recurrent funds be sourced for the basic administration service?
- From where can recurrent funds be sourced for the land and sea management services inside the Aurukun Shire?
- From where can recurrent funds be sourced for the land and sea management services outside the Aurukun Shire?

The answers to these questions were more readily forthcoming for the Wik sub-region than for the Coen sub-region .

Suggested Short-Term Plan:-

- (i) First employ a part/time temporary secretary, using CDEP initially.
- (ii) Then seek emergency funding for first year of operation from ASC and appoint a SECRETARY for one year.
- (iii) PBC SECRETARY to make application to ATSIC for annual funds for PBC compliance costs.
- (iv) ASC to provide office facilities for PBC Secretary at a minimal cost.
- (v) Travel costs for meetings to be calculated and incorporated into costings.
- (vi) Strategic plan to be developed which aims to offset the above costs from future compensation payments and income generating agreements in relation to land and sea development in the Wik sub-region .

With respect to this last strategy, the Wik and Wik Way native title group, whose members are already signatories with Comalco for the Western Cape Communities Co-existence Agreement, should consider apportioning a proportion of their income to the Wik PBC administration. Similarly any future benefits from the Pechiney Mining group or Gulf Clay's proposed Kaolin project, should include a similar component. ASC already receives substantial untied income from commercial sources, in the order of between one and two million dollars per year, which is in addition to its tied budget from the state government (pers. comm., CEO, ASC 10/7/01.)

Suggested Long-term Plan:-

This can best be conceptualised as several dominant forms of potential cash flows. Firstly there will occur flows of money from ASC to outstation groups for land and sea management activities and incorporating CDEP resources, both inside and outside the Shire. Such flows would draw on ATSIC outstation funds, tourist/camping

permit fees, canteen funds etc. Secondly, flows of money could come from future mining operations on the basis of ILUAs, some of which would flow back to the Council to offset its inputs to some extent.

The Aboriginal Benefits Trust Fund (ABTF) in the Northern Territory provides a model of how mining royalties may be disbursed across a wider Aboriginal population whilst at the same time ensuring some tangible benefits and/or payments for traditional owners in the immediate locale of a mining operation. The idea of using this model has been well received by the Wik and Wik Way people at Aurukun.

A number of individuals pointed out the case of the Wik-way and their negotiation in the Western Cape Community Co-Existence Agreement. At the meeting of 25/07/01, the Wik Way representatives indicated they supported the sharing of tourism money across the all Wik groups who are part of the Wik and Wik Way Native Title Claim. In this way needy Wik people whose estates are located on inside country could receive some benefits. A similar position was taken by the Puch/Wanam groups with respect to the future Kendall River Holding Kaolin Mine (see below).

It should be noted that the receipt of disbursements and/or the investment of sizeable amounts of royalty money is not part of the experience of most Wik people, and nor is it an activity that readily relates to traditional law and custom. It is arguable that Elders are not qualified to make decisions of this sort without relevant information, skills and experience. To minimize the potential negative impacts of cash disbursements in communities and in addition, to simplify taxation responsibilities, it has been recommended that any such disbursements be in the form of practical and desired consumable goods eg refrigerator, freezer, washing machine, drier, air-conditioner, 4WD vehicle, dinghy, outboard motor etc (O'Faircheallaigh 1996:58).

Several of the more immediate economic prospects in the Wik sub-region are as follows:-

1. *Economic Aspirations for the Merapah Pastoral Property*

Over 10 years ago it was argued that, in principle, the envisaged pastoral enterprise for Merapah did not require the acquisition of new skills but the maintenance and transmission of existing skills obtained by mainly older men and some women who had worked for years on cattle stations. Rather than a specialist approach (using high tech innovations and approaches such as helicopter and contract mustering), working the cattle should be participative and community-oriented (thus labour intensive). (von Sturmer 1989.) This strategy has clearly not worked so that it now needs to be reviewed and updated. Other past economic aspirations by people at Merapah have included

fruit marketing (consignments of mangoes), tourism (small scale catering to a specialist market), craft production by women (baskets and mats), and timber cutting.

2. *Wik Way Aspirations for Compensation for Mining by Comalco*

In the mid 1990s Wik Way people were strongly of the view that they should receive substantial compensation for mining on their land (Area 3, 4 and 5 of Wik and Wik Way Claim), by taking advantage if possible, of the access to a portion of statutory royalties provided for under the *Aboriginal Land Act 1991*. Wik Way people were also of the view that compensation should be paid retrospectively for past exploration activity since the 1950s. The majority felt that compensation should accrue to family or clan-based landowning groups in the form of specific support for outstation and/or enterprise development. Typically, this group wished to have compensation utilized to provide housing, access to transport (including vehicles and boats), and basic facilities (especially water). A substantial number of people felt that some compensation should also flow to the wider Wik community, usually in the form of assistance with the development of infrastructure and services at Aurukun. (O'Faircheallaigh 1996:58.)

There was strong agreement among most of those consulted at that time that both compensation and the use and management of resources provided as a result of compensation, should be managed independently by family or clan-based groups, and not through an existing organization or through a new, community-based or regional organization. They did recognize that a broader organizational framework might be required to facilitate efficient service provision, but were adamant that decision-making should be decentralized. (O'Faircheallaigh 1996:59.)

3. *Kendall River Kaolin Mine*

The proposed Kendall River Kaolin Mine is currently the subject of consultation between the mining company and the traditional owners. The project development is still at the exploration phase. The main clay deposit is in the central/northern part of Kendall River Holding (Area 24). Development of this mine would involve a slurry pipeline north to shipping facilities at Weipa and the upgrading of the access road back to the main Peninsula Development Road. It will be an open-cut mine. This would involve extensive cultural heritage clearance work, and potential employment including on land rehabilitation and landscaping after mining is completed, ie the potential for a number of forms of income for traditional owners, in addition to any compensation or royalty monies which may be negotiated under

an area ILUA. Puch and Wanam people have agreed (meetings held in July 2001) that any income from the mine should be shared amongst the wider Wik group. It was stressed that there was a need to think about other groups who were less fortunate, and that other Wik groups who would receive money from the mining would also share later.

Given that these mining companies are or will enter into ILUAs with the Wik people, Noel Pearson's idea of raising loans using ILUAs as a type of capital base (See Chapter 1), is worthy of investigation. If an ILUA guarantees periodic cash inputs into a PBC, there are a number of ways in which this might be leveraged to raise capital. One is by securing a guaranteed future income to provide a large up-front capital base; another is to use an initial deposit secured in a bank account with an agreement not to withdraw it, using this as a base to raise loan finance, which can then be serviced from the regular ILUA income. Figure 22 illustrates the hypothetical situation of a Wik sub-group raising a loan for a shrimp or prawn farming enterprise, based on its income from an ILUA.

#### Consideration of Alternative Models by the Wik

A variety of alternate models were presented to traditional owners for consideration on different aspects of PBC planning and design.

- (a) Consideration occurred of the two alternate trustee and agency model types for the PBC structure.
- (b) Consideration occurred of alternate models for the structure of the land and sea management agency. One option was for the PBC to have two service agreements, one with ASC for services inside the Shire, and a second with a future agency to be established, which would service that part of the Wik and Wik Way Claim Area outside of the Aurukun Shire. This was rejected in favour of using the existing Aurukun Shire Council LSM Unit. The Council also strongly supports this option, and would not like to see another bureaucracy established at Aurukun as a result of the native title claim. It was recommended not to duplicate bureaucracies but rather plan for the synergies of shared/complementary administration systems. (pers. comm., CEO, ASC 10/07/01.)
- (c) Given the currency of the 'ceremonial groups' model, the author attempted to promote an alternate model, partly to test the appeal of the former model. A minority of people agreed with a 'river system' model, but these individuals were mainly people from the south of the claim (Puch/Wanam) or from the south-east of the claim who may have been marginalized to some degree by the 'ceremony group' model. There was eventually a compromise which uses both 'ceremony group' and, where these are less applicable, either social,

linguistic or geographic group descriptors (as noted earlier).

- (d) Another alternate structure was one PBC versus four or five PBCs for different areas. This was also rejected in preference for the unity of all the Wik and Wik Way.

#### Further Evaluation of the Wik Strategic Proposal

There are a range of important problems and issues that would require ongoing investigation and resolution to refine the Wik strategic proposal, and they are outlined in Appendix 6. In summary they can be listed as follows:-

- (a) Canvassing the views of Wik people at Coen, Pormpuraaw and Napranum about the PBC structure.
- (b) Role of the Pormpuraaw and Napranum Community Councils in Wik LSM, and their relation to the Aurukun LSM Centre.
- (c) The relation of the PBC to the Mungkan Kaanju National Park.
- (d) Whether LSM at Merapah Pastoral Property is to be administered from Coen or Aurukun.
- (e) The legal relation between the Wik Way, as a party to the West Cape Communities Co-Existence Agreement, and the Wik PBC.
- (f) Potential role of the Aurukun Justice Group of Elders in Wik and Wik Way native title matters.

It has not been possible to thoroughly address all of these issues within the time constraints of the consultancy.

#### Findings on Linking Indigenous Land-holding Entities into the Wider Planning Environment

In both case-study sub-regions, PBC structures have been selected which are of the 'agency' type (as opposed to the 'trust' type) with a representative (rather than participatory) structure. This approach deliberately assumes the role of PBCs and land trusts to be mere 'post boxes' or vehicles for the broader land-holding group. Minimalist structures can then be put in place without too much reliance on intricate internal corporate governance devices. Emphasis needs to be placed on the external arrangements including:

- Negotiating satisfactory service contracts between the regional LSM agency and the Indigenous title-holding entities;
- Developing satisfactory consultation and communication devices between the LSM agency and the traditional owners and the title-holding entities;
- Ensuring properly resourced consent and consultation of native title holders by the PBC and/or its Secretariat;
- Developing forms of expertise in particular areas of land and sea management by regional Indigenous

planning organizations such as the NTRB and Balkanu (e.g. provision of expert pastoral management advice/services);

- Obtaining funding for land management initiatives: In this respect it is likely to be far easier for an LSM agency to attract funding for land management initiatives than for the recurrent operational costs of a PBC/land trust. It may be possible to build PBC consultation costs into land management grants rather than constantly rely on scarce title-holding entity resources from official government sources.
- Cape York Land Council to have a compensation unit monitoring future acts within determination areas and pursuing payments of compensation on behalf of native title holders.
- Utilisation of a percentage of any compensation paid to title-holding entities (PBCs, land trusts) toward the costs of the LSM agency (and possibly the NTRB);
- Balance of compensation to be utilised in accordance with wishes of native title holders as directed to the title holding entity.
- Developing a constructive and supportive role by the NTRB towards the title holding entities.

Such an arrangement would involve the following:

1. Land holding/native title group (unincorporated group of individuals);
2. Land holding entity;
3. Sub-region LSM agency;
4. Land holders' corporation for enterprises and contracts (optional);
5. Native Title Representative Body.

Each PBC will have contracts to engage (i) a secretariat service to maintain its basic legal functions (meetings, correspondence, etc), and (ii) a land and sea management service to manage (or sub-contract management of) specified native title rights and interests. To enhance simplicity of arrangements, the secretarial services could be provided from within the LSM agency. This LSM service function allows incomes derived from compensation, etc. negotiated under ILUAs to be channelled through the PBC to the LSM agency which can practically engage in a range of land-based operations, drawing upon infrastructure, CDEP workers, rangers, consultants etc on behalf of the native title holders. In all cases there needs to be a close coincidence between the membership, and to some extent the structure, of the land-holding entities in the sub-region and that of the LSM agency to prevent a conflicts of interest, although it would be possible to incorporate spouses, and those with historical interests in land in the membership of the latter. There are clearly administrative and consultative complexities encountered at and near sub-regional boundaries where groups may choose (or be persuaded) to seek LSM services from two sub-regional centres in the adjoining sub-regions.

For simplification of consultation and decision-making it would be useful for LSM agencies to adopt a level of internal structural planning and procedure that mirrors that of the land-holding entities in the sub-region with regard to the relations with traditional owner groups. Although there are a complex range of dimensions to social and territorial structure in the two Indigenous case-study sub-regions, for the purposes of planning and engaging in land and sea management, the Wik and Wik Way group has chosen to model itself as being composed of eight sub-groups (five of whom are ceremonial groupings), each of which is associated with a sub-area of the Wik and Wik Way Native Title Claim. LSM operations could be compartmentalized into these eight sub-areas and directed by the representatives on the PBC for each respective sub-area. Rangers working in a particular sub-area could be drawn from the local native title group. LSM expenditure and accounting might also be organized along similar lines.

The Coen sub-region has defined itself as comprising four language-named tribes with discrete territories. Whereas the Wik leaders have so far not chosen to formally incorporate their eight sub-groups, but rather to work through existing organizations (such as the Aurukun Shire Council), the traditional owners in the Coen sub-region wish to formalize their four grouping into four corporations. Preliminary consultation indicates the need for such an independent corporate vehicle for each of these four tribes to carry out land and sea management contracts, outstation development, enterprises, etc. The suggested Coen Region Land and Sea Management Agency would thus devolve a number of contracts (also using its CDEP and the outstation infrastructure) to one or more of the four 'language tribe' corporations. But in the interests of achieving economies of scale, it is agreed that a single Coen Region Land and Sea Management Agency should provide all common administration functions for the four groups. It is proposed that the LSM Agency would provide secretarial services for the 18 or more PBCs and land trusts which are or will be formed in the Coen sub-region. However in the interests of rationalizing this multiplicity of titles, a method has been proposed to ultimately amalgamate these entities for each tribe, through a process that results in all of a tribe's land and sea areas having a single land holding entity which doubles as both PBC for its native title interests and land trust for Aboriginal freehold land. However the issue of overlapping areas of interests between adjacent groups will add some complexity over and above the four core tribal PBCs.

It is thus conceivable that land-holding groups may not wish to forego their direct control over the management functions of their land-holding entities (by outsourcing these functions to an agency) and instead pursue an agenda of demanding greater resources.

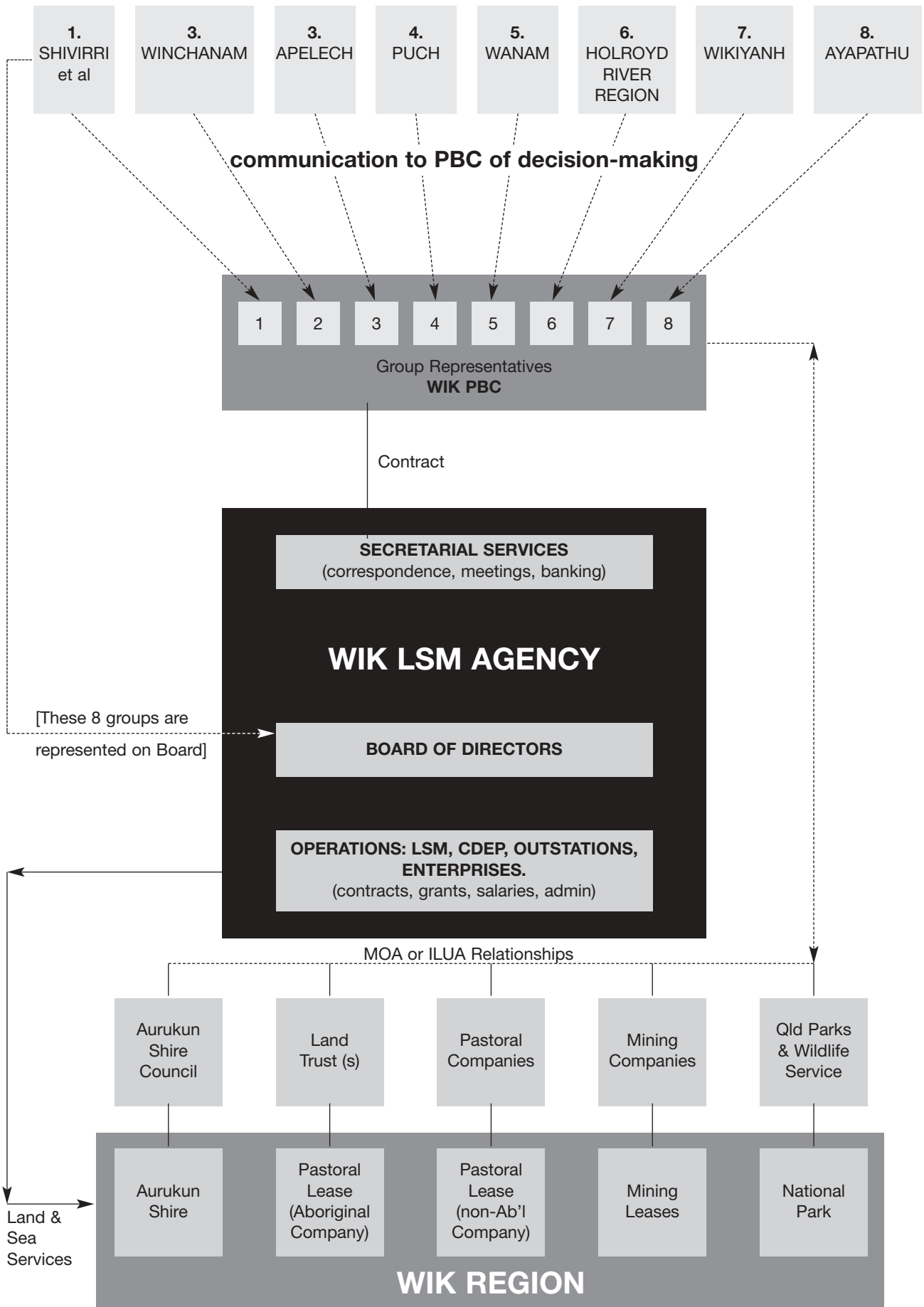
Given the complexities surrounding the different types of tenure (and therefore land holding entities) that exist within each of the land holding groups (be they distinguished by language-named tribe, ceremonial group, etc), the authors are of the view that greater consideration should be given in the short term to rationalisation of the management arrangements for such tenures, rather than in addressing the cumbersome proposal to harmonise and amalgamate the legal entities. Such an approach would seek to separate the title-holding functions of the land-holding entities from their management functions. The outcome would be a series of native title corporations/land trusts holding various tenures on behalf of the groups with a contracted regional land and sea management agency looking after the day-to-day management of the country. Major management issues crossing a relevant threshold (e.g. in the case of PBCs – issues requiring a ‘native title decision’) would still be referred to the title holding entity, in which case there would follow an extensive consultation and consent process for decision-making by the relevant group (facilitated by the Land and Sea Management Agency, the NTRB and/or the PBC). Accordingly the decision would be likely made by the group decision-making process, and directions given to the (agency type) PBC to implement (sign-off on) the decision.

To self-operationalize the above planning models, the Wik and Wik Way native title claimants seem to be in

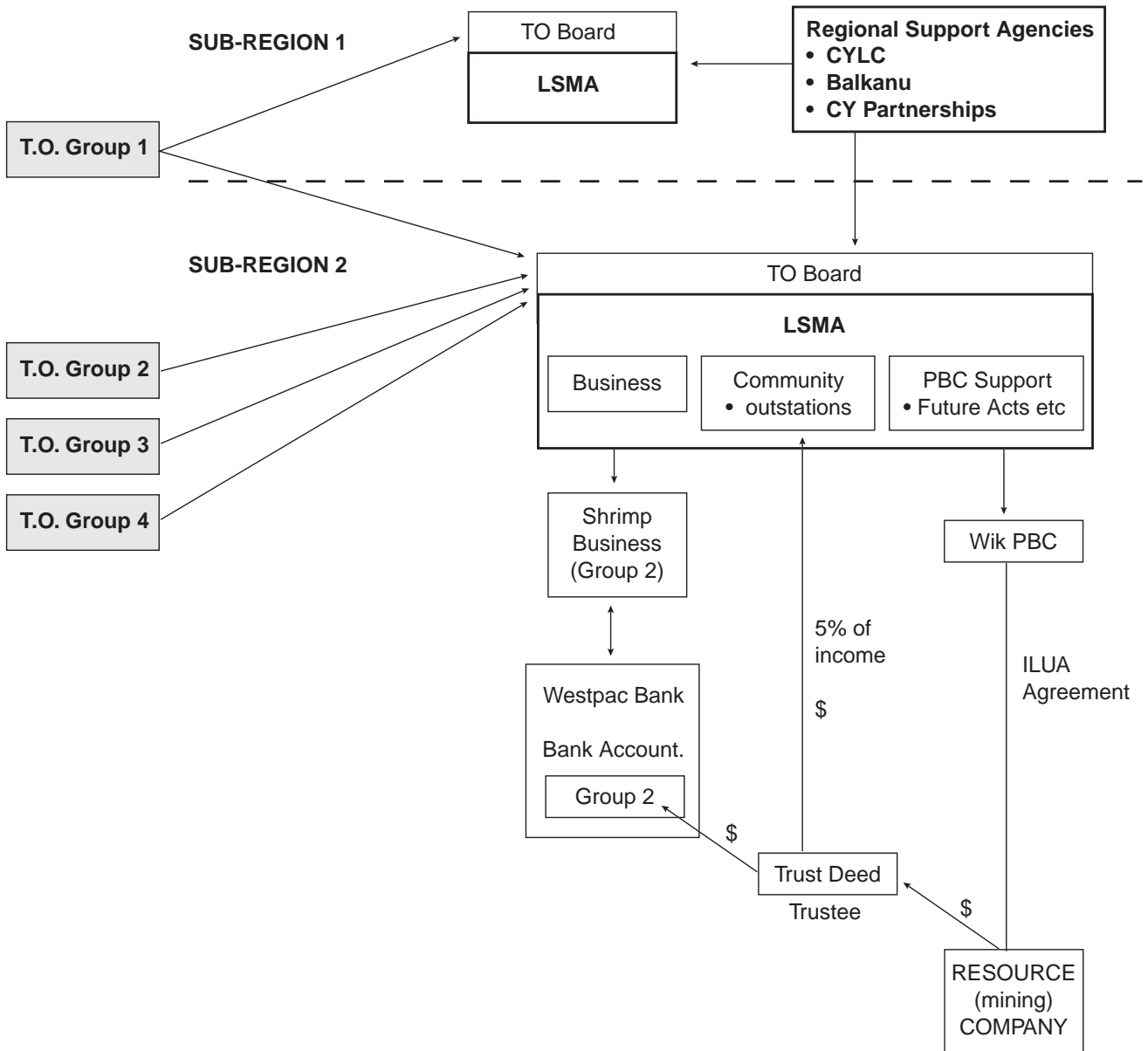
a better position regarding both the establishment of early economic support and the ongoing long-term receipt of funds through mining ILUAs which in turn could be used to raise bank loans and secure other forms of capital. The potential for the Coen sub-region to self-finance its PBC and land trust functions is at present extremely limited, which raises the issue of whether responsibility should be taken by government in this regard. In both cases, resources will be needed to facilitate meetings of native title holders outside of the PBC structures, in keeping with the requirements of the NTA and with customary decision-making processes. This necessary function should not be overlooked in planning. Despite the proposals contained in this chapter to generate local funding for the maintenance of PBCs, the Commonwealth’s responsibility of meeting the base administration costs should not be displaced, given it was the architect of the Native Title Act and its Regulations. (A recommendation is made in the next chapter regarding this.)

As a final note of caution, the authors point out that the above models have obvious policy issues requiring debate and acceptance within the land-holding groups. The models are a pragmatic response to the financial and logistical constraints imposed by the existing legal and administrative regimes. Many of the individual principles and strategies that have been elicited in the preceding chapter will be re-iterated in the concluding chapter.

**Figure 21 Diagram illustrating the proposed structural relationship between the Wik PBC and the Wik LSM Agency, within the Wik Sub-region.**



**Figure 22 Hypothetical situation involving two adjoining sub-regions of Cape York.** In one Sub-region, a T.O. group on whose land mining occurs, obtains funding from an ILUA Agreement via its PBC. This yields a regular income on which to raise a loan for starting a shrimp farming enterprise.





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## CHAPTER 8: CONCLUSIONS

### Introduction

In this study there have been elicited a large range of planning and design issues pertaining to PBCs, their relation to other Indigenous land-holding entities, and their capacity to discharge land and sea management functions. These planning and design issues can be conveniently considered under the following sub-headings:-

- Regional planning
- PBC Design-Internal (planning for establishment and operation)
- PBC Design-External
- Social planning
- Economic planning
- Environmental planning
- Legal planning
- Government policy planning
- Legislative and regulatory planning

In this final chapter, the authors have attempted to summarize these issues and the emergent principles about designing and sustaining PBCs, in the expectation that they may be applicable elsewhere in Australia as well as in Cape York.

### Regional Planning

A focus in this study has been on the external environment of the PBC, and the practical aspects of the functioning of PBCs in their operational environment. For this reason it has been necessary to start with a consideration in this study of the planning region, and in turn, planning sub-regions.

It has been proposed from the outset to rationalize land-related activity within a set of sub-regions for Cape York, in line with the vision of the NTRB's strategic planning proposal for the same. It is considered important to identify the variety of government and industry agencies that have interests and/or strategies for regional development. Naturally, a coordinated and transparent approach will maximise the outcomes of the individual planning strategies. Accordingly, local Indigenous strategies that have a specific focus (eg land and sea management, land or sea based enterprises, cultural heritage programs) will be greatly benefited by increased communication with those government and other non-Indigenous agencies managing regional strategic plans, and by recognition (where possible) of the goals of those plans.

By way of example, the regional planning environment of Cape York can be summarized as follows:-

### *The regional planning environment in Cape York*

*The CYLC shares a unity of purpose and complementarity of function with a number of regional organizations, jointly committed to the broad objectives of the ATSIC Peninsula Regional Plan (1995-2005). The ATSIC Regional Council and CYLC demonstrate a high degree of congruency in multi-issue regional planning. CYLC and ATSIC both share the focus of increasing Aboriginal control and ownership over land. CYLC and Balkanu (established by ATSIC) work closely together with a longitudinal outlook. Other agencies who have developed a regional plan or approach for the Peninsula include: NHT (the Cape York Natural Heritage Trust Plan), Apunipima, ILC, EPA and QPWS. Other significant initiatives in the region, involving negotiations and planning between groups with disparate interests are CYPLUS and the Cape York Heads of Agreement. The following agencies and services have publicly stated the necessity or desire to work co-operatively with other agencies and the Indigenous community to achieve their goals: NHT, EPA, DATSIP (creating partnerships within government and increased co-ordination is one of their primary goals), GBRMPA and DNRM. DNRM is a significant source of information regarding land resources and spatial data for regional planning and maintains an innovative and responsive land tenure system.*

The Indigenous regional agencies in Cape York (such as CYLC, Balkanu and ATSIC) need to continue to consolidate the sub-regional structures, guide their implementation, and co-ordinate them at the regional level. In turn, there is potential for the collective of Land and Sea Management Agencies from each sub-region, as being representative of traditional owners and native title holders, to become the formal constituents of such organizations as the NTRB (CYLC) and Balkanu. Two sub-regions in Cape York have been utilized as Case Studies in this project, the Coen Sub-region and the Wik Sub-region, with a view to exploring issues in the design of operational models of PBCs.

### *Comparative Findings on the Two Case Studies*

*While patterns of land tenure, social organization and identity are not uniform across the Coen Sub-region, there is a degree of congruency at the level of identification with four language territory groups or language-based 'tribes', viz Lamalama, Umpila, Ayapathu and Kaanju. There is a total of eleven existing or potential Aboriginal land trusts under the ALA in the Coen Sub-region. There are an additional five native title claims which could potentially result in five PBCs. The native title claims are all of the 'exclusive possession*

and occupation type' and each has a very 'full' set of rights and interests being asserted. There is one pastoral lease held by an Aboriginal Corporation formed under the ACA Act. In addition to those areas of land with formal Aboriginal ownership or interests, there are other sizeable parcels of land in the Coen Sub-region including nine (non-Indigenous owned) pastoral leases and two timber reserves. The regional planning environment includes a central Indigenous service agency (CRAC) which delivers outstation, land and sea management and CDEP administration services (amongst other services), as well as the Lockhart River Community Council which also has a LSM programme with interests in the north-east corner of the Coen Sub-region.

In the Wik Sub-region, the Wik people comprise a broad division of a single language grouping and share a range of broad cultural similarities. The building block of their land tenure system is the clan estate which in turn amalgamates into other forms of complex and intersecting sociospatial identities. In the context of the planning of sub-group representation in a Wik PBC structure, it is the larger-scale units of riverine groups and ceremonial groups that appear the most useful, though customary decision-making may be deferred to any of the smaller groupings until the level of the clan or family is reached. The Wik Planning Sub-region of the CYLC mainly comprises that area which is the subject of the Wik and Wik Way Native Title Claim. Within this claim area, there are at least 33 parcels of land and sea to be managed. These include parcels of DOGIT land, Aboriginal Land Lease land, pastoral leases under both Aboriginal and non-Aboriginal ownership, and areas under mining leases. It has been proposed by the current authors to include the westernmost portions of the Mungkan Kaanju National Park within the sub-region. Listed in the Wik and Wik Way Native Title Claim are an extensive range of rights and interests that may form part of the requirements of land management but their extent of application will be variable throughout the different land tenures reflecting the diversity of arrangements negotiated and formalized with ILUAs. The Wik Sub-region is characterised by the presence of an Aboriginal Shire Council (Aurukun), one of only two in the whole of Queensland. Administratively, the sub-region is dominated by the Shire with outstation development mainly confined to the western part of the sub-region. The Aurukun Shire Council also has established an active land and sea management programme which is integrated with the outstation movement and CDEP.

An outcome of the above case studies is the need to create a legal agreement between the native title holders as represented by their PBCs and a sub-region land and sea management agent which has the administrative capacity and infrastructure to engage in LSM projects on behalf of (as well as through employing) native title holders. The nature and extent of such agreement will depend on several factors including:

- The 'type' of PBC adopted by the native title holders (active or passive);
- The level of non native title land use occurring within the determination area; and
- The number of native title decisions to be made (and therefore the amount of consultation and decision-making required).

### Regional Boundary Planning Issues

Through the analysis of the two case study sub-regions, a number of regional planning issues emerged around the theme of boundary integrity. Problematic boundary occurrences that need to be rationalized or accommodated are as follows:-

- (i) The case of a sub-group of native title holders located just inside the outer boundary of the planning sub-region, who prefer to contract LSM services from an adjoining sub-region's LSM agency, necessitating the PBC to have two (or more) LSM contracts.
- (ii) The converse case of an LSM agency wanting to provide services for a group of native title holders in an adjoining sub-region.
- (iii) The case of an industry-generated ILUA straddling two (or even three) sub-regions and PBC determination areas, and the necessity to create an administrative structure for the ILUA that engages with not only the separate PBCs, but also their LSM agencies.

Another way of conceptualising this issue is that, rather than being a 'boundary problem', it is an issue of 'orientation' (pers. comm., M.E., 15/11/01), in that boundary groups will have dual orientations to two (or more) regional centres.

### The Potential Role of PBCs in Regional Governance

Long-term structural change and reform is required to achieve a more appropriate set of mechanisms for regional Indigenous governance that complements native title and other Indigenous land-holding structures. Key aims would be to minimise friction and obstruction with respect to Indigenous settlement planning and development processes on the one hand, and of future acts and ILUA processes on Indigenous land under the jurisdiction of Aboriginal Councils on the other.

The question may well be asked to what extent can a PBC itself become a vehicle for native title holders' aspirations of self-management and regional governance? At present the extent to which the Australian legal system recognises the autonomy of self-determining Indigenous societies is restricted to relatively limited native title interests in land and waters. Nevertheless there may be some future potential for the courts to gradually widen the scope of common

law recognition to protect other facets of customary law, for example rights to administer justice, customs governing adoptions etc. In the meantime the emphasis needs to be on the ways in which PBCs can become part of existing governance structures.

There may also be potential in the future for a form of treaty to be negotiated in Australia establishing a platform and framework for the negotiation of various regional treaties. Ideally, PBCs would become sufficiently established in order to take on a significant role within any emerging governance structures. However, such developments may or may not occur. In the meantime, native title holders must grapple with the difficulties of establishing and maintaining a PBC within a regime characterised by excessive restrictions and complexity, and without the fiscal support required to make it workable.

Nonetheless, the fact that PBCs have the legal capacity to attract compensation settlement funds, create employment and bring resources into their communities, means that they will become (at least in some cases) powerful regional organisations in their own right. The breadth of influence of PBCs is reflected in the planning categories outlined above. The confines of this report however have limited the authors to focus upon the establishment and operation of PBCs as land users and managers in their current regional contexts and within the existing legislative regime.

### **PBC Design – the internal environment of the PBC**

PBCs need to have a clear structure, defined functions and transparent processes so as not to be an administrative and political burden in themselves. There are many issues that need to be considered in their internal design. For example:-

- maintaining the integrity of traditional decision-making processes whilst responding to the legal and administrative requirements of the PBC regime;
- pressures of dealing with timeframes imposed by external parties;
- the demography of the membership of the PBC;
- levels of politicization within the native title group; and
- the logistical demands of maintaining traditional decision-making processes.

Major determinants for the design of PBCs include:

- the desires of the native title holders as to what sort of role they want their PBC to play;
- the nature of the native title group and desired decision-making processes;
- the legal and policy constraints of the PBC regime (see Chapters 2 and 6);;
- the availability of resources to support the PBC's administration and other operations; and
- potential external relations of the PBC.

### **Active or Passive PBC?**

The relative attributes of what the study identifies as passive and active PBC types need to be carefully considered and compared in the design development of a PBC.

The passive PBC is designed to be a minimalist structure with little administrative and political 'baggage'. It is best suited to the agency PBC type since it will not hold the native title interests, which will remain with the native title holding group. The passive PBC structure is similar to the tripartite arrangement of the Land Trust, Land Council, Traditional Owner structure of the Northern Territory land rights model (established under the *Aboriginal Land Rights (Northern Territory) Act 1976*). The passive PBC adopts a similar role to the Northern Territory Land Trust by deferring decision-making to the native title holders. Therefore due to the limited role of the PBC as an agent of the native title holders, its membership could be limited to that necessary to meet the minimal requirements of the *Aboriginal Councils and Associations Act 1976 (ACAA)* and therefore need only be 'representative' of the native title group. In contrast a participatory model of corporate governance aims to include as many as possible of the native title holders as PBC members. The passive PBC will have limited demands for resources but will be heavily reliant on the support of either the NTRB or any regional Land and Sea Management Agency, in the same way in which Land Trusts in the Northern Territory are reliant on the support of their Land Councils.

The requirement of the PBC Regulations for the PBC to conform with or respond to traditional decision-making, raises the question, should traditional decision-making be restricted to the polity, i.e. kept outside the PBC and the outcomes of decisions conveyed to the PBC, or should the governing structures themselves (e.g. the PBC Governing Committee) engage in traditional decision-making? It is the authors' view, in the case of a large native title claim where the constituents number many hundreds or even thousands, as in the case of the Wik and Wik Way native Title Claim, the role of the PBC should be confined to that of 'passive' corporate governance. In this model, the PBC stands between the native title holders and the institutions of the outside world (government agencies, industry, etc.), but does not itself make native title decisions. Rather, it has a responsibility to consult with native title holders and then to communicate the outcome of the consultation and the native title holders' decision (whether it be 'consent' or otherwise with respect to, for example, future acts) to the outside world.

In contrast to the passive model, the active PBC assumes a greater responsibility for the making of decisions within the determination area. The trustee PBC type is better suited to an active role, because it 'holds' the native title on behalf of the native title

holders and is empowered to deal with it, subject to the consultation and consent provisions which require native title decisions to be made in accordance with traditional decision-making processes. Active PBCs could adopt representative or participatory membership structures (Mantziaris and Martin 2000) depending on the circumstances at hand and whether it is intended to attempt to replicate traditional decision-making within the PBC governance structure itself.

#### An Active Trustee PBC (Representative) Model:

An active trustee PBC could involve a PBC for a native title group comprising 400 people from 15 'descent groups'. The membership of the PBC could be limited to 30 persons, with each descent group nominating two representatives to become members. The Governing Committee could also be comprised of the entire 30 people (or alternatively 15) with equal descent group representation. Depending on the nature of the decision and the laws and customs of the group, decisions made by such a 'representative' corporate structure could be consistent with the traditional decision-making processes of the group. If so, by using this model, the traditional decision-making processes could be married with the governance structures imposed by the PBC regime. In such cases, this model would eliminate the need to distinguish between 'native title decisions' and 'non native title decisions', because all of the decisions of the PBC would be in accordance with the requirements of the PBC Regulations. (Note that the technical distinction between these two categories of decisions was outlined in Chapter 6.)

The obvious dangers of creating such a purely representative PBC structure include the lack of accountability to other native title holders, who as non PBC members would be forced to rely on their status as beneficiaries to redress any concerns about the management of the PBC.

#### An Active Trustee PBC (Participatory) Model:

In this model, the aim is to secure PBC membership for the entire native title group. The major difference to the previous model is that the native title holders also hold membership rights including for example to call for special general meetings of the PBC and to remove and/or appoint members of the Governing Committee. The potential danger of this model lies in the impact of such corporate governance machinations to the traditional decision-making of the group.

The choice between passive and active PBCs therefore reflects the spectrum of opportunities available in apportioning decision-making responsibilities between the PBC and the native title holders. At one end of the spectrum, all decisions (including 'native title decisions') could be made by an active PBC with a representative structure. Such a PBC could operate if it were possible to replicate traditional decision-making within the PBC governance structure itself. The

obvious dangers of creating such a purely representative PBC structure include the lack of accountability to other native title holders, who as non PBC members would be forced to rely on their status as beneficiaries to redress any concerns about the management of the PBC. At the other end of the spectrum, a purely passive PBC would have no role other than to 'rubber stamp' decisions (including non-native title decisions) made by the native title holders.

### Recommended Models

In Chapters 6 and 7, PBC models have been outlined for each case study which, given the planning data available to the authors, appear to be the best possible models in the current circumstances. Some further options for models in the study sub-regions have been outlined which would necessitate a shift or refinement in state government policy. The ideal or best practice model for PBC rationalisation is not currently feasible due to legislative and regulatory restrictions but may be viable in the future if there is appropriate legislative and/or regulatory change.

In both case-study sub-regions, PBC structures have been selected for the purpose of this study, which are of the passive 'agency' type (as opposed to the active 'trust' type) with a representative structure. This approach deliberately assumes the role of PBCs and land trusts to be mere 'post boxes' or administrative vehicles for the broader land-holding group. Minimalist structures can then be put in place without too much reliance on intricate internal corporate governance devices. However the relative attributes of the passive and active PBC types need to be carefully considered and compared in the ongoing design development of any PBC.

### Funding

One of the key determinants for PBC design is the availability of funding for administration. Unless and until adequate funding is allocated toward the establishment and maintenance of PBCs, these entities are likely to suffer the same fate as that of existing land trusts established under the ALA, where compliance with minimum standards is at very low levels. Poor funding is also likely to lead to poor levels of consultation with the native title holders and substandard decision-making. This in turn increases the likelihood for dispute amongst native title holders. Of course some PBCs may be fortunate enough to have resource agreements in place providing a ready source of funding for the administration of the PBC. Such organisations will have greater flexibility in designing decision-making structures that protect the interests of the native title holders and yet are able to be implemented effectively.

### Key PBC Design Choices

The main choices for the design of PBCs therefore include:

(i) Active or Passive PBC?

This decision may reflect the level of trust within the group for those who would sit on the PBC. However many other considerations would also be relevant such as the nature of land use within the determination area, the capacity of the group to operate a PBC actively engaged in the management of its land, the availability of resources, the nature of traditional decision-making, the demography of the group etc.

(ii) Agency or Trustee PBC?

This decision may be best determined once the initial choice between an active or passive PBC is made. On the face of it, the agency PBC may be better suited to the passive PBC role, however there are complex legal issues involved in this choice which require careful case by case analysis.

(iii) Participatory (full membership) or Representative (limited membership) PBC?

By limiting membership of the PBC, the scope for 'interference' in traditional decision-making by ACAA corporate governance issues will be reduced. On the other hand membership rights created by the ACAA may become an important means of maintaining accountability to the native title group.

(iv) Separated Traditional Decision-making or Merged?

Should the Governing Committee be structured to replicate and/or perform traditional decision-making or should it be left to the native title group?

Overwhelmingly, these key choices and decisions on PBC design need to be made by native title holders on a case by case basis. Rigidly applying models, such as the passive and active PBC types, will not necessarily be successful, as the circumstances confronting the formation and operation of each PBC will vary markedly. Indeed, as in the case of the Wik PBC (in general terms a passive, agent, participatory type of PBC), it is likely that many native title holders will prefer a hybrid of the models to meet their particular requirements.

In order to ensure the consultation and decision-making functions of the PBC are transparent, regular and equitable on behalf of the native title holders, the following recommendations are made (based largely on the findings in Chapters 2 and 6).

### **Recommendations:**

1. That PBCs establish a register recording:
  - Details of each native title decision including the proponent, nature, location, purpose and duration of the act;
  - Details of any compensation proposed for the act (if any);
  - Evidence of consultation with the NTRB about the native title decision;
  - Evidence of consultation with the relevant native title holders affected by the decision; and
  - Evidence of a decision by the relevant native title holders.
2. That PBCs include in their rules a requirement to establish and maintain such a register.
3. That each PBC provide in its rules for the making of classes of decisions (both native title decisions and non-native title decisions) by the PBC in its own right, without reference to the native title holders.
4. That the PBC rules prescribe the minimum requirements for the making of native title decisions.

### **PBC Design – the external environment**

There are two categories of issues to consider in planning the relations and linkages between a PBC and the operational elements in its external environment; firstly its relation to other PBCs and land trusts in the sub-region, and secondly its relation to other planning and land management agencies and departments.

#### **Structural Options for PBCs**

Here the issue is how to promote the regional organization and rationalisation of land trusts and PBCs, and the need to be able to cross administrative boundaries between Indigenous tenure types within the sub-region.

The combination of the ALA and NTA systems in Queensland has led to a situation where several parcels of land with differing tenures may be subject to a single native title determination, yet also include one or more areas of ALA freehold held by one or more land trusts; hence the need to harmonise the title management and land management systems. It is expected that there occur many other similar complex situations in other Australian States which have their own land rights acts (e.g. NSW, NT, S.A.). In addition there may be a number of native title claims in a sub-region which have identical or overlapping groups of claimants in common.

Among traditional owners and native title holders, there is thus emerging a significant level of confusion and frustration about the respective operations of land trusts and PBCs, particularly where they are comprised of similar membership and hold functions with respect to the same areas of land. Given the importance of both the native title and ALA regimes to the Indigenous people of Cape York Peninsula, it is imperative that a solution be found to reconcile the practical day-to-day operations of the land-holding and land-managing entities. This in turn will reduce parallel confusion and frustration being experienced by external parties trying to engage in negotiations, communications and contracts with the traditional owners.

The integration of PBCs and land trusts into single corporate entities for suitable large scale sociogeographic units (e.g. language-based tribes in the case of the Coen Sub-region) would not only simplify arrangements and reduce confusion but also reduce as much as possible administration costs through a more effective (larger) scale of economy. However it should be noted that there will still remain the need for funds for effective grass-roots consultation on decision-making with traditional owners and native title holders.

There would appear to be three options for co-ordinating the operations of Land Trusts and PBCs. These are:

1. Determination of a land trust as a PBC;
2. Appointment of a PBC as a grantee of a land trust; or
3. Coordination between PBC and land trust by agreement.

The first of these options, at the time of writing, was within the consideration of an ATSIIC review and would require the Commonwealth Minister to amend the PBC Regulations to broaden the class of eligible corporate entities to include ALA land trusts. The authors believe this option would deliver the best outcome by limiting the resultant structure to a singular corporate entity.

The second option relies on the Queensland Government to appoint a PBC as grantee of a land trust. The transfer mechanisms of the ALA present a real opportunity to streamline claims processed under both the NTA and the ALA. In Chapter 2 it was argued that there is no apparent technical impediment to the appointment of PBCs as trustees of ALA land. Such appointments should not be controversial as the appointment of singular corporate trustees is commonplace in land administration. However, even if achieved, the appointment of a PBC as a land trust will not overcome the difficulties arising out of having two distinct co-existing corporate entities (PBC and land trust). The question remains as to the extent to which the operation of the two entities can be harmonised post transfer or grant under the ALA, and post

determination of native title. A preliminary model of how this might occur was set out earlier in Chapter 2 (Table 5).

The third option may have to be given priority in the event that the other options are unable to be implemented within reasonable time frames. If the Queensland Government is opposed to the appointment of PBCs as grantees of land trusts, and the Commonwealth Government does not amend the PBC Regulations to allow land trusts to become PBCs, then a form of mutual agreement between PBCs and land trusts (potentially an ILUA) may be the only means by which some degree of co-ordination of the entities can be achieved. It would of course be preferable to commence discussions for such an agreement at the earliest possible stages to ensure that the rules of each corporate entity are as similar as possible. However, this option would appear to be the least efficient and provides the greatest scope for fragmentation of Indigenous interests.

### ***Policy Recommendations on the ALA in Queensland:***

In the interests of furthering Option 2 above, the following recommendations are made with respect to the Queensland Government.

5. That priority be given to the transfer of land, under the ALA, which is subject to advanced native title proceedings rather than making land available for the ALA claims process.
6. That funding for the administration of land trusts be increased significantly to ensure compliance with minimum statutory provisions and functions
7. That the Queensland Government provide a formal response to the proposal to appoint PBCs as grantees of land trusts.

### **Servicing PBCs from their external environment**

PBCs need to have strong institutional links through service agreements, contracts, memoranda of agreement and or ILUAs with these various external entities as well as to their Aboriginal polity. Emphasis needs to be placed on the following external arrangements:-

- Ensuring properly resourced consent and consultation of native title holders by or on behalf of the PBC;
- Negotiating satisfactory service contracts between the sub-regional Land and Sea Management Agency and the Indigenous title-holding entities;
- Developing satisfactory consultation and communication devices between the LSM Agency and native title holders and the title-holding entities;
- Developing a constructive and supportive relationship between the PBC and the NTRB.

Accordingly, and irrespective of the statutory title of the local government area (eg DOGIT or Aboriginal Shire in Queensland), it may be important to have agreed future act processes in place, as between the PBC and Aboriginal Councils, for future dealings over Council areas subject to determinations of native title. If PBCs do not have some basic capacity to self-administer such relationships for them to function legally, they will require an administrative agent acting on their behalf. In the interests of reducing the costs of carrying out such negotiations, the following recommendation is made.

**Recommendation:**

8. That Aboriginal Councils and PBCs negotiate model ILUAs for future acts within DOGIT and/or Council areas.

Legal and working relationships need to be constructed between the following entities:-

- Land Holding/Native Title Group (unincorporated group of individuals);
- Land Holding Entity (either PBC or ALA Land Trust or both);
- Sub-region Land and Sea Management Agency;
- Land Holders' Corporation for enterprises and contracts (optional);
- Native Title Representative Body.

It is recommended that PBCs have contracts that engage:-

- (i) a Secretariat service to maintain its basic legal functions (meetings, correspondence, etc), and
- (ii) a Land and Sea Management service to which the PBC might outsource some of its functions, eg the management of certain areas of native title land.

To enhance the simplicity of arrangements, the Secretariat services could be provided from within the Land and Sea Management (LSM) Agency. The extent of the service contracts will depend on whether an active or passive PBC model is adopted. For example the use of a passive model for a PBC suggests externally-procured part-time secretarial services (including receiving, preparing and dispatching mail, organizing meetings of the PBC and when necessary, of the native title holders).

In the model of PBC design proposed above, an agreement is required between the LSM agency and the native title holders (via the PBC), whereby the native title holders might agree to consent to the LSM agency to perform certain acts or classes of activity (see Rec'd 3). This would enable day-to-day transactions to take place within the LSM agency without its staff having to continually consult with the native title holders eg. a policy where the LSM staff can approve permits for certain scales of tourist activity, camping, fishing etc, without having to worry the PBC membership.

The proposed LSM service function also allows income derived from compensation or other benefits, negotiated under ILUAs to be channelled through the PBC to the LSM agency which can engage practically in a range of land-based operations, drawing upon any available infrastructure, Community Development Employment Programme (CDEP) workers, Rangers, or consultants, on behalf of the native title holders. In all cases there needs to be a close coincidence between the membership, and to some extent the structure, of the land-holding entities in the sub-region and that of the LSM Agency to prevent conflicts of interest, although it would be possible to incorporate spouses, and those with historical interests in land in the membership of the latter where that is not possible for a PBC.

Two diverse outcomes of implementing such a planning model in the Coen and Wik sub-regions are outlined in the report. Whereas the Wik leaders have (so far) opted for a single PBC and have not chosen to formally incorporate each of their eight sub-groups for local land management purposes, but rather to work through existing organizations (such as the Aurukun Shire Council), the traditional owners in the Coen sub-region wish to formalise their four language-named tribal grouping into four corporations to carry out land and sea management contracts, outstation development, and enterprises. In the interests of rationalising the multiplicity of 18 or more titles in this latter region, a method has been proposed to amalgamate these entities in the case of each tribe, through a process that results in all of a tribe's land and sea areas having a single PBC as a Trustee of any ALA Land Trust.

The use of a central service provider in each planning region (or sub-region) for administrative service to the various PBCs and other Indigenous land-holding entities is common to both sub-region case studies and is a key emergent design principle. However, administrative and consultative complexities are identified that are likely to be encountered at and near sub-regional boundaries where groups may choose to seek LSM services from two sub-region centres in adjoining sub-regions, and where land tenures on Indigenous Land Use Agreements (ILUAs) straddle across sub-regions.

**Recommendation:**

9. NTRBs should look to forming and/or supporting one central service provider in each planning region (or sub-region) to provide an administrative service to the various PBCs and other Indigenous land-holding entities in that region or sub-region.

Let us resummairize how these arrangements might work in the two case study sub-regions.

*Case Study Details:-*

Although there are a complex range of dimensions to social and territorial structures in the two Indigenous case study sub-regions, for the purposes of planning and engaging in land and sea management, the Wik group has chosen to model itself as being composed of eight sub-groups, five of whom are ceremonial groupings and the remaining three are based upon social, language and geographic group descriptors, whilst the Coen Sub-region has defined itself as comprising four language-named tribes with discrete territories. Whereas the Wik and Wik Way leaders have so far not chosen to formally incorporate their eight groups, but rather to work through existing organizations (such as the Aurukun Shire Council), the traditional owners in the Coen Sub-region wish to formalize their four groupings into four corporations. Preliminary consultation indicates the need for an independent corporate vehicle for each of these four tribes to carry out land and sea management contracts, outstation development, enterprises, etc. But in the interests of achieving economies of scale, it is agreed that a single land and sea management agency should provide all common administration functions for the four groups. It is proposed that the LSM agency would provide secretarial services for the 18 or more PBCs and land trusts which have or are being formed in the Coen Sub-region. However in the interests of rationalizing this multiplicity of titles, a method has been proposed to ultimately amalgamate these entities for each tribe, through a process that results in all of a tribe's land and sea areas having a single land holding entity which doubles as both PBC for its native title interests and land trust for Aboriginal freehold land. However the issue of overlapping areas of interests between adjacent groups will add some complexity over and above the four core tribal PBCs.

Given the complexities surrounding the different types of tenure (and therefore land-holding entities) that exist within each of the land holding groups (be they constituted by language-named tribe, ceremonial group, etc), the authors are of the view that greater consideration should be given in the short term to the rationalisation of the management arrangements for such tenures, rather than in addressing the cumbersome proposal to harmonise and amalgamate the legal entities. Such an approach would seek to separate the title-holding functions of the land-holding entities from their management functions. The outcome would be a series of native title corporations/land trusts holding various tenures on behalf of the groups with a contracted regional land and sea management agency looking after the day-to-day management of the country. Major management issues crossing a relevant threshold (e.g. in the case of PBCs – issues requiring a 'native title decision') would still be referred to the title holding entity, in which case there would follow an extensive consultation and consent process for decision-making by the relevant native title (or in the case of land trusts, traditional owner) group

(facilitated by the sub-regional land and sea management agency, the NTRB and/or the PBC). Accordingly the decision would be likely made by the group decision-making process, and directions given to the (agency type) PBC to implement (a sign-off on) the decision.

The above models have obvious policy issues requiring debate and acceptance within the land-holding groups. The models are a pragmatic response to the financial and logistical constraints imposed by the existing legal and administrative regimes. It is conceivable that land-holding groups may not wish to forego their direct control over the management functions of their land-holding entities (by outsourcing these functions to an agency) and instead pursue an agenda of demanding greater resources. An example of this approach is to be found in the Coen Sub-region. Here the proposal is that the land and sea management agency would devolve a number of contracts (also using its CDEP and outstation infrastructure) to one or more of the four 'language tribes', each of which would have its own corporation.

Probably the most critical external design issue in the passive PBC model, is the development of satisfactory consultation and communication devices between the PBC, the native title holders and the LSM agency. In order to respond to consent requests under the NTA, properly resourced consultation of native title holders needs to be ensured.

Another external relationship for which some consideration is required is between the PBC and the NTRB. The PBC is likely to be heavily reliant on the NTRB, at least initially, for the provision of legal and other professional services.

### **The Social Planning of PBCs and Land Trusts**

Within the CYLC there is a significant amount of expertise in social planning by in-house and consultant anthropologists. There are also numerous studies and technical reports on classical and post-classical land tenure and social organisation. This represents an invaluable set of resources for understanding alternate group structures and dynamics for improved PBC design. Understanding the differentiation of rights and interests between sub-groups and individuals of a group in the design of cultural heritage management processes is another important and related planning issue.

Unfortunately the structure of the PBC is often the last element to be considered in the native title claim process. Perhaps the outcomes of a native title claim including the modus operandi of the PBC should be discussed and workshopped from the outset (including with anthropologists as facilitators). This is because, as the claimants pursue their claim, important dynamic aspects of their political processes and social structuring are likely to be revealed and may well hold the clues as to how the PBC should or might operate in reality.



Perhaps a key principle is to replicate the claimant group social structure and decision-making dynamics of the claim process in the PBC.

**Recommendation:**

10. The NTRB should encourage its consultants to explain the concepts of PBC to native title claimants from the outset of their claim, and encourage the various phases of the claim to draw upon the customary decision-making processes and their structure, in order to develop prototype PBC operations, and to experience and reflect on the advantages and disadvantages of such.

Another related issue for social planning is the promotion of PBC design and operation as a component of effective community government. One of the objectives of the ATSIC Regional Plan is to develop culturally appropriate ways for Indigenous people to exercise increased autonomy in local and regional government. A complementary goal of Queensland Department of Aboriginal and Torres Strait Islander Policy (DATSIP) is that of improving local community well-being by encouraging appropriate ways for governing within communities. It would seem important for both ATSIC and DATSIP to take account of the requirements for the development of effective PBC structures to ensure congruency and compatibility with their planning frameworks in relation to Indigenous governance of land and sea. Other specific governance aims would be to minimise unreasonable, unnecessary friction and obstruction with respect to Indigenous settlement planning and development processes, through ILUAs between native title holders and Aboriginal Community Councils.

Further social planning issues to consider when designing and establishing the PBC are as follows:-

- (i) Understanding the internal structure, political processes and authority structure of the relevant native title holding 'community' in relation to future PBC operations;
- (ii) Ensuring that customary decision-making is well understood by all those concerned and not compromised;
- (iii) Establishing the correct facilitation process to assist traditional owners in holding decision-making meetings at appropriate locations in traditional country;
- (iv) Considering alternative designs for the internal structure of PBCs to ensure the representation of different sub-groups; and
- (v) Identifying appropriate traditional owners with customary environmental knowledge to guide land and sea management activities.

A topic of social concern in one of the case study sub-regions was the impact of cash disbursements from

mining ILUAs given the already high incidence of alcohol abuse and family violence on Cape York.

**Recommendation:**

11. NTRBs should inform PBCs that if they wish to minimize the potential negative social impacts of cash disbursements in communities and in addition, simplify taxation responsibilities, that such disbursements could be in the form of practical and desired consumable goods eg white goods, vehicles, dinghies, etc.

**The Economic Planning of PBCs and Land Trusts**

The case study provides the following background of players of relevance to economic planning.

*ATSIC plays a significant role in funding the economic development in the Cape York study region, whilst Balkanu in turn directs a proportion of the ATSIC funding for specific economic development initiatives in the region. A large portion of the ATSIC funding is also channelled through the CDEP program. There are at least two other government authorities concerned with economic planning. The ILC has a strong focus on the economic development and improved economic viability of Indigenous owned land (but also promotes environmental, cultural and social sustainability). The ILC takes a local and grassroots approach by engaging consultative and problem-solving practices with traditional owner stakeholders. DATSIP is concerned with improving the standards of living for Indigenous people across Queensland. One of its eight key areas as described in the Ten Year Agreement, is economic development across the state.*

A key problem for Indigenous land-holding groups is to develop a capacity to raise capital so as to sustain the infrastructure for engaging with the outside world and sustaining the legal status of the land-holding entities. Financial support both for operational as well as infrastructure costs for PBCs will be required immediately after (if not before) title handover. At the very least, a minimum income is required for a base secretarial and administration service to fulfil the legal compliance requirements of land trusts and PBCs (including meeting organization and travel costs, etc.).

In planning a particular PBC, it will be necessary to identify the minimum annual resource level for it to operate; or (put in a different way), determine the cost to sustain the minimum activities and functions of a PBC for it to be effective (see lists of same in Chapter 7).

Potential sources of funding for PBCs would appear to be:-

- ATSIC Regional Council grants;
- Utilisation of existing resources within Aboriginal land holding systems, for example use of NTRBs, land trust infrastructure, Aboriginal Councils and Local Governments;

- Indigenous enterprises on native title or Aboriginal land;
- Compensation and/or benefits under resource exploitation ILUAs;
- Other State and Federal Government grants;
- The securing of bank loans against a guaranteed annual income over a fixed period of years from one or more ILUAs (The first payment/s would be held in a bank account to form the necessary deposit);and
- Securing loans by a charge over buildings or other improvements on native title land

However the relative ease with which such funding sources are accessible to different PBCs will vary. Obviously those with lucrative ILUAs will be in an advantageous position to invest and accrue funds, whilst those without ILUAs or enterprise backing may remain poor and suffer perpetual problems in even performing at a legally acceptable threshold. This reinforces the idea that some basic level of administration funding should be provided by the Commonwealth Government for all PBCs.

It should be noted that it is likely to be far easier for an LSM agency to attract funding for land management initiatives than for the recurrent operational costs of a PBC/land trust. In order to raise money for PBC administration expenses, it may be possible to build PBC consultation costs into land management grants rather than utilise the scarce PBC resources.

Clear rules of agreement will have to be established amongst traditional owners (including native title holders) as to how income into the LSM agency will be distributed, to complement those set down for PBC income (if any). This is particularly the case where a sub-group of native title holders has an established income stream from an ILUA or other agreement but the other sub-groups in the PBC do not. There is thus a need for an economic plan that allows, on the one hand, Aboriginal income into the region to be equitably spread to groups across the region for basic LSM functions but which at the same time recognizes local native title rights in compensation outcomes or acknowledges local enterprise initiatives by individual groups.

### **Recommendations:**

12. Exploration of types of financial structures that can be set up for the receipt of funds from land enterprises which best fit with Indigenous interests (eg. the role of family trusts, land agencies, CDEP).
13. The NTRB to have a compensation unit monitoring future acts within determination areas and pursuing payments of compensation on behalf of native title holders.
14. That NTRBs include in any ILUA negotiations or similar types of agreements, a percentage of

any compensation paid to the title holding entity toward the costs of (i) PBC administration, and (ii) the land and sea management agency (and possibly the NTRB);

15. Balance of compensation to be utilised in accordance with wishes of native title holders as directed to the title holding entity.

### **Case Study details**

*To self-operationalize the above planning models, the Wik Sub-region seems to be in a better position regarding both the establishment of early economic support and the ongoing long-term receipt of funds through mining ILUAs which in turn could be used to raise bank loans and secure other sources of capital. The potential for the Coen Sub-region to self-finance its PBC and land trust functions is at present extremely limited, which raises the issue of whether responsibility should be taken by government in this regard.. In both cases resources will be needed to facilitate meetings of native title holders outside of the PBC structures, in keeping with the requirements of the NTA and with customary decision-making processes. This necessary function should not be overlooked in planning.*

Despite the proposals contained in this chapter to generate local funding for the maintenance of PBCs, the Commonwealth's responsibility of meeting the base administration costs should not be displaced, given its role as architect of the Native Title Act and its Regulations This point cannot be stressed enough, if, in the long run, the system of land holding bodies set up under the NTA and ALA are to have any success in delivering positive outcomes for the native title holders and traditional owners of Cape York.

The issue of the desirability and capacity of PBCs to participate in the economic development of native title land has not been fully canvassed in this report. The authors consider it should be the subject of further research.

### **Environmental Planning**

Any region in any State of Australia undoubtedly will have a complex range of government and Indigenous agencies, departments and authorities involved in land (and sea) management and the current study area is no exception.

#### **Case Study Details**

##### *(a) Land management*

*The CYLC's corporate mission is effectively to both improve Indigenous control and management of land and to improve participation of Indigenous people in decision-making regarding land management. Balkanu also plays an important role in planning the use of Aboriginal land with a focus on economic development. The ILC is another significant player with the stated role being the provision of advice and assistance to Indigenous land holders to support them in establishing and maintaining*

land uses that suit their country, are sustainable in the long term and are a priority for them. CAT which primarily provides technical services with a focus on innovation and cultural appropriateness has worked with communities designing living environments for outstations as well as LSM agencies.

State agencies such as the EPA and QPWS are focused on strategic planning for the management of Queensland's natural and cultural environment. The EPA also focuses on the promotion and regulation of sustainable industries. DNRM focuses on the promotion of the sustainable use of land resources, particularly water ways and native vegetation (State Forests). Of interest to the present study are the DPI agencies including the Queensland Fisheries Service, DPI Forestry, and Office of Rural Communities.

The NHT is a significant Commonwealth Agency whose planning activities relate to promoting sustainable agriculture and managing natural and cultural environments. Of particular interest to Indigenous land and cultural heritage are two programs; the Indigenous Land Management Facilitator Program and the Indigenous Protected Areas Program. The NHT delivers services at the community, regional, state and Commonwealth levels.

The Cook Shire Council also asserts an interest in promoting the environmentally sustainable development of land in the region.

(b) Sea management

The Fisheries Action Program by the NHT hopes to develop an awareness amongst all resource users and the wider community of important fisheries, develop a sense of ownership and responsibility amongst all user groups, encourage participation, by the direct users of fisheries, encourage sustainable fishing practices, and integrate fisheries issues with regional planning.

The primary focus of GBRMPA is the protection and development of the Great Barrier Reef Marine Park. They have developed a 25-Year Strategic Plan through extensive consultation with a variety of interested parties. The GBRMPA established an Indigenous Cultural Liaison Unit to encourage the development of effective and mutually acceptable practices for implementation. This includes the recognition of cultural heritage and the management of fisheries that meet the needs of Indigenous interests.

A premise of the current study has been the need to administer land and sea management for an entire sub-region through one agency to achieve economies of scale on behalf of the traditional owners and native title holders incorporated into land trusts and PBCs. It is clear from the case study findings that such an LSM Agency will have many external entities with which to transact on environmental matters. There will also be a need to engage and transact with other Indigenous land

holding/managing organizations in adjoining sub-regions. There is a priority need here for some sort of GIS system in which LSM agencies, subject to the wishes of the native title holders, can store and maintain local Indigenous place and site data including that collated by anthropologists.

**Recommendation:**

16. The NNTT as well as other relevant State and Commonwealth Departments (eg ILC, NHT, EPA, QPWS) should sponsor the appraisal, selection and adaptation of a user friendly GIS software for national use by Indigenous LSM agencies.

In the models of PBC design outlined above, an agreement is required between the LSM agency and the native title holders. (via the PBC), whereby the native title holders agree to consent to the doing of certain acts belonging to a class of activity (see Recommendation 3). This would enable day-to-day transactions to take place within the LSM agency without its staff having to continually consult with the native title holders, e.g. a policy where the LSM staff can approve permits for certain scales of tourist activity without having to refer each and every application to the PBC or land trust.

**Conservation Areas**

The State of Queensland's political failure to identify a clear position on Indigenous involvement in National Park and Conservation Area management continues to have a detrimental impact on the rationalisation of Indigenous land and sea management structures at the regional and local levels. There is nevertheless considerable scope, via a range of existing and/or potential legislative and administrative mechanisms, for a PBC to be meaningfully involved in the management of nature Conservation Areas. It would be possible for the Board of Management of a Conservation Area to be comprised of the PBC Governing Committee or be nominated by the PBC under an agreement with the Minister (perhaps through an ILUA). It would also be possible to create a PBC which was then appointed as grantee of ALA inalienable freehold with a term leaseback arrangement for a National Park.

**Recommendations:**

17. That the Queensland Government resolve the impasse on leaseback arrangements for successfully claimed National Parks by agreeing to term leases of appropriate duration (30 years).
18. That the Queensland Government expedite discussions with native title claimants on appropriate arrangements for the involvement of PBCs in the management of National Parks and other Conservation Areas, and implement those arrangements.

## Legal Planning for PBCs and Land Trusts

There is a need for both PBCs and Land and Sea Management Agencies to have ready access to sound legal advice. Such advice will be necessary when making particular decisions about the management of native title lands. For example, assessing the nature of particular decisions will require advice as to whether it is a 'native title decision' thus requiring the implementation of the consultation and consent provisions. Legal services will also be required to advise on the negotiation of ILUAs, the doing of certain future acts over native title land and the recovery of compensation. The extent of demand for legal assistance will probably depend on the nature and extent of future act activity occurring within the determination area and also the ability of the PBC/LSM to establish systems to respond to such acts.

## Further Government Policy Planning

At the time of this study, the Commonwealth Government and ATSIC had both indicated that there was no allocated money for the administration of PBCs. Findings by the current authors indicate that PBCs cannot meet their prescribed statutory functions without some base funding. Unless base funding is made available, the native title legislation is unworkable. Government failure to ensure funding for the basic maintenance of PBCs will create a political environment of uncertainty and vulnerability for such industries as mining, tourism, fishing and pastoralism. The same observations can equally be made about the Queensland Government and its commitment to resourcing ALA land trusts to operate and discharge their obligations under the ALA legislation and regulations.

In a worst case scenario, continued lack of funding will lead to poorly negotiated outcomes marked (potentially) by corruption, lack of accountability and legal uncertainty. To protect the mainstream corporate infrastructure of the Australian community, the Commonwealth Government spends millions of dollars on regulatory agencies such as the Australian Securities and Investment Commission (ASIC) and Australian Consumer and Competition Commission (ACCC). By virtue of the restrictions of the PBC Regulations, PBCs are denied the protection and benefits of operating within the mainstream system and are forced to operate within an unfunded, ill conceived, over regulated and yet easily corruptible system.

### **Recommendation:**

19. That the Commonwealth Government provide the basic annual costs of PBCs throughout Australia to comply with the minimum requirements of the Aboriginal Councils and Associations Act, and (ii) comply with their functions, particularly in relation to native title decision-making. (This could be administered directly to PBCs through ATSIC or by N.T. Representative Bodies using tied ATSIC funding.)

20. That recurrent funding be provided by the Commonwealth and State Government for the operational costs of Indigenous Land and Sea Management Offices in each of the CYLC sub-regions of Cape York.
21. That the Queensland Government take steps to ensure that Trusts established under the ALA are operationally sustainable.

## Legislative and Regulatory Planning

The legislative framework governing the establishment and operation of PBCs displays a burdensome complexity which derives from a range of factors including:

- the inherent difficulty in corporatising native title interests;
- inappropriate regulations and practices which have developed in the administration of the ACAA, although both the Act and the ACA regulations are currently under review;
- poorly conceived and inappropriate PBC Regulations;
- the involvement of both Commonwealth and State Governments and their respective legislative and administrative regimes; and
- the intersection of numerous pieces of legislation governing land title and management.

Legislative reforms raised in the current study for consideration are contained in the following recommendations.

### **Recommendations for Commonwealth:**

22. That the NTA and PBC Regulations be amended to clarify and confirm:
  - (a) the ability of the Federal Court to determine more than one PBC for any determination of native title; and
  - (b) the capacity of a single PBC to be determined in relation to several determinations of native title, provided that the native title holding groups are identical in each determination.
23. That the PBC Regulations be amended to widen the class of corporate entities eligible for nomination as a PBC (to include those under Corporations Law and State based land rights regimes such as the ALA etc.).
24. That the 'deemed consultation and consent' provisions of the NTA be reviewed and amended to ensure the protection of native title holders' collective interests and ensure the integrity of traditional decision-making processes.
25. That consideration be given to the enactment of new wholesale legislation governing the incorporation and regulation of PBCs.

### **Recommendation for State of Queensland:**

26. That the Queensland Government clarify the powers of Land Trusts by amendment of the ALA, (ie whether the general provisions of the *Trusts Act 1973* (Qld) apply to Land Trusts).

## Summary of Recommendations

1. That PBCs establish a register recording:
  - Details of each native title decision including the proponent, nature, location, purpose and duration of the act;
  - Details of any compensation proposed for the act;
  - Evidence of consultation with the NTRB about the native title decision;
  - Evidence of consultation with the relevant native title holders affected by the decision; and
  - Evidence of a decision by the relevant native title holders.
2. That PBCs include in their rules a requirement to establish and maintain such a register.
3. That each PBC provide in its rules for the making of classes of native title decisions by the PBC in its own right without reference to the native title holders.
4. That the PBC rules prescribe the minimum requirements for the making of native title decisions.
5. That priority be given to the transfer of land, under the ALA, which is subject to advanced native title proceedings rather than making land available under the ALA claims process.
6. That funding for the administration of land trusts be increased significantly to ensure compliance with minimum statutory provisions and functions.
7. That the Queensland Government provide a formal response to the proposal to appoint PBCs as grantees of land trusts.
8. That Aboriginal Councils and PBCs negotiate model ILUAs for future acts within Deed of Grant in Trust (DOGIT) and/or council areas.
9. NTRBs should look to forming and/or supporting one central service provider in each planning region (or sub-region) to provide an administrative service to the various PBCs and other Indigenous land-holding entities in that region or sub-region.
10. The NTRB should encourage its consultants to explain the concepts of PBC and RNTBC to native title Claimants from the outset of their Claim, and encourage the various phases of the Claim to draw upon the customary decision-making processes, in order to develop prototype PBC operations, and to experience and reflect on the advantages and disadvantages of such.
11. NTRBs should inform PBCs that if they wish to minimise the potential negative social impacts of cash disbursements in communities and in addition, simplify taxation responsibilities, that such disbursements could be in the form of practical and desired consumable goods eg white goods, vehicles, dinghies or other forms of investment.
12. There be an exploration of types of financial structures that can be set up for the receipt of funds from land enterprises which best fit with Indigenous interests (eg. the role of private family trusts and corporations, Land Agencies, CDEP).
13. The NTRB to have a compensation unit monitoring future acts within determination areas and pursuing payments of compensation on behalf of native title holders.
14. Utilisation of a percentage of any compensation paid to the PBC toward the costs of the Land and Sea Management Agency (and possibly the NTRB if it is the service provider).
15. Balance of compensation to be utilised in accordance with wishes of native title holders as directed to the PBC.
16. The NNTT as well as other relevant State and Commonwealth Departments should sponsor the appraisal, selection and adaption of a user friendly GIS software for national use by Indigenous LSM agencies.
17. That the Queensland Government resolve the impasse on leaseback arrangements for successfully claimed National Parks by agreeing to term leases of appropriate duration (30 years).
18. That the Queensland Government expedite discussions with native title claimants on appropriate arrangements for the involvement of PBCs in the management of National Parks and other Conservation Areas, and implement those arrangements.
19. That the Commonwealth Government provide the basic annual costs of PBCs throughout Australia to (i) comply with the minimum requirements of the Aboriginal Corporations Act, and (ii) comply with their PBC functions, particularly in relation to native title decision-making. (This could be administered directly to PBCs through ATSIC or by Native Title Representative Bodies using tied ATSIC funding.)
20. That in order to facilitate the effective coordination of the native title land and sea management responsibilities of Cape York PBCs, recurrent funding be provided by the Commonwealth and State Governments for the operational costs of Indigenous Land and Sea Management Offices in each of the CYLC sub-regions of Cape York.
21. That the Queensland Government take steps to ensure that Trusts established under the ALA are operationally sustainable.

22. That, insofar as it may be necessary, the NTA and PBC Regulations be amended to clarify and confirm:
  - (a) the ability of the Federal Court to determine more than one PBC for any determination of native title; and
  - (b) the capacity of a single PBC to be determined in relation to several determinations of native title, provided that the native title holding groups are identical in each determination.
23. That the PBC Regulations be amended to widen the class of corporate entities eligible for nomination as a PBC (to include those under Corporations Law, State based land rights regimes such as the ALA etc.).
24. That the 'deemed consultation and consent' provisions of the NTA be reviewed and amended to ensure the protection of native title holders' collective interests and ensure the integrity of traditional decision-making processes.
25. That consideration be given to the enactment of new wholesale legislation governing the incorporation and regulation of PBCs.
26. That the Queensland Government clarify the powers of land trusts by amendment of the ALA (ie whether the general provisions of the *Trusts Act 1973* (Qld) apply to land trusts).

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## APPENDICES

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| Appendix 2 | Draft ‘Certificate of Consultation and Consent’ for use by PBCs concerning the making of native title decisions, as devised by Cape York Land Council | Appendix 6 | Further Case Study Materials – Wik Sub-region  |
| Appendix 3 | The Granting of Land by the Indigenous Land Corporation and its relation to Prescribed Body Corporates  | Appendix 7 | Further Materials on the Cape York Planning Environment  |
| Appendix 4 | Details of the Project Methodology  | Appendix 8 | A General Description of Traditional Decision-making Processes, Developed by the Cape York Land Council to Support Authorisation of Native Title Claim Applications in Cape York |

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# APPENDIX 1: DRAFT RULES OF NGAN AAK-KUNYCH ABORIGINAL CORPORATION

18 March 2002 – DISCUSSION DRAFT  
DRAFT RULES OF NGAN AAK KUNCH ABORIGINAL CORPORATION  
By Philip Hunter, Ebsworth and Ebsworth

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## 1. Name

1.1 The name of the Corporation is the NGAN AAK KUNCH ABORIGINAL CORPORATION.

## 2. Interpretation

2.1 In these Rules:

*act* has the meaning given by section 226 of the *Native Title Act*.

*AC&A Act* means the *Aboriginal Councils and Associations Act 1976 (Cth)*.

*AC&A Regulations* means the *Aboriginal Councils and Associations Regulations 1978 (Cth)*.

*affect* has the meaning given in section 227 of the *Native Title Act*.



**affected area** means a determination area or any part of it about which a native title decision is proposed to be made.

**affected native title holders** means those native title holders who hold native title rights and interests that may be affected by a proposed native title decision.

**Committee** means the Governing Committee as provided for in these Rules.

**Committee's Report** means a report prepared in accordance with section 59(2) of the AC&A Act.

**Corporation** means NGAN AAK KUNCH ABORIGINAL CORPORATION.

**determination area** means the land and waters the subject of a determination of native title in relation to which the Corporation is registered on the National Native Title Register.

**determination of native title** means a determination of native title pursuant to the *Native Title Act*.

**Examiner's Report** has the meaning given in section 59(3)(b) of the AC&A Act.

**Native Title Act** means the *Native Title Act 1993 (Cth)*.

**native title decision** means a decision:

- (a) to surrender native title rights and interests in relation to a determination area; or
- (b) to do, or to agree to do, any other act that would affect the native title rights or interests of the native title holders,

and includes a decision refusing to make a proposed native title decision.

**native title holders** means those members of the Wik and Wik Way Peoples who from time to time hold native title rights and interests in relation to a determination area.

**native title** and **native title rights** and interests has the same meaning as in the *Native Title Act* and in relation to a determination area means those rights and interests determined in a determination of native title to be held by the native title holders.

**Public Officer** means the person appointed by the Corporation to be the Public Officer as defined by the AC&A Act.

**registered native title body corporate** has the same meaning as in the *Native Title Act*.

**Registrar** means the person appointed by the Minister under the AC&A Act to be Registrar of Aboriginal Corporations.

**Regulations** means the *Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)* (as amended) made pursuant to the *Native Title Act*.

**Representative Body** means the Cape York Land Council or any other body that is from time to time recognised as a representative Aboriginal/Torres Strait Islander body under section 203AD of the *Native Title Act* for any part of a determination area.

**Wik and Wik Way Peoples** means Aboriginal persons who identify as and are recognised as Wik persons or Wik Way persons in accordance with Wik and Wik Way traditional laws and customs.

2.2 In these Rules and unless the contrary intention appears:

- (a) expressions used have the same meanings as those ascribed to them by the AC&A Act;
- (b) definitions used in these Rules from the *Native Title Act* include any amendments that may be made to those definitions in the *Native Title Act* from time to time;
- (c) a reference to legislation or regulations includes any subsequent amendments to that legislation or regulations and, if legislation or regulations are repealed, it includes the legislation or regulations that are substituted for them;
- (d) a reference to any gender includes all genders;
- (e) the singular includes the plural and vice versa; and
- (f) any inconsistency between these rules and the AC&A Act will be resolved in favour of the AC&A Act.

### 3. Type of Corporation

3.1 The Corporation is an Incorporated Aboriginal Association under the AC&A Act.

### 4. Registered Office

4.1 The registered office of the Corporation shall be at the official address of the Public Officer, notified to the Registrar of Aboriginal Corporations in accordance with section 57 of the AC&A Act.

### 5. Liability of Members

5.1 The members of the Corporation are not liable to contribute towards the payment of the debts and liabilities of the Corporation.

## 6. Objects

- 6.1 The objects for which the Corporation is established are to:
- (a) be the subject of determinations of native title under section 57 of the Native Title Act;
  - (b) be a registered native title body corporate in relation to a determination area for the purposes of the Native Title Act;
  - (c) perform the functions of a registered native title body corporate that does not hold native title rights and interests in trust for the common law holders under the Native Title Act and the Regulations. These functions include the following:
    - (i) to act as agent or representative of the native title holders in respect of the native title;
    - (ii) to manage the native title of the native title holders as authorised by the native title holders;
    - (iii) to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;
    - (iv) to invest or otherwise apply any money held in trust as directed by the native title holders;
    - (v) to consult with the native title holders in accordance with Rule 8.2;
    - (vi) to perform any other functions in relation to the native title rights and interests as directed by the native title holders;
  - (d) protect the native title rights and interests of the native title holders;
  - (e) promote the recognition of the native title rights and interests of the native title holders;
  - (f) advance the cultural, social, political, economic and legal interests of the native title holders, including by establishing appropriate legal entities to achieve these objects;
  - (g) relieve the poverty, misfortune, disadvantage and suffering of the native title holders;
  - (h) take advantage of investment and commercial opportunities that arise or relate to the native title holders and to exploit those opportunities to generate assets and funds for charitable purposes and employment opportunities for the native title holders and
  - (i) perform any other functions that are ancillary or incidental to but not inconsistent with the performance of the functions of a registered native title body corporate.

## 7. Powers

- 7.1 Subject to these Rules, the *AC&A Act*, the *Native Title Act* and the Regulations, the Corporation has power to do all things necessary or convenient to be done to fulfil the objects of the Corporation.

## 8. Performance of Functions and Exercise of Powers

### General

- 8.1 The Corporation shall not perform a function or exercise a power except to fulfil an object of the Corporation and, in performing a function or exercising a power, shall act so as to:
- (a) protect the interests of affected native title holders;
  - (b) minimise, and to the maximum extent practicable avoid, exposing native title holders to claims, actions or debts for which they may be personally liable; and
  - (c) comply with Rule 8.2 and act in accordance with the consent and direction of affected native title holders when making a native title decision.

### Native title decisions

- 8.2 The Corporation shall not make a native title decision unless it:
- (a) has used its best endeavours to ascertain the identity of the affected native title holders;
  - (b) is satisfied that the affected native title holders understand the nature and purpose of the proposed native title decision, and the extent, if any, of any claims, actions or debts to which the affected native title holders may be liable as a result of the native title decision;
  - (c) has consulted and considered the views of the Representative Body and, where it considers it to be appropriate and practicable, given notice of those views to the affected native title holders; and
  - (d) is satisfied that the affected native title holders consent to the making of the proposed native title decision and have given a direction to the Corporation to make the native title decision.

## 9. Outsourcing

- 9.1 Where the Corporation is required to meet certain requirements in relation to the performance of its functions and exercise of its powers, the Corporation may request the assistance of or engage the Representative Body or an appropriately qualified consultant acceptable to the affected native title holders to meet those requirements.
- 9.2 Anything done by the Representative Body or a consultant under Rule 9.1 shall be done in accordance with these Rules as if the Corporation was doing it. The Corporation, where it is satisfied that this has been done, may act on a report prepared by the Representative Body or the consultant as to the doing of those things as if the Corporation had done those things itself, and may be satisfied on the basis of such a report as to the matters required to make a native title decision under Rule 8.2.

## 10. Membership

- 10.1 Membership of the Corporation is open only to adult Aboriginal people who are native title holders and who are at least eighteen years of age.
- 10.2 The members of the Corporation shall be those persons who:
- (a) are eligible to be members under Rule 10.1;
  - (b) apply to the Committee to become members; and
  - (c) the Committee decides may be admitted to membership.
- 10.3 The Committee shall consider each application for membership at the next meeting of the Committee following the receipt of the application.
- 10.4 The only grounds on which the Committee may refuse to accept an application for membership is from a person who is not eligible to be a member of the Corporation under Rule 10.1.
- 10.5 Any person whose application for membership is refused by the Committee pursuant to Rule 10.4 may seek to have that decision reviewed at the next Committee meeting. The Committee may either affirm the refusal of or accept that person's application for membership.
- 10.6 All members shall be entitled to attend, speak and vote at general meetings of the Corporation and be eligible for appointment as officer bearers or members of the Committee.
- 10.7 A register of members must be kept by the Public Officer.
- 10.8 A member shall cease to be a member:
- (a) upon that member's death; or
  - (b) upon receipt by the Committee or the Public Officer of that member's written resignation from membership.

## 11. Governing Committee

- 11.1 The Committee of the Corporation shall be a committee of sixteen (16) members comprising two members from each of the following Representative Groups who are to be appointed to the Committee in accordance with Rule 11.3. The Representative Groups comprise those persons having native title rights and interests in each of the following regions or affiliated to the following ceremonial or language groups, being native title holders:
- (a) who:
    - (i) affiliate with the Shivirri ceremonial group;
    - (ii) are native title holders for the Ward River, Norman Creek, Pera Head, Mbang, Moingam, Hey River, Embley River or Marmoss River regions; or
    - (iii) affiliate with the Alngith or any other Wik Way language group;
  - (b) who affiliate with the Winchanam ceremonial group;
  - (c) who affiliate with the Apelech ceremonial group;
  - (d) who affiliate with the Puch ceremonial group;
  - (e) who affiliate with the Wanam ceremonial group;
  - (f) who are native title holders for the lower (bottom-side) Holroyd River, Christmas Creek or Edward River (as those rivers are known locally) regions;
  - (g) who identify as Mungkanhu or who affiliate with the Wik-Iyanh language group;
  - (h) who affiliate with the Ayapathu language group,
- ("the Representative Groups").**
- 11.2 The members of the Committee shall be appointed:
- (a) at the first general meeting of the Corporation; and
  - (b) at the annual general meeting held three (3) years from the date of the first general meeting and every third annual general meeting following that meeting.
- 11.3 The appointment of members to the Committee will be made in the following manner:
- (a) the members of each Representative Group shall provide to the Secretary the names of the two (2) members nominated by that Representative Group to be members of the Committee at or before the time when nominations are called for at the meeting; and
  - (b) the members nominated by each Representative Group to be appointed to the Committee must give their consent to being nominated to the Chairperson before they are appointed to the Committee.
- 11.4 If the members of a Representative Group:
- (a) do not provide the names of two (2) members nominated to be appointed as members of the Committee in accordance with Rule 11.3; or
  - (b) nominate members and either or both of the two (2) members nominated do not give their consent to being nominated in accordance with Rule 11.3,

- (c) that Representative Group's remaining positions on the Committee will be treated as casual vacancies and may be filled in accordance with Rule 11.9.
- 11.5 Except as otherwise provided in these Rules, the members of the Committee, including members appointed to fill casual vacancies on the Committee:
- (a) hold office until the next annual general meeting at which members of the Committee are to be appointed;
  - (b) are eligible for reappointment as a member of the Committee.
- 11.6 A person cannot become or remain a member of the Committee if he has been convicted of an offence against a Commonwealth, State or Territory law and sentenced to imprisonment for:
- (a) three (3) months or longer if the offence involved fraud or misappropriation of funds;
  - (b) one (1) year or longer in the case of any other offence,
- unless:
- (c) at least five (5) years have passed since the date of conviction and the person is not serving a term of imprisonment; or
  - (d) the Registrar or the Minister has declared in writing that this Rule does not apply to a particular person in relation to a particular conviction.
- 11.7 A person ceases to be a member of the Committee if:
- (a) the person ceases to be a member of the Corporation;
  - (b) the person resigns as a member of the Committee by written notice signed by that member and given to the Secretary;
  - (c) the person becomes bankrupt or insolvent under administration;
  - (d) the person becomes incapable of holding office because of a civil penalty disqualification by a Court; or
  - (e) a resolution is passed by a majority of not less than seventy-five (75) percent of the members present at a general meeting, seeking to remove the person from the Committee if, by reason of infirmity, absence or any other reason, the Corporation is of the opinion that he has ceased to be an effective member of the Committee.
- 11.8 If a resolution to remove a member from the Committee is proposed in accordance with Rule 11.7(e):
- (a) written notice of the proposed resolution is to be forwarded to the member not less than seven (7) days before the date of the general meeting at which the resolution is to be moved; and
  - (b) the member is to be given an opportunity to respond to the proposed resolution at the general meeting.
- 11.9 If at any time there is a vacancy in the membership of the Committee ("casual vacancy"), the members of the Representative Group from which the casual vacancy has occurred may appoint an additional member to fill that casual vacancy.
- 11.10 The Committee shall meet to attend to its business as often as it considers necessary.
- 11.11 At least a majority of members of the Committee shall be a quorum for any meeting of the Committee.
- 11.12 Reasonable notice of each meeting of the Committee shall be given to each member of the Committee.
- 11.13 Subject to these Rules, the *AC&A Act* and the *Native Title Act*, the members of the Committee may meet together (whether in person, by telephone, radio, video link, television, satellite link or any other means of communication by which all persons participating in the meeting are able to hear and be heard by all other participants) for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit.
- 11.14 At each meeting of the Committee, the members of the Committee present shall appoint a Chairperson from the members of the Committee to chair that meeting.
- 11.15 The Secretary or such person as the Committee appoints shall keep proper minutes of the proceedings of all meetings of the Committee.
- 11.16 The Committee shall manage and control the affairs of the Corporation in accordance with these Rules and with the *AC&A Act* and for that purpose may exercise the powers of the Corporation as if they had been expressly conferred on the Committee by a general meeting of the Corporation.
- 11.17 The Committee may from time to time delegate such of its functions and powers (and revoke any such delegation) to four (4) or more members of the Committee for such periods of time as it deems appropriate.
- 12. Duties of Members of the Governing Committee**
- 12.1 The members of the Committee must:
- (a) consider, and be guided by, acknowledged traditional law and observed traditional custom of the native title holders;
  - (b) act honestly, diligently and with reasonable care;
  - (c) not make improper use of information or opportunities received through their position; and

(d) where the Corporation acts as an agent or representative of the native title holders, manage and control the affairs of the Corporation in the interests of all native title holders and in accordance with these Rules, the *Native Title Act*, the Regulations and the *AC&A Act*.

### **13. Appointment and Removal of Employees**

13.1 Except as otherwise provided in the *AC&A Act* or these Rules, the Committee shall have power to appoint and remove or suspend employees and agents and to determine the powers, duties and payment of employees and agents.

### **14. Disclosure of Interest**

14.1 A member of the Committee who has any interest (other than a native title right and interest) in a contract or arrangement, or proposed contract or arrangement, in a matter being considered or about to be considered by the Corporation must disclose the nature of the interest at a meeting of the Committee as soon as possible after the relevant facts have come to his or her knowledge and a record of such disclosure must be made in the minutes of that meeting.

14.2 A member who has disclosed an interest under Rule 14.1 must not, without the approval of the Committee, be present during any deliberation about that matter or take part in any decision about that matter.

14.3 Where a matter referred to in Rule 14.1 is one in relation to which the member who has disclosed the interest is an affected native title holder, the Committee may give its approval to the member being present during the relevant deliberation and taking part in the relevant decision.

### **15. Office Bearers**

15.1 There shall be a Secretary who will be the sole office bearer of the Corporation. The Secretary shall be appointed by the members of the Corporation at the first general meeting of the Corporation, and thereafter, at the annual general meeting of the Corporation held three (3) years from the date of the first general meeting and every third annual general meeting following that meeting. A member of the Committee may be appointed Secretary. The Secretary is eligible for re-appointment.

15.2 Any casual vacancy in the office of the office bearer may be filled by a member of the Committee. The member of the Committee so appointed will retain the office of office bearer until the next appointment of office bearer and will be eligible for re-appointment.

### **16. General Meetings**

16.1 The first general meeting of the Corporation must be held within three months after incorporation.

16.2 The first annual general meeting of the Corporation must be held within 15 months after incorporation. Subsequent annual general meetings must be held within three months of 30 June in each year.

16.3 The order of business of the annual general meeting will be:

(a) to confirm the minutes of the last general meeting, whether the annual general meeting or a special general meeting;

(b) where the annual general meeting is that held after a period of three (3) years from the date of the first general meeting, and subsequently every third annual general meeting, to appoint the Committee members and office bearers of the Corporation;

(c) to receive from the Committee any reports concerning the activities, business and decisions of the Corporation during the preceding financial year ending 30 June, including the Committee's Report and Examiner's Report;

(d) to appoint an examiner if required by subsection 59(3) of the *AC&A Act*; and

(e) to conduct such other business as the meeting shall determine.

16.4 Subject to these Rules, the place, date and hour of every general meeting shall be determined by the Committee and notice of the meeting, including the purpose of the meeting, shall be given to the members of the Corporation at least ten (10) days prior to the date of the meeting, by any means the Committee considers appropriate.

16.5 An annual general meeting and a general meeting shall be open to all native title holders and any native title holder in attendance at a general meeting, who is not a member, may speak but not vote at the meeting.

16.6 Subject to these Rules and the *AC&A Act*, the members of the Corporation may meet together (whether in person, by telephone, radio, video link, television, satellite link or any other means of communication by which all persons attending and participating in the meeting are able to hear and be heard by all other participants) for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit.

16.7 A member who is noted as being present at a meeting (whether in person, by telephone, radio, video link, television, satellite link or any other means of communication) is deemed to be present until the conclusion of the meeting unless it is recorded through the Chairperson that the member has left the meeting.

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- 16.8 The Corporation will ensure that proper minutes are kept of the proceedings of all general meetings.
- 16.9 The members present at an annual general meeting or a general meeting of the Corporation shall appoint a member of the Committee as Chairperson to chair the meeting.
- 17. Special General Meetings**
- 17.1 The Committee may call general meetings in addition to the first general meeting and the annual general meeting.
- 17.2 Any general meeting other than the first general meeting and the annual general meeting shall be called a special general meeting.
- 17.3 The Committee shall, on the request of seven (7) members or ten (10) percent of the total number of members of the Corporation, whichever is the greater, call a special general meeting of the Corporation as soon as practicable but no later than one (1) month of the receipt of such a request, if the request:
- (a) is in writing;
  - (b) states the nature of the business sought to be dealt with at the meeting;
  - (c) is signed by all of the members making the request; and
  - (d) is served on the registered office of the Corporation.
- 17.4 The order of business at a special general meeting shall be:
- (a) to confirm the minutes of the last general meeting, whether the annual general meeting or a special general meeting;
  - (b) to deal with all matters for which the meeting was called; and
  - (c) to conduct such other business as the meeting shall determine.
- 17.5 No person may make any public statement on behalf of the Corporation unless authorised by the Committee.
- 18. Quorum**
- 18.1 No business shall be transacted at any general meeting unless a quorum of members is present. A quorum shall be at least twenty-five (25) percent of the total membership of the Corporation or twenty (20) members, whichever is the lesser.
- 19. Consensus and voting**
- 19.1 Questions arising at any meeting of the Corporation must be decided by consensus or, in the absence of consensus, after reasonable effort having been made to reach consensus, by a majority of votes.
- 19.2 Where a vote is required, each member present will have one vote. Voting will be by show of hands unless the meeting otherwise decides.
- 19.3 In the event of an equal number of votes being achieved, the Chairperson appointed to chair the meeting has a casting vote.
- 19.4 A member may appoint another member as proxy at a meeting. A member shall not hold more than three proxies. A notice appointing a proxy must be in the form set out in the Appendix to these Rules and must be given to the Secretary at least twenty-four (24) hours before the meeting.
- 20. Notices**
- 20.1 A notice may be given by the Corporation to any member either personally, or in a manner which accords with the traditional laws and customs of the native title holders, or by sending it by post to that member at his registered address.
- 20.2 Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.
- 20.3 Notice of any general meeting shall be given in accordance with these Rules to every member of the Corporation.
- 20.4 For any annual general meeting or general meeting, the Committee shall use its best endeavours for public notices to be displayed at prominent places in the townships of Aurukun, Pormpuraaw, Napranum and Coen at least ten (10) days before the date of any meeting, so as to give notice of the meeting to all native title holders.
- 21. Public Officer**
- 21.1 The Committee shall, within three (3) weeks after incorporation of the Corporation, appoint a person to be the Public Officer of the Corporation in accordance with section 56 of the AC&A Act. The Public Officer may be a member of the Corporation, an office bearer of the Corporation or a person who is not a member of the Corporation.
- 21.2 Where for any reason there is a change of Public Officer, the Corporation must, within three (3) weeks after the appointment of the new Public Officer, notify to the Registrar the full name and official address of the Public Officer.
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21.3 Where the Corporation changes the official address of the Public Officer it must, within three (3) weeks of the change, notify the Registrar of such change.

## **22. Register of Members**

22.1 The Public Officer must keep at his or her official address a register showing:

- (a) the name, address and date of birth of every member of the Corporation;
- (b) the date on which each member became a member of the Corporation; and
- (c) the date on which a member ceased to be a member of the Corporation.

22.2 The Public Officer must ensure that the register of members is open for inspection to members of the public at all reasonable times.

22.3 As soon as practicable after each 30 June but not later than the next 31 December, the Committee must give the Registrar a copy of the Register of Members or a list of the names and addresses of all the persons who are members of the Corporation, in accordance with subsection 58(3) of the AC&A Act.

## **23. Common Seal**

23.1 The Corporation must have a common seal, which must be kept in the custody of a person nominated by the Corporation.

23.2 The common seal of the Corporation must be in the form of a rubber stamp with the full name of the Corporation inscribed in legible characters.

23.3 The common seal must not be used or placed on any document unless authorised by the Committee or at a general meeting of the Corporation.

23.4 If the common seal is placed on any document at least three (3) members of the Committee must sign the document.

23.5 The Committee may delegate to at least four (4) members of the Committee the power to place the common seal on any or any categories of documents provided three of those members so delegated sign the document. Such delegation may be specific or general and may be limited in time and by purpose.

23.6 The placing of the common seal in accordance with any such delegation made by the Committee shall bind the Corporation.

23.7 All documents that have the common seal placed on them pursuant to Rule 23.5 shall be tabled at the next meeting of the Committee.

## **24. Banking**

24.1 Official receipts must be issued for all moneys received by the Corporation.

24.2 All funds of the Corporation must, in the first instance, be deposited in a bank account of the Corporation no later than the first working day following the day of receipt or as soon as possible thereafter.

24.3 The account must be operated and all transactions signed or approved under the signature jointly by at least two (2) members of the Committee or by at least one (1) member of the Committee and one other person to whom the Corporation has delegated this responsibility. The Committee must inform the Corporation's bank in writing if and when there is any change to the names of those people who are authorised to operate the account.

## **25. Application of Funds and Property**

25.1 All funds or property of the Corporation not received on trust or otherwise on terms that require it to be accounted for in a particular way, shall be available at the discretion of the Committee for the purpose of carrying out the objects of the Corporation.

25.2 The funds and property of the Corporation shall not be paid or applied directly or indirectly by way of dividend, bonus or otherwise by way of profit to any member, except by way of payment in good faith of reasonable and proper remuneration to any member, officer bearer, servant, agent or employee of the Corporation for or in return for services actually rendered to the Corporation.

25.3 All funds or property of the Corporation received on trust or otherwise on terms that require it to be accounted for in a particular way shall be applied in accordance with the terms of that trust or those other terms as the case requires.

## **26. Accounts**

26.1 Proper accounts and records must be kept by the Secretary or such person as the Committee appoints, of the transactions and affairs of the Corporation. The Committee must do all things necessary to ensure all payments out of the moneys of the Corporation are correctly made and properly authorised and that adequate control is maintained over the assets of, or in the custody of, the Corporation and over the incurring of liabilities by the Corporation.

26.2 Except to the extent of any exemption under section 59A of the AC&A Act the Committee will, as soon as practicable after each 30 June, cause to be prepared a Committee's Report consisting of:

- (a) a statement, in a form approved by the Registrar, showing whether the Committee has complied with the obligations imposed by the *AC&A Act*, the *AC&A Regulations* and the Rules during the financial year ending on that date;
- (b) a balance sheet setting out the assets and liabilities of the Corporation as at that 30 June;
- (c) an income and expenditure statement giving a true and fair view of the income and expenditure of the Corporation for the financial year ending on that 30 June; and
- (d) a copy of the latest list of members given to the Registrar under subsection 58(3) or (4) of the *AC&A Act*.

## 27. Audit

- 27.1 Rules 27.2 to 27.4 must be complied with except to the extent of any exemption under section 59A of the *AC&A Act*.
- 27.2 As soon as practicable after the Committee's Report has been prepared, the Corporation must cause a person authorised by the Registrar for the purpose, to:
- (a) examine whether the Committee and the Corporation have complied with the obligations imposed by the *AC&A Act*, the Regulations and the rules of the Corporation and whether the balance sheet and income and expenditure statement are based on proper accounts and records and in agreement with those accounts and records; and
  - (b) give the Committee an Examiner's Report of the results of that examination, drawing attention to any irregularity that it has disclosed.
- 27.3 The Committee must forward to the Registrar a copy of the Committee's Report and the Examiner's Report as soon as practicable after receiving the Examiner's Report and in any case not later than 31 December after the end of the relevant financial year.
- 27.4 The Committee must make a copy of the Committee's Report and the Examiner's Report available at the annual general meeting of the Corporation as well as for inspection at all reasonable times by members of the Corporation.

## 28. Alteration of Objects and Rules

- 28.1 Subject to Rule 28.2 the objects of the Corporation, the definition of "native title holders" in Rule 2.1, Rules 8.1 and 8.2 and the definition of "Representative Groups" in Rule 11.1 must not be altered or amended in any way except as required by law or with the consent of the native title holders given and evidenced in accordance with these Rules as if it were a native title decision in relation to which all native title holders were affected native title holders.
- 28.2 The objects of the Corporation and the Rules must not be altered unless the alteration is consistent with the *Native Title Act*, the Corporation's status as a registered native title body corporate under the *Native Title Act* and the *Regulations*.
- 28.3 Subject to Rules 28.1 and 28.2, the Rules may be altered by a resolution passed by a majority of not less than seventy-five (75) per cent of the members of the Corporation present and voting at a meeting and where the proposed alterations to the Rules have been specified in the notice of the general meeting.
- 28.4 At the commencement of the third year following incorporation, and every three (3) years thereafter, the Committee shall ensure that a review is undertaken as to the appropriateness and effectiveness of the Rules of the Corporation. The findings and recommendations of the review by the Committee must be presented at the next annual general meeting of the Corporation.
- 28.5 The Public Officer, in accordance with sections 52 and 54 of the *AC&A Act*, must file a notification of the alteration of the Rules with the Registrar within six (6) weeks after the making of the alterations.
- 28.6 The alteration or amendment of the objects or the Rules will not take effect unless and until approved by the Registrar.

## 29. Winding Up and Replacement

- 29.1 Subject to the requirements of Division 6 of Part 2 of the *Native Title Act*, the Corporation may be wound up by its members in accordance with the *AC&A Act* and this Rule 29.
- 29.2 The Corporation may be dissolved by a resolution passed by a majority of at least seventy-five (75) per cent of the members of the Corporation voting at a meeting specially convened for the purpose and of which not less than twenty-one (21) days notice has been given.
- 29.3 The resolution of dissolution must specify:
- (a) a Corporation or fund established for the benefit of Aboriginals to which the property and funds of the corporation must be transferred, such Corporation or fund to meet the requirements of section 78(1)(a)(ii) of the *Income Tax Assessment Act 1936 (Cth)*; and



(b) a prescribed body or bodies corporate the rules of which include rules in the form of Rules 6.1, 8.1 and 8.2 that will replace the Corporation for purpose of carrying out the functions in relation to a determination area prescribed by the *Native Title Act* and the *Regulations*.

29.4 If the property and funds of the Corporation include any property or funds held on trust, such property and funds shall be dealt with in any winding up of the Corporation, in accordance with the instructions of the beneficiaries of those trusts.

### **30. Disputes**

30.1 Disputes between the Corporation and a member or between the Corporation and a native title holder shall be settled in accordance with the traditional laws and customs of the native title holders.

30.2 Where the Committee is satisfied that a dispute between the Corporation and a member or between the Corporation and a native title holder is not frivolous, unreasonable or vexatious, the Committee must convene a meeting of appropriate and relevant native title holders to consider and endeavour to resolve the dispute.

30.3 Where a dispute arises between the Corporation and a member or between the Corporation and a native title holder, members of the Corporation and the Committee must:

- (a) participate in good faith in efforts to resolve the dispute;
- (b) attend meetings called for the purpose of resolving the dispute;

30.4 In the event of a dispute between the Corporation and a member or between the Corporation and a native title holder not being resolved within three (3) months from the commencement of the dispute the Committee may request the Representative Body to use its best endeavours to mediate in relation to the dispute.

30.5 If the Representative Body refuses the request, the Committee must appoint an independent mediator to mediate in relation to the dispute.

### **31. Confidential Information**

31.1 Except as otherwise required by the Regulations or the Rules or with the consent of the affected native title holders, the Corporation and its members shall keep confidential any information which may come into its or their possession in the course of the exercise of the powers and functions of the Corporation where the information is confidential according to the traditional laws and customs of the native title holders who provided that information or is the subject of a request by a native title holder that it be kept confidential.

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**APPENDIX 2:  
DRAFT ‘CERTIFICATE OF CONSULTATION AND CONSENT’  
FOR USE BY PBCS CONCERNING THE MAKING OF  
NATIVE TITLE DECISIONS, AS DEVISED BY  
CAPE YORK LAND COUNCIL**

**HOPE VALE CONGRESS ABORIGINAL CORPORATION  
REGULATION 7 CERTIFICATE**

This Certificate is made in accordance with Regulation 7 of the Native Title (Prescribed Bodies Corporate) Regulation 1999 (Cth).

**SUMMARY OF NATIVE TITLE DECISION**

Reference Number: \_\_\_\_\_

Summary of native title decision: \_\_\_\_\_

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**CERTIFICATION OF NATIVE TITLE DECISION**

Hope Vale Congress hereby certifies that:

1. It has ascertained the identity of the affected *native title holders* (see Part B).

AND

2. It is satisfied that the *affected native title holders*:

(a) have been consulted about the *native title decision* as described in Part A; and

(b) understand the nature and purpose of the native title decision and the extent to which the *affected native title holders* may be liable as a result of it (see Part C); and

(c) have consented to the *native title decision* (see Part D).

OR

3. The *affected native title holders* have pre-approved this type of *native title decision* (see Part E) .

AND

4. Cape York Land Council Aboriginal Corporation has been consulted about this *native title decision* and their views have been considered by Hope Vale Congress (see Part F).

**SIGNATURE OF MEMBER OF EXECUTIVE**

This certificate was prepared by:

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Position: \_\_\_\_\_

Date: \_\_\_\_\_

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**PART A – NATIVE TITLE DECISION**

The *native title decision* proposed to be made by Hope Vale Congress is: \_\_\_\_\_

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Describe the area affected by the *native title decision*: \_\_\_\_\_

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Mark on the attached map the area affected by the *native title decision*.

Will any native title holders be liable to any claims, actions or debts as a result of the proposal?

- Yes \_\_\_\_\_
- No \_\_\_\_\_
- Unknown \_\_\_\_\_

Other relevant information about the *native title decision*: \_\_\_\_\_

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**PART B – AFFECTED NATIVE TITLE HOLDERS**

The *affected native title holders* in relation to the *native title decision* are:

- Clan group: \_\_\_\_\_
- Families: \_\_\_\_\_

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- Individuals: \_\_\_\_\_

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**PART C – CONSULTATION WITH AFFECTED NATIVE TITLE HOLDERS**

Hope Vale Congress consulted the *affected native title holders* about the *native title decision* as follows: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**PART D – CONSENT AND DIRECTION BY AFFECTED NATIVE TITLE HOLDERS**

We, the undersigned, are *affected native title holders*, and we hereby consent to the *native title decision* and direct Hope Vale Congress to make the *native title decision*.

We further state as follows:

1. The *affected native title holders*, made their decision to consent to the *native title decision* in accordance with their traditional law and custom.

OR

2. The *affected native title holders* made their decision to consent to the *native title decision* as follows: \_\_\_\_\_

\_\_\_\_\_

AND

3. We believe that Hope Vale Congress has complied with the conditions referred to in Rule 8.2 of its Constitution for making *native title decisions*.

Note – At least 5 *affected native title holders* must sign this document. If there are less than 5 *affected native title holders*,

Name	Address	Clan Group	Signature

then all the *affected native title holders* must sign this document.

**PART E – PRE-APPROVED NATIVE TITLE DECISION**

This *native title decision* is the type of decision that the native title holders have previously authorised Hope Vale Congress to make (the ‘original native title decision’).

The Reference Number of the original native title decision is: \_\_\_\_\_

\_\_\_\_\_

**PART F – CONSULTATION WITH CAPE YORK LAND COUNCIL**

The views of Cape York Land Council were sought by Hope Vale Congress on the *native title decision* as follows:

- Date: \_\_\_\_\_
  - CYLC Officer: \_\_\_\_\_
  - Response: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

Signature by CYLC Officer: \_\_\_\_\_

Date: \_\_\_\_\_

The views of Cape York Land Council were considered by Hope Vale Congress as follows:

- Date: \_\_\_\_\_
- Meeting: \_\_\_\_\_
- Hope Vale Congress decided:
  - That those views were appropriate and practicable, and gave notice to the *affected native title holders of those views as follows*: \_\_\_\_\_
  - \_\_\_\_\_
  - \_\_\_\_\_
  - That those views were not appropriate and practicable.

We, the undersigned, are members of Hope Vale Congress. We hereby certify that:

1. Cape York Land Council has been consulted about the *native title decision* as described in this Part; and
2. The views of Cape York Land Council have been considered in accordance with the Rules of Hope Vale Congress and the *Native Title (PBC) Regulations* as described in this Part.

Name	Address	Clan Group	Signature

Note – At least 5 members of Hope Vale Congress must sign this document.

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## **APPENDIX 3: THE GRANTING OF LAND BY THE INDIGENOUS LAND CORPORATION AND ITS RELATION TO PRESCRIBED BODY CORPORATES**

The ILC has helpfully provided the following legal response to issues raised by the Cape York Peninsula Native Title Land Use and Management Project (ILC 2001). The response has been edited for brevity by the current authors. The ILC has for some time been considering whether it is advisable to make a grant of land to a PBC. The general view taken is that the ILC should recommend that a Title Holding Body (THB) should not be formed as a PBC. The following information is set out as follows:

- the legislative requirements imposed on the ILC in respect of granting land.
- the usual requirements of the ILC in respect of granting land
- whether it is advisable for an ILC THB to be formed as a PBC .

### **Legislative Requirements Relating to the Grant by the ILC of an Interest in Land (from ILC 2001)**

1. Section 191D of the Aboriginal and Torres Strait Islander Commission Act 1989 states the ILC may only grant land to an 'Aboriginal corporation. An Aboriginal corporation is defined in s4 of the ATSIC Act as being:
  - (a) an Aboriginal association incorporated under Part IV of the Aboriginal Councils and Associations Act 1976; or
  - (b) a body corporate where either of the following conditions are satisfied:
    - (i) all the members of the body corporate are Aboriginal persons or Torres Strait Islanders, or both;
    - (ii) a controlling interest in the body corporate is held by Aboriginal persons or Torres Strait Islanders, or both.
2. The relevant requirements of the ATSIC Act, in relation to the grant of land are as follows:
  - that ILC may only grant interests in land to Aboriginal or Torres Strait Islander Corporations (s191D);
  - (ii) that ILC may enter into agreements with a grantee THB in relation to the carrying on of land management activities (s191E);
  - (iii) a THB is prohibited from disposing of its interest in ILC granted land, or giving a charge with respect to an asset that consists of, or includes, the interest in ILC granted land, without the consent of ILC (s191S);
  - (iv) the ILC is taken to hold a (caveatable) interest in the land so as to protect its rights to enforce various obligations of the THB, including those arising under s 191S;
  - (v) a THB may surrender its interest in the land to ILC (s191T).

### **Usual Requirements of the ILC in granting land (from ILC 2001)**

In granting an interest in land to an ATSI Corporation, it is the usual requirement of the ILC that it will wish to ensure (as far as possible):

- (i) that the THB (Title Holding Body) remains an ATSI Corporation as defined in the ATSIC Act;
- (ii) that the THB is representative of the traditional owners of the land notwithstanding that the cultural significance of the land is derived through traditional, historical or contemporary attachment and that the proposed purposes for the land may include a broader use base.
- (iii) that within reason, a THB should confine its activities to holding land for the benefit of its members.
- (iv) that the rules and objects of the THB are consistent with it being a "non-profit body" for the purpose of section 9-15(b) of A New Tax System (Goods and Services Tax) Act 1999 (see paragraph 29 below).
- (v) that the rules and objects of the THB are appropriate to enable it to hold title to the land (and, where not a company limited by shares, to hold title as trustee for the traditional owners);
- (vi) that the rules of the THB as they relate to membership and objects cannot be changed without the approval of a substantial majority of the members and of the traditional owners; and,
- (vii) that in the event that the THB is wound up, the land granted by ILC cannot be disposed of in the course of that winding up other than by way of a transfer back to ILC, or to another ATSI Corporation which represents the traditional owners and which is agreed upon by ILC.

### **Preserving the rights of the members of a THB to make a claim for Native Title under s47 NTA (from ILC 2001)**

It is advisable for the ILC to at least ensure that the rights of members of a THB to make a claim for native title pursuant to section 47 NTA are preserved on the

grant by the ILC of an interest in pastoral land. Section 47 provides for the statutory revival of native title rights and interests previously extinguished at common law, where the requirements of (i) and (ii) are satisfied.

The effect of s.47 is that in determining whether or not native title exists and, if so, the nature and extent of the native title rights and interests to be recognised, the Federal Court (or other appropriate Court) must disregard any prior extinguishment of native title effected-

- by the grant by the State (or Territory) of the pastoral lease itself;
- by the grant of any other interests in relation to the leased land; or
- by any acts carried out by virtue of the holding of that lease or such other interest.

In order to take advantage of s.47, subsequent to the transfer of a Pastoral Lease by the ILC to a THB, the requirements in section 47(1)(b) NTA need to be satisfied, by:

- An application for determination of Native Title being made.
- The application should be limited to the area the subject to the Pastoral Lease holding. Where there is already an existing Native Title claim over the Pastoral Lease land, there is no need for the further claim to be registered as the overlapping claims will be dealt with in the same proceedings.
- The application should be made by those persons who are acknowledged as having primary traditional responsibilities and rights over the Lease hold land as applicants, on their own behalf and on behalf of other traditional owners, being Aboriginal people who hold the 'communal, group or individual rights of Aboriginal people' in relation to the Lease holding land.
- To satisfy s.47(1)NTA at the time that the application is made, the Pastoral Lease must, so far as ILC granted land is concerned, be held 'on Trust for any of those persons; [who made the application claiming to hold the Native Title or any other person with whom they claim to hold the title] or a company whose only shareholders are any of those persons'.

A Trustee is the most desirable form of THB for the ILC granted pastoral lease. The Trustee could be either an incorporated body, or a company incorporated under the Corporation's Law. The objects and rules of that body would need to be suitable for that purpose.

If the THB were also to be a PBC under the *Native Title Act*, it would have to be incorporated under the *Commonwealth Aboriginal Council's and Associations Act*.

**Whether it is Advisable for an ILC THB to be formed as a PBC (from ILC 2001.)**

The advice given to the ILC states that for the following reasons it is not appropriate for the ILC to

grant an interest in pastoral land direct to a body formed as a PBC:

- After there has been a determination of Native Title, the PBC membership must only comprise persons who have "native title rights and interests" – ie native title holders. The ILC may wish to include in the THB Aboriginal persons with other than a native title relationship with the Land.
- There is no need for a PBC until such time as there is a determination of Native Title, and in fact it may be undesirable to create a PBC before a Native Title claim is made. Each Native Title determination will produce a different collection of recognised rights and interests. The nature of rights and interests recognised will necessitate a tailoring of the PBC, which is to hold and manage those rights and interests. The peculiarities of each Native Title determination should be accommodated in the design of a PBC.
- There may never be a determination of Native Title, in which case there will be no requirement for a PBC.
- The determination of Native Title may, and will most likely be, in relation to an area of land considerably larger than the area covered by the Pastoral Lease, in which case the PBC would be that which holds the Native Title rights and interests for a larger claim.
- It may be desirable for the beneficiaries of the Leasehold Trust to be different from the beneficiaries of the Native Title Trust. For example, the beneficiaries of the Leasehold Trust may include people with historical connection to the Leasehold area who are not Native Title holders or the beneficiaries of the Leasehold Trust may be more limited than those of the Native Title Trust.
- Where an Incorporated Association is Trustee both of Native Title rights, and of the Leasehold Title, there is the potential for conflict to arise both in relation to:
  - a) The Legal obligations of the Trustee with respect to the Lease (ie. in complying with the terms and conditions of the Lease, possibly as against the wishes of the Native Title holders); and
  - b) The obligations which arise in its capacity as Trustee.
- Whilst it is likely that the non-extinguishment principle would apply in relation to any act done by the THB subsequent to the Grant of the Lease, Native Title rights and interests may nevertheless be affected or impaired by acts of the Trustee. If the Trustee is also Trustee of the Native Title rights and interests, this may place it in a position of conflict.
- The Lease holding Trust may wish to have as a beneficiary a corporate body for taxation reasons. This would not be possible if the Trustee were a PBC.
- There is the possibility that the Lease holding body

may be wound up, or subject to administration. If the THB were also a PBC, this would create undesirable complications (although s60 of the Native Title Act does allow for the replacement of Prescribed Bodies Corporate).

### **Preferred Structure for Title Holding Body (from ILC 2001.)**

- In view of the above, a preferred structure would be that the THB is not a PBC. The Membership should include the traditional owners for the Leasehold area.
  - The beneficiaries of the Trust would include the members of the THB. There is doubt whether people with historical connections to the Leasehold area can be beneficiaries of the Trust. Consideration could also be given to the possibility of having a corporate beneficiary for taxation purposes.
- In the event that a PBC is established in relation to the Leasehold area, (or in relation to a broader area which includes the Leasehold area) the THB could be required under the terms of the Trust to negotiate an agreement with the PBC (or the prospective Body Corporate) as to how the Lessee will consult with the PBC.
  - Where a business entity is intended to be formed as well as a THB, the arrangement in the diagram to follow might be considered.

Some of the problems the ILC faced in making a grant of monies to an Aboriginal corporation for the transfer of land by the State under the Aboriginal Lands Act are exemplified in the case of the purchase of Silver Plains in the CYLC Coen Region. This is discussed further in Chapter 4 of the current report.



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## APPENDIX 4: DETAILS OF THE PROJECT METHODOLOGY

### Project Participants: roles and responsibilities

The CYLC Project team comprised Peace Declé (Legal Research Officer, CYLC), Peter Blackwood (Manager, Research and Consulting, CYLC), Paul Hayes (former PLO, CYLC), Noel Pearson (Special Consultant, CYLC), Scott McDougall (legal consultant, co-author on legal issues), David Yarrow (legal consultant), Paul Memmott, Rachael Stacy and Anna Meltzer of 'Paul Memmott and Associates' (consultant planners/anthropologists). Paul Memmott was the principal author of the report.

The Advisory Committee set out in the project contract, was comprised of representatives of the National Native Title Tribunal, the Queensland Department of Premier and Cabinet, and the Indigenous Land Corporation. The role of the committee was to inform the Consultants of issues related to the project as they affect or are likely to affect the representative agencies' stakeholders.

The NNTT participants in the Project Advisory Committee have been Mary Edmunds and Graham Fletcher (Members working in the Cape), Stephen Duxsbury (Regional Manager, Cairns), Amy Barrett (Case Manager, Cairns), Paul Durante (Assistant Case Manager, Cairns) and Stephen Sparkes (Manager of Legal Team, based in Perth). The State of Queensland representatives in the Project Advisory Committee have been Kevin Murphy (NTS), Buzz Symonds (TRG) and Beverley Coleman (NTS). The Indigenous Land Corporation (ILC) was represented by Ashley Martens, Lachlan Walker and Ellie Bock.

### Project Objectives and Outcomes

These are as set out on pp 2 to 4 of the CYLC/NNTT briefing document for this project, and are as follows:-

#### *Specific issues to be addressed*

The present project proposes to... [use] case studies [which] will cover a variety of the matters arising in native title determination applications in Cape York, involving such determined native title rights and interests as require strategic land and waters management for the protection of native title.

The case studies will address the following:

- (i) Identification of issues that need to be considered in order for RNTBCs to operate effectively as the holders and/or managers of native title, including:
  - identification of those claimed native title rights and interests which require a land-management regime;
  - the development in mediation of PBCs to

reflect the traditional relationships among the various native title holding sub-groups as they relate to responsibility for and the implementation of a land-management regime;

- the relationship between the decision-making processes of the PBC/RNTBC and other community, sub-regional, and regional decision-making processes;
  - ways in which the RNTBC might relate to other bodies dealing with land and resource management in Cape York Peninsula;
- ii) Options arising from the case studies for the development of a land-management strategy for the native title lands and waters, as developed between the RNTBC and other relevant organisations, for example:
    - other Aboriginal organisations such as the Native Title Representative Body or Bodies, DOGIT community councils, the Indigenous Land Corporation, ATSIC, local, sub-regional and regional organisations;
    - State and Federal government bodies and processes in Cape York, eg, the Tenure Resolution Group (TRG), Natural Heritage Trust (NHT), Great Barrier Reef Marine Park Authority (GBRMPA), national parks, local government.

#### *Project Objectives*

- (i) To make use of a research project that addresses the land-management implications of native title claims in Cape York, in order to assist in the development of effective PBCs as part of the mediation or post-mediation process.
- (ii) To explore how the priorities of native title holders for the use of their native title lands relate in practical ways to the priorities and requirements of other stakeholders.
- (iii) To identify and analyse the issues set out in 3.1 above, in consultation with the native title claimants or holders, the Native Title Representative Body, the Queensland State Government, and other relevant stakeholders.
- (iv) To carry out the project in a way that provides to the stakeholders, in the first instance through the Advisory Committee, an informed set of land-management issues as a basis for their own further action.

#### *Project Outcomes*

- (i) Draft rules for one or more of the case study PBCs /RNTBCs.
- (ii) Recommendations about the development of

relationships between the RNTBCs and other relevant stakeholders as they relate to land management of native title lands and waters.

- (iii) Preparation and circulation of options for a strategic plan or set of plans for land management in the case study areas that address issues arising or likely to arise in other areas of Cape York.
- (iv) Report on issues for Cape York and, on the basis of Cape York experience, for native title claims in other areas of Australia.

[End of briefing document]

## Methodological Process

The following process details pertain largely to the methodology employed by the anthropological and planning members of the research team.

### (1) Subjects of Study

The following broad subjects were the focus of the study:-

- (a) Existing structure of customary Native Title holding groups and sub-groups (eg. language and dialect groups, tribes, clans, descent groups, regional blocs), and their territories of N.T. interest.
- (b) The priorities of land (and sea) use and management, held by these groups.
- (c) Decision-making processes (customary and/or existing) of these groups, with respect to land and sea management.
- (d) Native Title rights and interests of these groups (as defined by their claim documents).
- (e) Local Indigenous agencies and organisations (L.I.O.s) currently or potentially involved in land and sea usage and/or management, and the relation of their L.I.O.s to the Native Title holders and their RNTBCs.

These L.I.O.s would include DOGIT Councils and Trustees, Aboriginal Land Act Trusts, Aboriginal Shire Councils (viz Aurukun), body corporates holding ILC purchased land, CYLC, Balkanu, etc.

- (f) The wider stakeholders with interests in the lands and seas of the Native Title holding groups which includes State and Commonwealth Government departments, pastoralists, miners, Tenure Resolution Group (TNR), Natural Heritage Trust (NHT), Great Barrier Reef Marine Park Authority (GRMPA), National Parks, ILC, local government, etc.

### (2) Aims of Data Analysis

The original aim of the analysis was to develop some optional schematic plans (with issue statements and analyses) for proposed effective RNTBCs, which contain the key aspects of:-

- (a) Their internal structure, including membership, rules, goals, decision-making processes, land and sea management capacities, political stability and self-maintenance capacity; and drawing upon traditional principles and structures.

- (b) Their method of engaging and transacting with other L.I.O.s and whether the respective structures of the RNTBC and certain L.I.O.s can be rationalized and merged to some degree where there are common or overlapping memberships and interests in lands and seas.
- (c) Their method of engaging and transacting with the wider stakeholder groups and their priorities/goals for the purposes of land and /or sea management.
- (d) The likely impacts of the wider stakeholder groups on the RNTBC including demands for services, land and sea management and management planning, decision making, endorsement of land and sea agreements, etc.
- (e) The economic prospects of the RNTBC given the above functions, including to be able to receive income in return for its services to the wider stakeholders, and thus its capacity for economic sustainability as an RNTBC,
- (f) how the RNTBC and its structure will relate to the 10 year plan currently being developed by the CYLC, government and other bodies, and
- (g) how the above will lead to a viable land and/or sea management strategy.

A further area about which to make recommendations is how RNTBC and Stakeholder statutory frameworks (legislations, legislative conditions and rules) might be altered or adjusted to enhance the effectiveness of the operation and transactions of the RNTBC.

### (3) Data Collection Methodology

- (i) Obtain briefing documents and extract relevant concepts and points, including Karajarri PBC Project, Martin and Mantziaris book, Burke/Mantziaris papers, CYLC 10 year planning documents, Native Title Act and legal requirements of RNTBCs.
- (ii) Carry out document study and data collection at CYLC to obtain existing profile information on each of the case study T.O groups, their territories and interests.
- (iii) Meet with traditional owner groups to discuss and record their land use needs, rights, goals, operation preferences, visions, etc.
- (iv) Interview reps from L.I.O.'s to profile their structure, needs and operational preferences.
- (v) Meet with Project Advisory Committee to obtain stakeholder profiles and needs, and then meet with selected stakeholder organizations to complete schematic model of same. This aspect may also involve collecting statistics and various legal documents that provide the operational powers and rules to certain stakeholder groups.

### (4) Literature Analysis

- (i) Legal
  - Requests for NNTT data via Amy Barrett and Paul Durante

- Use of NNTT libraries, Perth and Cairns.
  - Law Library, University of Queensland
  - Ebsworth and Ebsworth Wik Native Title Bibliography
- (ii) Anthropology
- The authors decided not to focus on the earlier anthropological literature (for example Donald Thompson, Norman Tindale, Lauriston Sharp and Ursula McConnel) of the two case study sub-regions, due to the ample quantity of contemporary analyses that develop and fine-tune this earlier literature. The bulk of contemporary literature discussing social organisation, land tenure practices, regional and local agreements, and management strategies, has emerged as a result of recent Native Title and Land Claims in the region. The authors have also consulted the AIATSIS catalogue, a bibliography (containing 17 entries) from the Cairns National Native Title Tribunal library and a bibliography provided by Ebsworth and Ebsworth titled Wik Native Title Bibliography. Peter Sutton (1997a) has prepared an overview of work produced by Anthropologists relating to the Wik, while Claffey (1996) has summarised the work produced by anthropologists relating to the Kaanju and Umpila peoples on the eastern side of the Cape.
- (iii) Planning
- Literature that deals with the traditional owner's aspirations re Land & Sea Management, has been gathered mainly from CYLC library and files.
- (5) **Data sets and units (subdivided into two case studies based in two adjoining CYLC regions)**
- (i) Identity of areas of land with Indigenous planning influence
- (a) Native Title areas (determined, claimed); identity of claimants, rights and interests claimed, ref no., map.
  - (b) Aboriginal (ALA) land (determined, claimed); identity of claimants, ref no., map.
  - (c) Other (eg ILC purchase, DOGIT)
- (ii) Social profile of claimant or traditional owner groups
- Focus first on the description of the group social structure in the claim documents.
  - Then include any description of the group social structure used in other (esp. land management) transactions.
- (iii) Decision-making processes of claimant/T.O groups
- Is there any record of customary decision-making that seems relevant.
  - How did decision-making occur for the process of making the claim; possibly develop a model of same.
  - How is decision-making occurring at present by the Trust.
- (iv) Aspirations for and practices of land (and sea) management
- Documents outlining plans or aspirations for proposed land management.
  - Documents outlining actual land management practices that are occurring.
  - Interview data on same
- (v) Interaction with other agencies re land (and sea) management
- Identity of other agencies with whom claimants/trustees are interacting or have been asked to interact on land management issues.
  - Brief profile of agency, its role and concerns
  - Details of how such transactions have occurred (mode of transaction: physical interaction, communication methods, consultation methods, cost issues)
- (6) **Field Methodology**
- The following two structured interviews were prepared by P.M. for field use.
- 1) **Interviews with Indigenous leaders/ Spokespersons/ Elders of Claimant Clans.**  
(by Anthropologist)
- 1.1 What area/How many blocks of land do you talk for? [identify on map]
  - 1.2 What do you want to do with your area of land?
  - 1.3 What are your plans for land (and sea) management?
  - 1.4 How do you make decisions as a clan or group? How do other groups make decisions (same way or different?)
  - 1.5 Are any government departments/ Aboriginal organizations coming and talking to you? About what?
  - 1.6 Are there government departments/ Aboriginal organizations who are helping? how?
  - 1.7 Are there government departments/ Aboriginal organizations making it hard? why? how?
- 2) **Interviews with persons knowledgeable on local processes etc.**  
(by Lawyers, and Anthropologist if available)
- 2.1 Decision-making processes of claimant/T.O groups
    - 2.1.1 Is there any record of customary decision-making that seems relevant.
    - 2.1.2 How did decision-making occur for the process of making the claim; possibly develop a model of same.
    - 2.1.3 How is the decision-making occurring at present by the Trust.
  - 2.2 Aspirations for and practices of land (and sea) management
    - 2.2.1 Collect any documents outlining plans or aspirations for proposed land management.
    - 2.2.2 Collect any documents outlining actual land management practices that are occurring.

### 2.2.3 Interview data on same

## 2.3 Interaction with other agencies re land (and sea) management

### 2.3.1 Identity of other agencies with whom claimants/trustees are interacting or have been asked to interact on land management issues.

### 2.3.2 Brief profile of agency, its role and concerns.

### 2.3.3 Details of how such transactions have occurred (mode of transaction: physical interaction, communication, consultation methods, cost issues)

## 3) Workshop

[this is to focus on options and be led by the lawyers]

- Explanation of what our project is about
- The current proposed PBC model  
What are its strengths and weaknesses?  
How well does it work for particular problems?

Case Studies of hypothetical problems:-

- a) Case of a powerline that cuts across many groups. How does consultation occur?
- b) What happens when two groups can't agree.
- c) If it only affects one or two close clan groups, do all the other groups have to be told/asked?
- d) How is it decided who a problem affects? [This is working towards a hierarchical decision making structure]

What are alternate PBC options?

A three-day field trip to Coen and Lockhart River occurred on 16-18 July 2001, made by team members Rachael Stacy and David Yarrow with Peter Blackwood and Peace Declé from the CYLC. In addition to holding meetings in both communities, Rachael Stacy conducted interviews with small groups and individuals. Paul Memmott made the first field trip to Aurukun on his own during 9th to 11th July. This was after arrangements for other members of the team to accompany him had fallen through. A subsequent field trip was then made during 23rd to 25th July by P.M. with Peace Declé, David Yarrow and Phillip Hunter.

### (7) Field Preparation – Aurukun

At the time of commencement of this project the Wik and Wik Way claimants had already had a substantial amount of consultation on their PBC structure, and a concept for such was already in place and under discussion in the community. The Wik lawyers from Ebsworth and Ebsworth had distributed newsletters over several years describing what PBCs were and setting out the difference between PBC as Trust versus PBC as agent.

Phillip Hunter (of Ebsworth and Ebsworth) and Wik Anthropologist David Martin provided the basic details of this PBC model. It involved assembling five representatives from each of five ceremonial or ritual groups, whose territories were centred on different parts of the Wik area.

The five regional Ritual Clans (North to South) are as follows:-

- Shivirri (Saarra) = To the north of Aurukun, coastal groups, Wik Way speakers
- Winchanam = Includes Archer and Watson River groups, upper Love River groups plus inland (also known as 'inside/topside') people get classified in this grouping
- Apelech = The lower Love River groups and Cape Keerweer groups
- Puch = Knox and Kendall River groups and south to Hersey Creek (only).
- Wanam = South of the Kendall River, on Edward River

In addition David Martin provided a list of eight or ten key clan leaders resident at Aurukun who were of political significance in the Claim. To these were added the actual Claim applicants. All of these individuals were visited, consulted and interviewed during the fieldwork.

The Wik and Wik Way Claimant Applicants are:-

Mr Anthony Kerindun  
Mr Silas Wolmby  
Mr Wumpoo Banjo Kepple  
Mr Hogan Shortjoe  
Ms Geraldine Pamkojata Kawangka (since deceased)  
Mr Victor Kuukumu Lawrence  
Ms Gladys Tybingoompa  
Mr Robert Yeium Holroyd

NB At least five of these claimants are normally resident in Aurukun.

Another group who were 'earmarked' for consultation were the members of the Aurukun Shire Council. The Aurukun Shire Councillors were – Jacob Wolmby (Mayor), Lyle Kawangka (Deputy), Owen Koomeeta, Denny Bowenda, Craig Koomeeta, Winifred Ngakyunkwokka, Tony Kerindun, Clarence Peinkinna and Kaylene Chevathun.

### (8) Field Preparation – Coen and Lockhart River

A three day field trip to Coen and Lockhart River was arranged for 16-18 July 2001. Rachael Stacy, David Yarrow and Peter Blackwood and Peace Declé from the CYLC arranged to visit these places. In addition to holding meetings in both communities, Rachael Stacy would conduct interviews with small groups and individuals.

Field work preparation for the anthropological component included background study on the social organization of the Coen community and traditional owners of country in the Coen region. Literature

sources including transcripts of land claim hearings for Birthday Mountain and Mungkan Kaanju National Park; anthropological studies by Rigsby, Chase, Sutton, Hafner, Smith, Martin and Jolly including for Silver Plains, Port Stewart, Moojeeba, Merapah and the Coen region in general; and CYLC documents and files pertaining to the Coen region, Wik region and the Mungkan Kaanju National Park. On the basis of the literature accessed prior to the field trip, the language-named tribal group model was used as a basis for planning field work in the Coen region. Residents of Coen who belong to the groups Lama Lama, Kaanju, Ayapathu, Umpila and Mungkan were identified for interviews during the field work. As the first four of these groups are represented in the KULLA Trust a meeting with this committee was incorporated in the field work. A meeting of the trustees for the Geikie station also planned for the second day in Coen meant that some of these people could also be interviewed before their meeting began. Interviews with individuals from each of the four KULLA Trust groups were also planned as part of the field work but due to time constraints and lack of transport out of town only some interviews were possible. It was also hoped that individual meetings with the following people in Coen could be arranged: CRAC CEO, Peter Callaghan; CRAC Chair, Allan Creek; Ann Creek, the recently appointed Land and Sea Management Coordinator; personnel from Cook Shire Council; and Lachlan Walker from ILC. However, only some of these interviews were possible in the time available and due to the other commitments of these people at the time.

As a number of Kaanju and Umpila people live in Lockhart River, meetings with members of these groups were also arranged for the field trip to Lockhart River. Due to time constraints and a lack of vehicular transport it was decided to hold small group meetings at the Lockhart Council rather than interviewing individuals around the community.

#### (9) Field Work – Aurukun

Paul Memmott made the first field trip to Aurukun on his own during 9th to 11th July. This was after arrangements for other members of the team to accompany him had fallen through. A subsequent field trip was then made during 23rd to 25th July by P.M. with Peace Declé, David Yarrow and Philip Hunter.

Most of the time in the field (at least at Aurukun) was spent meeting individuals, taking copious genealogical notes, establishing their Aboriginal identity in terms of the available models of social organization, determining where they fitted into the model, and then seeking their views on the PBC structure, and whether it encompassed their group.

Relationships were developed with a number of individuals who offered additional information and creative views and who in some cases were able to assist in facilitating larger meetings.

Spokespersons were found for all the ‘ceremonial’ and ‘tribal’ groups of the working structure for the Wik PBC. However the classification of people from the south-east of the Claim area clearly had a degree of ambiguity about it. It was clear from an anthropological perspective that there was not sufficient consensus and clarity recorded in people’s land tenure models for this area, to be confident of the social organization. There was clearly a need to incorporate an eastern perspective from within Coen to complete the picture.

The same could be said to some degree for the capacity of Aurukun people to put the situation of Pormpuraaw people but the circumstances were more one of a political tension than a lack of clarity about land tenure. [Although note the Thayorr claim.]

Partly in an attempt to test the capacity of ceremonial groups to readily have meetings on land and sea management issues, a series of consultative meetings with these groups were proposed, but they only proved successful with the Puch, Wanam and Winchenem groups. A meeting of Puch and Wanam claimants was held on 10/07/01 at the residence of Elder Rodney Karyuka. The following personnel were in attendance:-

Rodney Karyuka	Robert Karyuka
Simeon Arkwookerum	George Korkatain
Gladys Tybingoompa	Adam Yungkaporta
Jonah Yungkaporta	

A second meeting was held of the Puch and Wanam Ceremonial Groups on 24 July 2001. Local attendees were as follows:

Rodney Karyuka	Adam Yunkaporta
Pedro Karyuka	Mavis Ngallametta (nee Marbunt)
Richard Koonutta	Gladys Tybingoompa
George Korkatain	Ron Billyard (Land and Sea Management Coordinator)

A Meeting was held on 24 July 2001 of Winchanam people from the Little and Big Archer Rivers. Local attendees were as follows:

Phillip Koongotema  
Dawn Koondumbin  
Beatrice Koondumbin  
Geraldine Kawangka (since deceased)  
Hudson Comprabar

A Community Meeting was held at Aurukun on Wednesday 25 July 2001. Local attendees were as follows:

Silas Wolmby  
Bert Comprabar  
Dawn Koondumbin  
Allison Woolla  
Ron Ngallametta  
Gladys Tybingoompa

Stanley Ahlers  
 Stephen Sam Karyuka  
 Craig Koomeeta  
 Joseph Chevathun  
 Beatrice Koongotema  
 Geraldine Kawangka (late)  
 Hogan Shortjoe  
 Lyall Kawangka  
 Maureen Karyuka  
 Mavis Ngallemetta  
 Edgar Kerindun  
 Morris Kepple  
 Ralph Peinkinna  
 Denni Bowenda  
 Mildred Kerindun  
 Caroline Peinkinna  
 Stella Owokran  
 Tony Kerindun  
 Kathy Shortjoe  
 Joe Ngallametta  
 Janine Chevathon  
 Fred Kerindun  
 Sharon Ngallametta  
 Thelma Taisman  
 Russka Riley  
 Stan Monday  
 Jacob Wolmby  
 Lindsay Koowarta  
 Rex Walmbeng

In all cases it was explained that the Project Team were doing two jobs, viz (i) helping the Wik and Wik Way Claim solicitor, Philip Hunter with setting up the Wik PBC, and (ii) carrying out the project for the NNTT of looking more generally at the problems of setting up PBCs.

A meeting was held with representatives of Aurukun Shire Council on Tuesday 24 July 2001. Local attendees were Jacob Wolmby (Mayor), Dean Kneebone (Deputy CEO), Craig Koomeeta (Councillor).

Further Interviews carried out at Aurukun with representatives of the Aurukun Shire Council as the regional service provider were as follows:-

Ron Billyard, Land and Sea Management Coodinator	09/07/01 (by P.M.)
Gary Kleidon, CEO, ASC.	10/07/01 (by P.M.)

#### (10) Fieldwork – Coen and Lockhart River

The field trip to Coen was made during July 16-17 by David Yarrow, Rachael Stacy, Peter Blackwood and Peace Declé, with Rachael Stacy, Peace Declé and David Yarrow travelling on to Lockhart River during July 17 to 18, 2001.

On the morning of 16 July, the Project Team met with

the KULLA Trust (9 members at the meeting) as well as with individuals and small groups of each of the four groups – Kaanju, Umpila, Lama Lama and Ayapathu on separate occasions.

A KULLA Trust meeting was held at the Wunthalpo Cultural Centre, Coen attended by Danny de Busch, Sunlight Bassani, Phillip Port, Jim Port, Joan Creek, Ian Tucandidgee, Lawrence Omeenyo, Blade Omeenyo, Peter Kyle, Peter Blackwood, Peace Declé, David Yarrow, Rachael Stacy.

Additional and follow up interviews conducted in Coen on the afternoon of 16 July and morning of 17 July included the following people:

- Group interview 1: Sunlight Bassani, Florrie Bassani, Florrie Liddy, Elaine, Helen, Joan Liddy – Lama Lama;
- Group interview 2: Thelma Burke, Rex Burke, Lurline Caliope, Jenny Creek, Roderick Burke, Theresa Heineman – Kaanju people some of whom live at Weipa;
- Group interview 3: Wompoo Kepple, Violet Kepple, Smithy Kepple who are all Mungkan and TOs for Merapah station. Smithy Kepple lives at Merapah
- Joan Creek – Ayapathu (identified as Kaanju when her H was alive)

The Project Team also spoke with Peter Callaghan, the current/interim CEO for CRAC and briefly with Ann Creek re the Ranger program.

At Lockhart River, Rachael Stacy, Peace Declé and David Yarrow arranged an Umpila meeting that was attended by Ian Tucandidgee, Keith Brown, Lawrence Omeenyo, David Omeenyo, Norman Waradoo, Johnny Brown, Peter Ropeyarn, Blade Omeenyo, Beatrice Rocky, Dorothy Short, Grace Warradoo, and Peter Kyle.

A meeting was also arranged with the Southern Kaanju, which was attended by Peter Creek, Gabriel Butcher, Harold Sandy, Joyce Clark (nee Butcher), Danny Butcher, Dora, and Lesley Butcher.

Phone Interviews were also carried out from Brisbane with:-

- Christine Stucley of ATSIC who is the employee for the Coen area (25.7.01).
- Erica Deeral of Burrigirku Land Trust, Cooktown (25.7.01)

#### (11) Data Collection from wider stakeholders

This has been done in part by reference to existing documents, in part by interview and in some cases by request to a stakeholder to submit a specific written position.

For example:-

- Natural Heritage Trust (NHT)
- Great Barrier Reef Marine Park Authority (GRMPA)

- National Parks (within the EPA)
- Indigenous Land Corporation (ILC)
- Aurukun Shire Council (ASC)
- Cook Shire Council (CSC)
- FNQ Regional Organization of Councils (FNQROC).

Interviews on Aboriginal Land Trusts in Queensland were carried out with:-

Merv Hanlon and Yolanda Pacheco 17/08/01

Merv Hanlon 27/08/01

**(12) Interviews with anthropologists**

A series of discussions and interviews were held with senior anthropologists actively involved in land claims and/or native title claims in the study region to cover customary decision-making, group politics and aspirations.

- |            |                  |                                       |
|------------|------------------|---------------------------------------|
| (i) Wik:   | David Martin ... | 07/01, 11/08/01, 15-16/11/01, 12/1/01 |
|            | Peter Sutton...  | 12/01                                 |
| (ii) Coen: | Bruce Rigsby ... | 27/08/01, 26/11/01                    |
|            | Ben Smith ...    | 03/09/01                              |

**(13) Preliminary Evaluation of Models and Preparation of Report**

Following data collection and analysis, operational models of RNTBCs and their associated properties and issues were presented to CYLC, and to the Project Advisory Committee for feedback. This in turn lead to evaluative comment and limited revisions to the models. These matters formed the basis of the final report (RNTBC rules of operational models, traditional owner and stakeholder issues).

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## APPENDIX 5: FURTHER CASE STUDY MATERIALS – COEN SUB-REGION

### Aboriginal Groups and Land Tenure in the Coen Region

#### Central Cape York Region

The content of this section has been largely drawn from the following documents held within the CYLC:

*Mungkan, Ayapathu and Kaanju Peoples' Land Claims to Mungkan Kaanju National Park and Lochinvar Mineral Field* (Chase et al 1998), *Kaanju/Umpila/Ayapathu/Lamalama Native Title Determination Application* (Cape York Land Council, n.d.), *The Ayapathu People of Cape York* (Smith and Rigsby, 1997) *Recent Connection History: Ayapathu People and Silver Plains Station* (Rigsby and Smith, 1999). These documents contain contributions from the following Anthropologists: Athol Chase, Bruce Rigsby, David Martin, Benjamin Smith, Mark Winter, and Peter Blackwood.

Aboriginal language groups within the central Cape York Peninsula region share social and cultural links, including kinship ties, marriage, reciprocal land use and co-habitation (Chase et al 1998:77-78). Chase et al (1998) provide a useful discussion of the various levels of identification and social organisation amongst contemporary Indigenous groups pursuing rights in land. They also acknowledge that the pattern is not uniform and relates to the “vicissitudes of European contact and occupation” (Chase et al 1998:34).

Ownership of particular tracts of land is considered to be derived through traditional affiliation. The term ‘owner’ connotes the primacy of speaking for a given tract, having certain and significant spiritual connections to it, and having the responsibility for making decisions regarding the use and access of that tract of land. (Chase et al 1998:43.)

The concept of traditional *territory* unites the dimension of geographic space with social and political considerations within a regional Aboriginal population. Particular individuals, families and groups are authorised by tradition to exercise various rights of control, decision-making and use for a given territory, over and above other individuals, families and groups. Such authorisations can be complex, sometimes fluid, and at times, subject to disputation. (Chase et al 1998:34).

Across the central Cape York Peninsula region there are systems of descent and territoriality that range from the anthropologically defined ‘exclusive’ (also known as ‘classical’ land tenure (after Sutton 1998)) model, to that which has been defined as the ‘inclusive’ (or ‘post-classical’). These models should be seen as existing at two ends of a continuum, with a variety of formations existing across regions and at various levels. Thus it is

difficult to define a given system at any point in time. “Indeed, a salient feature of Aboriginal land tenure is that the system is always dynamic, subject to local political and other forces, and capable of continuing transformation to meet often rapidly changing demographic, political and historical forces” (Chase et al 1998:35).

Chase et al (1998:35) describe the ‘exclusive’ model as upholding a strong ideology of patrilineal descent from an apical ancestor (which can comprise a spiritual connection or a corporeal connection or both). In recent times and in the lower generations, descent may be filial (through one’s mother or father). Connection is highly particularised to a certain tract of land within a wider language territory. Hence it has also been termed the ‘clan-estate’ model. Chase et al (1998:35) give the Umpila and Kaanju people as leaning towards this model. Strong evidence to support this assertion was given by the Southern Kaanju during the Birthday Mountain Claim. The second model (‘inclusive’) is more socially encompassing and is conceptualised in terms of the family group and extends out to the language territory group. It has also been termed the ‘language-named tribe’ model (Chase et al 1998:35). Chase et al (1998:35) give the Mungkan and Ayapathu as groups that fit at this end of the continuum, especially in the evidence given for the Archer Bend NP and Lochinvar USL Claims respectively.

#### Clan Estate Groups

In the ‘classical’ model, membership is gained through patrilineal descent – that is, one becomes a member of the clan if one’s father was a member. As an extension, membership is traced through one’s father’s father and one father’s father’s father and so on (Aboriginal Land Tribunal, Queensland 1999:1370-1). This is known by anthropologists as patrilineal descent. While there is no equivalent for the English word ‘clan’ in the indigenous languages of the central Cape York Peninsula, there are certain terms referring to groups formed through descent with specific affiliations or relations to land, and terms that reflect the relationship between individuals, groups and land. Clans were endogamous groups in that it was necessary to marry outside of the group.

Clans historically owned property (in the western sense) including land and water, but also in abstract and less tangible objects such as language varieties, songs, dances, body paint designs, stories etc. (Chase et al 1998:37; Aboriginal Land Tribunal, Queensland 1999:1370-1). The regional landscape is understood to be made up of hundreds of named tracts, known in Aboriginal English as ‘countries’. Each clan owned or



claimed connection to a number of countries which together made up the clan estate. In the eastern central Cape York region, estates consisted of contiguous tracts. ‘Company land’ referred to tracts that lay between clan estates and over which rights and interests were shared between local clans. Further, boundaries between countries were and remain illdefined. Chase et al (1998:37) suggest that it is more appropriate to define a country as having a focal point and indeterminate edges. (Chase et al 1998:37).

### Local Groups

Local groups were historically made up of a number of local clan members and their spouses who lived together and were the land-users. It was common that a wife would reside, after marriage, on her spouse’s clan estate. Anthropological evidence suggests that there was a pattern of ‘bride-service’ whereby a man would reside for a short period with his new wife’s family, on its clan land. (Chase et al 1998:38.) Regarding the use of land, women were awarded the right to use their spouse’s clan land. Similarly, men and women could by right use their mother’s (ie mother’s father’s and brother’s) land. However, in both cases the individual could not extend or give permission to other people to use the land. Further “Should the men of a clan leave no children to succeed to the estate, then it was typically the clans of daughters’ children (i.e. the daughters’ husbands’ clans) which might (among others) succeed to primary rights and interests in its estate” (Chase et al 1998:38). That is to say, individuals commonly succeed to their mother’s father’s estate in the absence of patrilineal members.

### Cognatic Descent Groups

The contemporary regional system has changed somewhat from the classical clan-estate model of a land-owning, patrilineal descent group to a ‘family’ group known in anthropological terms as a ‘cognatic descent group’. Further, these groups allow for filial descent from either one’s mother or father. Significant elements of the ‘classical’ clan estate model are maintained. For example, a family group owns an indigenous language in common with other families of the same estate. Cognatic descent groups are commonly associated with specific tracts of country which trace back to the country of one or more significant ancestors.

Even where the old clan estate model still strongly applies, such as among the Kaanju claimants, the “clans” are more accurately described, both in their composition and the principles of recruitment, as cognatic descent groups, rather than the strictly patrilineal groups they may once have been (Chase et al 1998:39).

### Language/tribal groups

The term ‘tribe’ has been established in the older anthropological literature and used to define a level of social structure above that of the clan and local groups.

It has commonly been used to define all those component groups who spoke a single language. The relevance of the term for defining a real category of social organisation has been called into question (Chase et al 1998:39). However, the term has been adapted in contemporary contexts to refer to language-named tribes, a concept widely accepted in the literature on Aboriginal land claims and native title claims in northern Australia (Rumsey 1989, 1993).

Language-named tribes have “coalesced from sets of earlier land-owning clans, and accepted that many of the land affiliation features of the clan estate system now apply to the broader language-named tribe” (Chase et al 1998:40-1). Again, there is evidence for varying stages of transformation between the clan, the cognatic descent group and the language-named tribe as the recognised and land-holding group among Aboriginal groups in the region.

Four language-named tribes on the eastern side of Cape York Peninsula are relevant to the Coen case-study area. They are the Ayapathu, Kaanju, Lama Lama and Umpila. These language-named tribes have been recognised in Claims under the *Aboriginal Land Act 1991 (Qld)* and the *Native Title Act 1993 (Cth)*. They also provide, to varying degrees across the four groups, a source of individual identification and are recognised as land holding entities. The four language named tribes provide a useful distinction, and will be used by the authors to delineate people with interests in country on the eastern side of the Cape York Peninsula.

Just as boundaries between clan estate groups (both in the classical model and the contemporary cognatic model) are characteristically imprecise, so too the countries of neighbouring language-named tribes tend to merge into each other, rather than following clearly delineated and precise boundary-lines:

“The territorial boundaries amongst the Lamalama, Umpila, Ayapathu and Kaanju, both on land and off-shore, are not precisely recognised; rather, they are matters for discussion, negotiation and agreement among the people involved in accordance with the particular context in which the question of identifying boundaries has arisen.” (Cape York Land Council, n.d.)

Although the precise boundaries of these four ‘tribes’ may be subject to change, the current authors, for the sake of planning convenience have placed nominal boundaries on the map in Figure.... so that hypothetical planning and legal scenarios can be constructed for the remainder of this analysis.

### Regional groups

Another form of inclusive system is the regional model. This crosses linguistic and other boundaries and takes its formation from regional post-contact historic circumstances. In the Coen region, marriage, trade,

co-habitation and ceremonies have coalesced to reproduce wider socio-cultural blocs. These blocs may draw from longer-running features of the social organisation and culture of the region which have been shaped by historical forces, for instance the 'Coen people' or 'Rokeby people'.

Particular examples are CRAC and Wunthalpo Land Trust, which are each composed of members of the four language-named tribal groups resident in Coen. These organisations give corporate form to a broader regional grouping of language-named tribes, which recognises there is a level of regional tradition followed in common by all groups, as well as regional interests which transcend those of either the family/clan groups or the language-named tribe. Additionally, there are also high rates of intermarriage and thus close kin relations among families (particularly resident in Coen and Lockhart River) who otherwise primarily identify with one or another of the language-named tribes in the sub-region.

### Summary of Land Tenure in Coen sub-region

There has been a tendency throughout the post-contact period, largely as a result of historical culture-contact forces during this period, for the Aboriginal system of land tenure in this region to shift from the strict 'patrilineal clan' end of the spectrum toward that of the 'language-named tribe' as the primary mechanism by which people identify with country and around which their ownership of land is organised and conceptualised. (Chase et al. 1998:42; Qld, ALT 1999:1370-1).

However, it would be incorrect to assume this has simply been a process of inevitable lineal change from one form to another. The extent to which these transformations have occurred in different groups varies quite widely. Due to the vicissitudes of European occupation and habitation, patterns of land tenure, social organization and identity are not uniform. Nevertheless everywhere there appears to have been a shift away from strict patrilineal reckoning to a greater recognition of filiation through mothers and grandmothers, as well as through fathers and father's fathers, often resulting in land-holding 'families' based on cognatic descent. These cognatic descent groups continue to display many of the same tenurial features as the patrilineal clans, including more or less exclusive estate ownership. (Chase et al 1998:42.)

At a broader level people identify with four language territory groups or language-based 'tribes', viz Lamalama, Umpila, Ayapathu and Kaanju. There is also a common notion of 'Traditional Ownership' involving spiritual connections to land and sites, and a primary customary right to speak for and make decisions about the use and access to land.

Following is a more detailed discussion of the social organisation, land tenure system and a brief history of these four language-named tribes.

## The Ayapathu

### Ayapathu Social Organisation

This group can be defined as the "Ayapathu language-named tribe" (Chase et al 1998) in the anthropological sense. Its claimants identify as the 'Ayapathu tribe', drawing their tribal name from the word *Yapathu*, the name for the language of the region. 'Ayapathu' signifies the people who spoke *Yapathu*. Dialects of the language were spoken in the area stretching from the eastern coast across to the inland western Cape York Peninsula. The contemporary Ayapathu tribe are the descendants of the inland Ayapathu who occupied an area to the west of and including the Great Dividing Range (and corresponding drainage systems) (Chase et al 1998:78.). Bruce Rigsby has recently (2001) identified the existence of two subgroups, the eastern Ayapathu and the western Ayapathu. From contemporary research, and research conducted by Anthropologist during the first half of the 20th Century, it is believed that the eastern Ayapathu speakers occupied country that stretched north to Coen and south to Ebagoolah and on the upper Holroyd River. However, little is known about the location of the western Ayapathu. (Rigsby 2001.)

Considering the language groups of Central Cape York Peninsula, it can be argued that the Ayapathu have probably moved the furthest in the direction of the 'language-named tribe' becoming the land-holding group. There is a sense among the contemporary Ayapathu that the tribe as a whole holds rights and responsibilities across Ayapathu tribal land as a whole. But it is also evident that, alongside this, older, fine grained and more particularised associations of individuals and families to specific tracts of Ayapathu land continue to be recognised. (Chase et al 1998:41.)

"Ayapathu claimants have little knowledge about Ayapathu clan names, membership and estates. However, contemporary Ayapathu families continue to maintain links with specific tracts of land which have evolved from the old clan estates, along with similar principles of affiliation at the level of the named Ayapathu language group, which coalesced from the previous inland Ayapathu clans." (Chase et al 1998:38.)

In addition, within this regional system there are specific rights and interests associated with being born at a place which form a complex layering of traditional affiliations to country (Qld, ALT 1999 :1373).

### Ayapathu Territory

The territory of the Ayapathu people comprises a large area situated to the south of Coen. This tribal land begins at the Great Northern Gully in Coen, and runs westward along the Coen River to Catfish Lagoon. From there, Ayapathu land runs south to Polappa Outstation and to the top half of Strathburn Station, and it also includes Crystal Vale Station, the abandoned

Ebagoola township and Yarraden Station. On the east, Ayapathu land includes the south-western part of Silver Plains Station and runs south along the Great Dividing Range from the Klondyke area down through to just south of Fox's Lookout. Much of the southern part of Lochinvar Station and the northern part of Bamboo Station are within Ayapathu tribal land. (Smith and Rigsby 1997, Cape York Land Council n.d.)

### **Ayapathu History**

Many adult Ayapathu men and women worked as stockmen and domestics respectively at Silver Plains, Polappa, Crystal Vale, Yarraden, Lochinvar, Strathburn, Bamboo and Rokeby Stations. These are the cattle stations and outstations on their homelands, as well as nearby in the region. The years of employment in the cattle industry involved a period of great disruption and change for Ayapathu people, during which they continued to care about their land and maintain a ongoing connection to it, as well as maintaining distinct forms of cultural practices throughout. (Smith and Rigsby 1997.)

Despite the impediments upon the Ayapathu arising from the European land tenure system and their disadvantaged position within the pastoral industry, Ayapathu people have continued throughout the post-contact period to visit old camping areas and Story Places within their tribal lands and to maintain the associated oral traditions and behavioural prescriptions relating to these. They have continued passing on knowledge about these places to younger generations. People treat Story Places with respect and attend to them where possible by burning them over and/or otherwise cleaning them. (Cape York Land Council n.d.)

New practices and skills learnt in cattle work during the past hundred years have often been incorporated as another way of looking after and managing country, and have not destroyed the connection of Ayapathu people to their tribal land. Ayapathu people visiting areas of their traditional country often comment that areas have been allowed to 'go wild' or have 'gone down the drain' (through their inability to practice traditional management techniques, such as regular burning). These observations arise as much from their responsibility to manage their country as Traditional Owners as they arise from their professionalism as cattlemen. (Smith and Rigsby 1997.)

### **Ayapathu Rights in Country**

"Ayapathu country is seen as both the right place and the only place that Ayapathu people have their future. In addition to their spiritual connections to their tribal country, Ayapathu people also maintain vital traditional economic connections with this country. Family incomes are low and household economies are supplemented by fishing, hunting and gathering. These are activities which people

can only conduct on their own Ayapathu country without having to seek the permission of other Aboriginal people. Being on one's own country means being able to undertake this economic activity without having to rely on the permission of other Traditional Owners". (Cape York Land Council n.d.)

The Ayapathu people have pursued interests in land in the Lochinvar USL, Mungkan Kaanju NP, Silver Plains and Crystal Vale areas. Their claim for exclusive traditional affiliation and historical association of the Lochinvar USL has been proved before and recognised by the Aboriginal Land Tribunal in the Lochinvar ALA land claim (Qld, Aboriginal Land Tribunal 2001).

### **The Kaanju**

Among the Kaanju, at the level of social organization below that of the language-named tribe, both clans and a socio-geographic division between Northern and Southern Kaanju people are recognised and are significant in affiliating people to particular tracts of country. In the context of the Mungkan Kaanju National Park Claim and, previously, in the adjoining Birthday Mountain Claim, the Southern Kaanju have been a recognised sub-group of the Kaanju language-named tribe, as are its constituent clans (Chase et al 1998:41).

### **Kaanju Social Organisation**

Whilst recognising a division between southern and northern Kaanju, and continuing to adhere to clan estate identities (particularly among the southern Kaanju), Kaanju people of the Coen sub-region recognise themselves as being part of a wider group of Aboriginal people who see themselves, and are seen by other Aboriginal people of the general region, as belonging to the Kaanju language group. From the viewpoint of all speakers from the general region, Kaanju speaking people could be referred to as *pama kanichi* ("on-top people" i.e. from the uplands) as distinct from the "down below" people. As *pama iichulichich* ("western people"), they are also distinguished from their eastern neighbours *pama kaawaychi* ("eastern people"). As well, a distinction is made between leeward and windward Kaanju people. (Cape York Land Council, n.d.)

"The Kaanju people maintain a general unitary identity as a "tribe" across this large area, though minor dialectal variations of the Kaanju language are associated with regional areas within it. Kaanju people also maintain an additional finer level of identification with their clan estates where this recognition is still known and maintained." (Cape York Land Council, n.d.)

In the McIlwraith Range area, for example, there are several estate-owning clans. There are a quite precise set of relationships between specific groupings and specific tracts of land which show clear derivation and indeed what can be seen as virtually identical in many ways to what might be called the classical clan estate system, with the proviso that groupings are clearly moving from a single notion of patrilineal descent in terms of primary rights in land to what anthropologists call cognatic descent. (Qld, Aboriginal Land Tribunal, 1999:1373.)

Thus, Kaanju lands can be represented as discrete, relatively bonded estates with clear links back to the original clan groups, for instance the Yikja estate, or the Watharra estate. (Qld, Aboriginal Land Tribunal 1999:1373.) Aboriginal people from these estates have maintained a continuous traditional attachment to their lands based upon descent from apical ancestors connected with their areas, the possession of a moiety system which classifies both people and land, and the moral authority which emanates from the creation period, 'Olilamu', when both people, the landscape, and the plants and animals it contains, were defined in their present form by the mythic spiritual creators. The Kaanju people from this area also see this authority constantly reinforced by the spirits of their deceased ancestors and relations who now inhabit their homelands. (Cape York Land Council, n.d.)

The classical clan-estate model is strongest among southern Kaanju, the majority of whom have been able to maintain during the post-contact period continuous connection with their country. This recognition has been significantly aided in recent times by the deep knowledge of country and the estate affiliations of the various families held by, and passed on to younger generations, by several older informants, many of whom, such as the late Mr. Thomas Creek, have now passed away.

The situation among the northern Kaanju is noticeably different. Here, there is a much greater proportion of "diaspora" Kaanju -individuals and families who are descendants of people long ago removed from the area, who have in recent years begun to return to their ancestral country. Among these, knowledge of clan estate affiliations is greatly attenuated, and there is therefore a much greater tendency among this group toward the language-named tribe level of country affiliation. Within this model, however, there are also some families – notably those who were never removed from the region and have continued to reside in Coen and Lockhart – who identify strongly with particular sites and the country surrounding those sites.

### **Kaanju Territory**

"Kaanju territory extends along the hill and mountain country of the northern Cape York Peninsula from approximately Coen to the

southerly point of the McIlwraith Range in the south, northwards to approximately the Moreton Telegraph Station where the Peninsula Development Road crosses the Wenlock River. To the east, the Kaanju territory meets the coastal groups associated with the linguistic territories of the Kuuku Ya'u, the Uuthanganu and the Umpila. To the west, the territory meets with lands associated with the various Wik-speaking peoples north and south of the Archer River." (Cape York Land Council, n.d.)

## **The Lamalama**

### **Lamalama Social Organisation**

The Lamalama comprise a 'language-named tribe' which has emerged over the past century out of historical processes which brought about the amalgamation more than forty patrilans (owning and speaking perhaps six separate indigenous languages) and numerous local groups. (Cape York Land Council, n.d.)

The tribe is today made up of over a dozen cognatic descent groups who share a common tribal identity based upon traditional cultural systems of land and sea tenure, spiritual and other beliefs, indigenous languages, and social and economic practices dating back beyond European contact. The post-contact history of these people, including removals, periods of demographic decline and the appropriation of large areas of their territory by the pastoral industry, has shifted people's primary social and personal identities away from the old clans and localised estates, toward an emphasis on a collective identity as the Lamalama tribe. The name Lamalama derives from the indigenous language of the majority of its former clans. (Cape York Land Council, n.d.)

Some recognition of the classical clan-based system remains to the extent that the contemporary cognatic descent groups and, in particular, their older members, recognise more particularised affiliations to the estates and sites of the patrilans of their founding ancestors. (Cape York Land Council, n.d.)

### **Lamalama Territory**

The Lamalama people are Traditional Owners for the lower Princess Charlotte Bay country, extending from the Normanby River mouth in the south, along the coast to Port Stewart and northward to near the Massey River, where Lamalama country meets up with that of the Umpila people. Lamalama territory also extends out from the coast to include the seas, islands, reefs, seagrass beds and cays at least as far as the Great Barrier Reef. Inland, it extends back to the Great Dividing Range, where it abuts that of their inland neighbours, the Kaanju and Ayapathu peoples, running south to Fox's Lookout and Saltwater Creek. Lamalama country incorporates a large southern portion of the Silver Plains Pastoral Lease. Further south again, it includes

Running Creek, Lilyvale and Marina Plains, and the northern part of Lakefield National Park. (Cape York Land Council, n.d.) Contemporary Lamalama residence centres on a relatively new settlement established on the lower Stewart River at Yintjingga and Moojeeba (see above).

### Lamalama History

Throughout the contact period, the Lamalama people have maintained a continual presence on their land. Though pastoralism and Queensland Government removals impacted upon their classical patterns of life on their land, these impacts have been ones of disruption rather than severance of the Lamalama connection to their country. During the early pastoral period (1880s to 1920s), Lamalama people became concentrated in a large community along the lower Stewart River. From this base, smaller groups continued to move along the coast and throughout the hinterland to hunt, fish, gather food and use other traditional bush resources. While some moved (or were removed) to the old Lockhart River mission at Bare Hill during the 1930s, a sizeable community, from a number of patrilineal clans, remained living at Port Stewart. They remained there throughout World War II, with some families living more or less continuously at Port Stewart and other families and individuals spending at least part of the year living and working on nearby stations, including Silver Plains, and at Coen. (Cape York Land Council, n.d.)

In 1961, the core of permanent residents at Port Stewart were removed by the Queensland Government to Bamaga. The Lamalama people did not easily accept this exile, and at least one attempt was made to walk from Bamaga back to Lamalama country. By 1970, many Lamalama people had returned to settle at Coen, from where they again took up residing on their own country, making short visits to fish, hunt, camp and gather bush tucker whenever transport could be arranged. (Cape York Land Council, n.d.)

The establishment of an outstation in 1984 followed by the grant of freehold land at Port Stewart in 1992, and the purchase of a Moojeeba block in 1994, has given the Lamalama people a more permanent and secure presence in their homelands area. From here, they have moved out by foot and by vehicle into their wider territory, both land, sea and estuarine, visiting country and producing a significant portion of their daily subsistence from fishing, hunting and the gathering of traditional foods. (Cape York Land Council, n.d.)

### The Umpila

#### Umpila Social Organisation

The Umpila, along with their northern coastal neighbours, are collectively referred to as *pama malngkana* (“people of the sandbeach”), *pama kawaychi* (“people of the east”), or *pama paakaychi* (“people from

down below” as contrasted to the “people from on top”, or the inland uplands). This terminology refers to the intensive marine and littoral focus of the Umpila and their coastal neighbours, a focus reflected in the high density of named places along the coastline, the possession of traditional marine-based technology and knowledge for exploiting marine resources, and their association with a ceremonial complex which is coast-oriented in the respect of the sacred histories and travels of the spiritual creator beings. (Cape York Land Council, n.d.)

#### Umpila Territory

The Umpila people of north-eastern Cape York Peninsula have their traditional country in a coastal area north of Princess Charlotte Bay and extending from approximately just south of Massy Creek (locally known also as ‘Massy River’) northward to approximately Friendly Point. This territory consists of a littoral plain extending inland to the eastern slopes of the Macrossan and McIlwraith Ranges. Beyond the shoreline, Umpila territory also extends seawards to include islands, cays and reefs on the inner side of the main Barrier Reef. (Cape York Land Council, n.d.)

#### Umpila Land Tenure

Family groups (sometimes called ‘clan’) of Umpila are said to ‘belong’ to particular clan lands, or estates. Each clan estate is associated with one of two named moiety divisions and this also gives moiety affiliation to members of the estate group through patrilineal descent. The moiety system is a component of the traditional rules of marriage. (Cape York Land Council, n.d.)

Through the common shared cultural systems of territory, knowledge, language and social practice the Umpila thus possess a traditional corporate identity as a unitary group (often referred to as ‘tribe’), as well as more specialised identities based on particular tracts within this corporate identity. The Umpila language, while distinctive, is closely related to the coastal languages of their northern coastal neighbours (the Uuthanganu and the Kuuku Ya’u) and their inland, or western, neighbours of the Peninsula uplands. (Cape York Land Council, n.d.)

#### Brief Time-line History of Coen Sub-region<sup>1</sup>

- 1789 William Bligh and the Bounty visit Lloyds Bay.
- 1848 Edmund Kennedy expedition – visits Ayapathu, Kaanju and Lamalama country.
- 1864 Jardine brothers expedition (lower Archer River).
- 1872 William Hann expedition (Morehead and Stewart Rivers – Ebgoola).
- 1875 Gold discovered at Ebagoola and Coen.
- 1879 Robert Logan Jack expedition (to Birthday Mt and headwaters of the Archer River).

- 1879 Second Jack expedition to McIlwraith Range and Nesbit River.  
Gold exploration and finds at Wenlock, Bunthen Bunthen. (Birthday Mt developed into a shaft mine in the 1920s-30s.) Mining ceased in the 1950s.
- 1880s Pastoral settlement began and was closely tied to the construction of telegraph lines (which enabled communication between Somerset and southern settlements – as a matter of defence).
- 1882 Lalla Rookh (Stewart River) station est.
- 1883 Langi Station est.
- 1884 Rokeby Station est.
- 1885 York Downs est.
- 1888 Merluna est.  
Violent clashes resulted on these stations with some white pastoralists also being killed.
- 1896 Police depot in Coen est. included Mounted Native Police.
- 1896 Archibald Meston toured the region.
- 1896 William Parry-Okeden (Superintendent) toured the region.
- 1897 Aborigines Protection Act 1897, passed in parliament.
- 1890s+ Presbyterian missions est. Mapoon (1891), Weipa (1898), Aurukun (1904), Lockhart R (1924).  
Approximate total of 300 people removed up to the 1960s from the Coen Police precinct.  
Coen Fringe camp in north of town near the Bend developed.
- 1930s Country Reserve est. in south of Coen.
- 1961 Lama Lama camp (Port Stewart) removed to Bamaga. Returned during 1970s. Community re-established in 1986.
- 1973+ The State Government starts building modern houses in Coen for the Aboriginal population.

### Areas of Land in the Coen Sub-region

The principal areas of land in the Coen Sub-region, in so far as Indigenous interests are concerned, and due in many cases to their extensive areas, are outlined as follows, and keyed to the maps in Figures 9 and 11.

#### 1. Birthday Mountain

A small area of Aboriginal Freehold land (granted under ALA in 1994) adjoining the north-eastern boundary of Mungkan Kaanju National Park. The area was granted to the Southern Kaanju, and held in trust by the Watharra Land Trust, comprised of the grantees who are members of the local

Watharra southern Kaanju clan estate group

#### 2. Mungkan Kaanju National Park

The Mungkan Kaanju National Park was formerly known as Archer Bend and Rokeby National Parks which were amalgamated, in accordance with the *Nature Conservation Act 1992*.

The National Park has been subject to claim under the ALA (it is not subject to any Native Title claim). The claim evidence was heard in 1998 and 1999 and has been the subject of a recent report by the Land Tribunal recommending a grant of two claims on the grounds of traditional affiliation as follows;

(i) Archer Bend: Wik Mungkan and Wik Ompom people

(ii) Rokeby: Wik Mungkan, Ayapathu and Southern Kaanju people

The Minister is yet to make a decision on the Tribunal's recommendation. Once the title is handed over, the issue remains as to negotiating a joint management agreement between TOs and the National Parks and Wildlife Service.

(i) The Archer Bend, or west side of the Mungkan Kaanju National Park, was claimed on behalf of the Wik Mungkan and Wik Ompom people on the basis of traditional affiliations and historical associations to the land claimed, including, but not limited to, the descendants of Short Charlie, Jimmy Lawrence and George Brody and his siblings (Chase et al 1998:7).

(ii) The Rokeby, or east side of Mungkan Kaanju National Park is claimed on behalf of the Southern Kaanju, Wik Mungkan and Ayapathu people on the basis of traditional affiliations and historical associations to the land claimed. The claimant group comprises a number of distinct sub-groups which identify with specific areas that hold traditional significance to them. These subgroups are:

(a) The sub-group (some members also belong to the Archer Bend sub-group) which claims country that lies in the western section of the Rokeby side. The geographical focus of this country is Rokeby Station and Langi Lagoon, extending to the junction of Ten Mile Creek and Archer River, south to near Jabaroo on the Coen River. These people are described as the Archer River Kepple and the Brody families (Aboriginal land Tribunal 2001:228)

(b) The sub-group which claims country on the eastern part of Merapah Station which extends into the Rokeby side. They are described as the Merapah Kepple family (Aboriginal land Tribunal 2001:228)

(c) The southern Kaanju lay claim to a part of

the Rokeby side of the National Park, east of a line running from near the junction of the northern boundary of the Park with 10 Mile Creek, south-east to the Coen River, then eastward along the Coen River to the eastern boundary of the National Park. The claimants include a number of families who trace their connection through ancestors associated with certain clan estates within and near the National Park

(d) The Ayapathu territory includes part of the Rokeby side of the National Park, an area that extends from Jabaroo, running eastwards along the Coen River to the boundary and roughly south to the boundary. The Ayapathu identify as a local tribe, or what anthropologists now call a 'language name tribe'.

3. Lochinvar USL

The land is described as Lot 1 on Plan ABL4, County of Coen. It has an area of about 1540 hectares of USL land adjoining the western boundary of Lochinvar Pastoral Holding and the south-eastern corner of Rokeby Claim Area, now known as the Mungkan Kaanju National Park. The land is located approximately 18 kilometres west of the township of Coen. An ALA claim was made by the same Ayapathu claimants as were involved in the Mungkan Kaanju claim (above). The claim was heard in 1998 and 1999, and the Land Tribunal recently reported to the Minister recommending a grant on the grounds of traditional affiliation to Ayapathu people. The Minister is yet to make a decision on the Tribunal's recommendation.

4. Coen Aboriginal Reserve

Reserve numbers R10 and R11 were transferred to the Wunthulpu Trust on 14/5/1998 and 4/6/1997 respectively. The trust is made up of representatives of the tribal groups from the Coen Region – significantly, Kaanju, Lamalama, Ayapathu and Wik Mungkan. Coen Regional Aboriginal Corporation has since built the Wunthalpo Cultural Centre on part of this land. This building contains a permanent historical photographic display of Aboriginal people of the Coen sub-region, and is now being used as a base for the NHT Land and Sea Management Coordinator and several CDEP rangers attached to this position.

5. Port Stewart (Yintjingga)

Aboriginal Freehold land transferred under the ALA in 1992 to the Lamalama people as grantees/trustees. Held by Yintjingga Land Trust, comprised of the Lamalama grantees. There is an established dry weather outstation on the banks of the Stewart River (established in 1984).

6. Moojeeba

Old town site just north of Port Stewart that was gazetted in 1902 but never developed. Lamalama purchased some blocks at an auction in 1994, and now have a substantial outstation there, linked to the Port Stewart outstation. The remaining area of the old town site remains as USL, now surrounded almost entirely by Aboriginal freehold land granted as part of the Silver Plains ALA transfer.

7. Silver Plains/McIllwraith Range aggregation

Silver Plains/McIllwraith Range aggregation which includes the old Silver Plains pastoral lease, the McIllwraith Range Timber Reserve and a portion from the old Geike pastoral lease. The purchase of the old Silver Plains pastoral lease by the Queensland Government was funded by several parties, including ILC, the State Government and the ANCA (a Commonwealth agency now called Environment Australia) on the agreement that 50% of the total land would be Aboriginal National Park and the remaining would become Aboriginal freehold.

(a) Non-national park areas of the Silver Plains/McIllwraith aggregation were granted as Aboriginal Freehold under an ALA transfer in December 2000 to the Kulla Land Trust, comprised of Kaanju, Umpila, Lamalama and Ayapathu peoples (hence KULLA as the name of the land trust). Executive members are resident at Coen, Lockhart River, Port Stewart, and Cairns. This is a problem in itself because of the high cost of flying them together for Trustee meetings. Kulla is presently being administered through the Coen Regional Aboriginal Corporation (CRAC) in Coen.

A portion of this area was contributed by ILC (although not a direct purchase per se... see notes on this). The ILC has noted that the individual language groups have expressed interest in developing their own enterprise and management programs on their own land, however, formal proposals for assistance have not yet been submitted. The ILC is willing to progress in this manner but feels the need to define their responsibility regarding land management and development over the entirety of the lease (pers. comm. Ashley Martens ILC, 6/12/01). Presently, developmental activity tends to be focused around the Silver Plains homestead (in Lamalama country) and at Station Creek (Ayapathu country). There is a need for a fire management regime at Silver Plains.

(b) Most of the remaining area is to be transferred and leased back as National Park following resolution of deficiencies with the lease-back and Aboriginal joint management arrangements currently available under the ALA and NCA (Blackwood 2001).

Two (2) Native Title claims also cover the Silver Plains/McIllwraith Range area (both proposed national park and non-national park areas), with mediation yet to commence and determinations yet to be made. Native title applications were made on behalf of the same four groups forming the KULLA Land Trust. At the time of writing the claims are:

- QC95/014 (QG98/6236) Kaanju/Umpila
- QC97/007 (QG6117/98)  
Kaanju/Umpila/Ayapathu/Lamalama

The Kaanju/Umpila claim (QC95/014) was submitted in 1995 and includes the old Timber Reserve and the adjacent (to the north) USL block, parcels where Native Title had not been extinguished. The process of negotiation between the three purchasing parties (over Silver Plains) was stalled in 1997, following a change of State Government the previous year. The Government purchased the property under the proviso that the other two parties (LIC and ANCA) would contribute at a later date. At this juncture, the Kaanju/Umpila/Ayapathu/Lamalama claim (QC97/007) was submitted over the entirety of the pastoral lease.

8. Umpila Native Title Sea Claim Area – QC95/001 (QG6009/98)

The Native Title sea claim was lodged originally in 1995. It now covers an area from coast to outer barrier reef (excluding Morris and Ellis Islands), off the coast of Silver Plains. It was lodged on behalf of the Umpila peoples, originally by the barrister P. Poynton, and included areas that have now been absorbed into other adjacent Native Title claims. For example #2 Umpila QC96/060 (QG6075/98) which covers a small area in the south of the Lockhart River DOGIT. The Cape York Land Council has since picked up the case. Mediation is yet to commence. Not yet registered.

Substantial anthropological research has been undertaken for the Umpila sea claim, Morris and Ellis Islands Claims and the Umpila coastal native title claim. This includes a major site trip with Traditional Owners down the coast from Lockhart to Port Stewart by anthropologists Athol Chase and Bruce Rigsby in 1997. (Blackwood 2001.)

9. Morris Island and Ellis Island

Two areas of available Crown land with a combined total of 20.55 hectares and known as Morris Island (Lot 1 on Plan ABL14) and Ellis Island (Lot 1 on Plan ABL 15) are located near Cape Sidmouth on the east coast of Cape York Peninsula, about 10 kms offshore, and approximately 66 kilometres north-east of the township of Coen midway between Port Stewart and Lockhart River. ALA claims have been lodged on behalf of Umpila people over each island. It is anticipated that hearings will be held during 2002. (Blackwood 2001.)

10. Lakefield National Park

Lakefield National Park is located to the south of and contiguous to Princess Charlotte Bay (see Figure 11) and is outside of the Coen Sub-region. However it is included due to it being an area with Lamalama interests near the boundary of the Coen Sub-region. The Park was claimed on behalf of Traditional Owners under an ALA claim. The Land Tribunal has recommended the land be granted on the grounds of traditional affiliation to a number of language groups, including Lama Lama. The Claimants, including the Lama Lama, are incorporated as Rirmirr Aboriginal Corporation. The Minister has agreed to grant the land, but the grant will not take place until there have been legislative changes to ALA and NCA regarding joint management and lease-back of national parks. (Blackwood 2001.) Note that the Lakefield National Park does not include the Cliff Islands which are to the north of the main Park and 20 kms from the mouth of the Stewart River.

11. Geike Pastoral Lease

ILC purchased the Geike Pastoral Lease in August 2000. The property was divested in July 2001 to a land holding body of three Southern Kaanju clan estate groups named the Geike Aboriginal Corporation (incorporated under the *Commonwealth Aboriginal Councils and Associations Act*). This Corporation holds the Pastoral Lease and its rules would allow it to become a PBC in the future should the Traditional Owners seek a native title determination over the property. The property is lacking in significant infrastructure. The ILC sees that there is limited capacity for enterprise development at this stage, although outstation development is a possibility (pers. comm. Ali Bock, ILC, 6/12/01). Unusually, the ILC provided financial support to the CYLC to facilitate the formation of the title holding body in preparation for the divestment, due to the higher expense arising from the remoteness of the property.

12. Merapah Pastoral Lease

Purchased by ATSIC about ten (10) years ago on behalf of Wik-Mungkan Traditional Owners. Discussions currently happening between ATSIC, ILC, CYLC and Traditional Owners to set-up a land holding corporation to which ATSIC can divest the property. Merapah is also covered by the Wik and Wik Way Native Title Claim, and Queensland government has indicated that it accepts that ATSIC purchased the property in trust for the Traditional Owners, and that *Section 47* of the *Native Title Act* will therefore apply to a native title determination. The title holding body for the pastoral lease is likely to be comprised of four Wik-Mungkan clan estate groups; however, the native title interests of these groups is likely to fall within



the PBC for the broader Wik and Wik Way Claim. Because Merapah is included in the Wik and Wik Way Native Title Claim, and lies within the Wik Planning Sub-region, it will be dealt with more exhaustively in the next chapter. However it is mentioned here as many of the traditional owners live in Coen and they may prefer to seek LSM services from Coen rather than Aurukun.

13. Lockhart River DOGIT

This DOGIT has recently been transferred under the ALA to two Land Trusts – one small area in the southern portion to the Creek family, and the rest of the DOGIT to a land trust comprised jointly of Umpila, Kuuku Y’au, Ulthalgamu and Kaanju Traditional Owners. The area of the township has not been transferred and remains DOGIT held by Lockhart Aboriginal Community Council.

The #2 Umpila Native Title Claim QC96/060 (Federal Court number: QG6075/98) covers a relatively small area in the far south of the Lockhart DOGIT Lease.

14. Marina Plains

A Native Title claim has been lodged over Marina Plains by the Lamalama QC99/022 (Federal Court number Q6021/89). The claim was registered on 6 November 2000.

15. Parcels of land currently under leasehold to non-Aboriginal pastoralists

- (a) Lovel Holding (aka Mt Croll).
- (b) York Downs Holding (partially within the boundaries of the Wik NT Claim).
- (c) Wolverton Holding.
- (d) Orchid Creek.
- (e) Leconsfield Holding (majority within the boundaries of the Wik NT Claim).
- (f) Alcestis Holding (aka ‘Bamboo’).
- (g) Lily Vale Holding.
- (h) Lochinvar Holding (term lease).
- (i) Aurora (term lease).

16. Crown Land

Two Timber Reserves exist; the large Running Creek Reserve (abutting Silver Plains) (24) and a small reserve comprised of a rectangular parcel encapsulated within Lochinvar Holding. (25). Within the limitations of the current study the authors have not been able to investigate the nature and extent of small parcels of land, for example police and camping reserves.

The Coen Sub-Region case study comprises the following parcels of Aboriginal freehold land. Birthday Mountain (1) and Port Stewart (5) have been previously claimed and transferred (respectively) as Aboriginal freehold under the *Aboriginal Land Act 1991*. The Coen Aboriginal Reserve (4) has been transferred as freehold

to a trust. The majority of the old Silver Plains Lease (7a) has been transferred to a trust. The remainder of the old Lease in addition to areas of an old Timber Reserve and a USL block (collectively 7b) has been transferred as Aboriginal freehold and is proposed to be subject to a conservation regime (remains to be finalised). The Lockhart DOGIT (13) (except for the township area) has been granted to two land trusts. In addition, part of Moojeeba township (6) purchased by Lamalama in 1994 is held as freehold (not Aboriginal freehold).

Several areas are pending transfer as Aboriginal freehold under the *Aboriginal Land Act 1991*, awaiting improved outcomes for Aboriginal ownership and management through changes to relevant legislation. The first is a parcel that includes sections of the old Silver Plains lease plus an old Timber Reserve (7b); the second is Lakefield and Cliff Islands National Parks (10); the third area includes two parcels collectively known as Mungkan Kaanju National Park (2). A small parcel known as the Lochinvar USL (3) has been recommended for grant as Aboriginal freehold and awaits only the minister’s decision. Claims for the Morris and Ellis Islands have also been lodged under the *Aboriginal Land Act*.

There are nine areas currently under lease to non-Indigenous pastoralists. One parcel, Geike (10), under term lease, has been transferred to the Geike Aboriginal Corporation (was formerly held by the ILC to be transferred to an Aboriginal corporation).

There are five Native Title claims within the Coen Sub-region.

### **The ILC position on Silver Plains (from ILC 2001)**

The land acquisition functions of the ILC are premised around land being purchased in a normal commercial transaction where money for the land is paid before the transfer of the interest in land. Thus ILC experienced difficulty in the Silver Plains matter, where the scheme was to be as follows.

The Silver Plains land, which was the subject of a proposed Indigenous land use agreement (ILUA) was to be declared by regulation to be ‘transferable land’ under s.12(e) of the *Aboriginal Land Act 1991* (Qld), and then this transferable land was to be granted in two stages under Part 3 of the ALA. The land defined in the agreement as ‘the balance of the region’ was to be granted first. The land that was intended to be leased back to the Queensland Parks and Wildlife Service by the land trust (‘the national park area’) was then to be granted on condition that the land trust pays to Queensland, \$1.125m in return for the grant.

In order for the ILC to make a valid grant of money under the scheme above, under its land acquisition functions (s.191D of the *Aboriginal and Torres Strait Islander*

Commission Act 1989 (ATSIC Act)), it was necessary:

- For the ILC to grant the money to the body which will be acquiring the interest in the land;
- For the body acquiring the land to be in existence at the time of the grant;
- For the acquisition to take place after the ILC grants the money;
- Where the body acquiring the interest in land is a land trust created under the AL Act, for all the trustees to be Aboriginal persons or Torres Strait Islanders; and
- For the grant to be used by the land trust to acquire that interest.

It was only possible for the ILC to make a valid grant of money because of the two stage process – a land trust was first created under s.32 of the AL Act. The land trust thus created then become a party to an agreement in which Queensland had a contractual obligation to make a further grant in trust of fee simple in return for the land trust's agreement to the following conditions:

- The trust would agree initially to pay an amount of money to Queensland (subject to a condition precedent that the trust first received this money as a grant from the ILC) for the acquisition of specified land by way of further grant by Queensland to the trust under the AL Act;
- The period within which this payment was specified, as was the period within which the associated grant would have to be made by Queensland;
- The trust would agree to pay a specified additional amount to Queensland in respect of the further grant within a specified time after that grant was made.

All of the above points to the fact that the ILC has limited scope to make grants of monies to Aboriginal corporations for land to be transferred to a particular Corporation under the *Aboriginal Land Act 1991* (Qld). The particular proposal needs careful examination prior to the ILC committing its funds to the proposal.

[End of Extract from ILC 2001.]

### **Duties of Lockhart River Homelands Land and Sea Management Coordinator**

In mid-2001 Lockhart River Council appointed a Homelands Land And Sea Management Coordinator for the community and DOGIT area, and adjacent sea country. The following summarises the duties and responsibilities for this position :-

- Development of a Land and Sea Management Plan and program for Lockhart River Homelands.
- Develop and implement strategies and action plans for families and clans to effectively manage natural and cultural resource degradation.
- Facilitate the development and implementation of strategies for natural, cultural and economic resource management.

- Source and secure funding that addresses the relevant requirements of Traditional Owners.

Work programs are to be developed for implementation by the Ranger Service and other interested community members/groups, including:-

- Arranging accredited training courses on country and in appropriate areas of natural, cultural and economic resource management
- Erosion control and management
- Weed infestation control
- Feral animal control
- Fire management
- Sustainable use of resources
- Tourism impact management, and
- Correct use and management of capital resources and technical equipment such as vehicles, boats, computers, chainsaws, firearms, etc.
- Facilitate the integration of relevant activities of Lockhart River Aboriginal Council and other Government agencies with those of the Land and Sea Management Steering Committee.
- Develop across-Government commitment and support for the delivery of on-ground land and sea management activities at the family/clan level.
- Act as the key contact point for outside resource agencies wanting to conduct natural, cultural and/or economic resource management activities on Lockhart River Homelands.
- Facilitate information sharing and create learning opportunities and training for all Aboriginal participants.
- Contribute to the development of an employment and training strategy, linking to other key areas of activity, which include CDEP, education, health, and community justice.
- Source funds and/or expertise to assist the Lockhart River Homelands, implement identified natural, cultural and/or economic resource management.
- Facilitate all Land and Sea Management project activities.
- Establish an effective strategic and financial management framework.
- Organise and manage secretariat services to the Land and Sea Management Steering Committee to include meeting organisation, keeping meeting records and implementing meeting decisions.
- Facilitate the coordinated implementation of land and sea management activities funded by resource agencies.
- Provide leadership, career direction and advice to staff engaged in land and sea management activities.
- Establish Networks with all relevant government departments, NGOs, agencies and informal

networks, other Indigenous LSM Centres, University environmental researchers, primary producer organizations, etc.

**Method of seeking ATSI funding for outstations through CRAC**

In order to receive this ATSI outstation funding, TOs consult with the CRAC Board and develop their requests for funding for infrastructure on their outstations. ATSI employees also visit outstations and

talk to TOs as well as meeting with CRAC. CRAC then submits to ATSI an application for a total amount of funding for all outstations in their jurisdiction. CRAC generally gets considerably less than it asks for and there is a six month gap between the application for funding and receipt of the money. The money provided by ATSI is paid as a lump sum for all of the outstations it administers.

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## **APPENDIX 6: FURTHER CASE STUDY MATERIALS – WIK SUB-REGION**

### **Details on areas of land in Wik Sub-region**

This information was compiled from the advice of individuals working on the Wik and Wik Way Claim (viz P.B. of CYLC, P.H. of Ebsworth and Ebsworth, anthropologist D.M.)

Areas 1, 12, 13, 14: Aurukun Shire

- Aboriginal land lease held by Aurukun Shire Council.
- Wik Native Title determination registered in 2000.

Areas 2, 6-10: Napranum DOGIT

- Held in trust by Napranum Aboriginal Community Council.
- Currently on Dept. of Natural Resources & Mines work plan for transfer under the ALA.
- Part of the Wik N.T. Claim but no Wik determination as yet.

Area 3 & 4: Comalco Mining Lease

- ML7024 – Comalco lease.
- Subject to Western Cape Communities –Co-existence Agreement ILUA (WCCCA) (March 01) and will be determined as a ‘conforming’ Native Title application in accordance with WCCCA. Traditional owners for this area will be members and beneficiaries of a Trust to be set up to administer and distribute Comalco compensation royalties and other WCCCA benefits.
- The conforming application was lodged as a new application over the Mining Lease area; simultaneously, the original claim was amended to remove this area. The new claim has been registered

Area 5: Comalco Mining Lease

- ML6024 – Comalco lease.
- Subject to WCCCA agreement (March 01) and will be determined as part of the same ‘conforming’ Native Title application lodged for ML7024. Traditional owners for this area will be members and beneficiaries of a Trust to be set up to administer and distribute Comalco compensation royalties and other WCCCA benefits.

Area 11: USL (Woolla Claim)

- Unallocated State Land (USL) claimable land under ALA.
- The ‘Aurukun (Ward River) Land Claim’ was made by a group of Aboriginal people to approximately 2080 hectares of available Crown

land situated approximately 13 kilometres north of Aurukun.

- Claim has been lodged (c1992) by Alison Woolla, with John Von Sturmer as the agent.
- However, claim has not been progressed due to priority given to Wik and Wik Way Native Title Claims over same area.

Area 13: Pechiney Mining Lease

- ML7032 – Tipperary Corp, Billington Aluminium Aus. BV, Aluminium Pechiney P/L Bauxite lease since c1970. No lease development has occurred. Pechiney is a large French company.
- No Wik determination to date. This area is inside the Aurukun Shire.

Area 15: Pechiney Mining Lease

- USL claimable land under ALA. No claim lodged to date.
- Also covered by ML7032 (bauxite lease) since c1970. No lease development to date.
- No Wik determination to date. This area is outside Aurukun Shire

Areas 16 & 17: Pormpuraaw DOGIT

- Held in trust by Pormpuraaw Aboriginal Community Council.
- Must eventually be transferred under ALA, though not currently on NRM workplan as far as the authors can ascertain.
- No Wik determination to date.
- Area 16 of the Pormpuraaw DOGIT has already been included in the Wik determination made: (D.M.,P.C.)

Area 17: Eddie Holroyd Lease

- Special lease held by Traditional Owner Eddie Holroyd, issued by Bob Katter as Minister for Aboriginal and Islander Advancement in the Bjelke Petersen era (1986), for Eddie’s services at the Crocodile Farm.
- The lease is not transferable and there is no right of renewal
- No Wik determination to date.
- The lease was originally over the Aboriginal Reserve. The DOGIT was issued later.
- This is a 30 or 32 year lease, which has run half-way through its term, and costing \$200 per year. It comprises 110,000 ha for grazing and agriculture.
- Eddie Holroyd is a member of the Pormpuraaw Community Council and accesses the CDEP

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<sup>1</sup> See also Chase et al (1998:31-32) which includes a history of the Outstation Movement and of the Government ‘buy-back’ of land in the region.

scheme for lease improvements.

- Solicitor Mark Love acts for Eddie Holroyd.
- The Wik will be able to get exclusive possession recognized through the application of Section 47 of NTA. This is not opposed by Eddie Holroyd, (who is also a claimant for this area) who will also be able to retain his lease..
- The lease was previously subject to a common law cross claim in the Federal court, lodged on behalf of Thayorre speaking clans affiliated to a number of sites and their associated tracts of country north of the Edward River, which is the southern boundary of the Wik and Wik Way Native Title Claim. This claim was withdrawn in September 2001 (along with the original Wik common law claim) on the basis that the Thayorre speaking clans now responsible for these estates recognise that the estates are Wik estates, and that the current owning clans can trace the descent of their rights and interests from Wik-speaking ancestors through traditional processes of succession. Their native title rights and interests will be recognised under the proposed Wik determination for this area.
- Eddie Holroyd has submitted a proposal to the ILC, which is yet to be assessed.

Area 19: Watson River P.L.

- Pastoral lease – non-Aboriginal owned.

Area 20: Sudley P.L.

- Pastoral lease owned by Comalco. Comalco has stated publicly ( Dec 2000 and November 2001) that it intends to handover P.L. to Aboriginal owners.
- Currently there is an outstation on the property [name?].
- May be pulled out of the Wik and Wik Way Claim and lodged as a new claim in order to get the benefit of Section 47 of NTA.
- Traditional owners include Troj/Anhathangagth (Wik) people (P.B.). A claim is also being asserted by Eddie Woodley on behalf of Yinwun people.

Area 21 (A & B): York Downs P.L.

- Non-Aboriginal owned pastoral lease, comprised of two blocks adjacent to and north of the Mungkan Kaanju National Park.
- Also known as ‘Merluna’. Lessee is Merluna Cattle Station Pty Ltd, with the owners of Watson River PL (Area 19) having 50% share.
- Predominantly Northern Kaanju interests. Wik Mungkan interests cover only a small area of the southern part of the lease adjacent to the Archer River. Represented by Agforce.

Area 24: Kendall River Holding

- Non-Aboriginal owned pastoral lease.
  - The pastoralist has a working relationship with ‘Agforce’.

- Current proposal for Kaolin mine. RTN consultations between company and Traditional Owners commenced in Pormpuraaw 25-27 June 2001.

Note: This project also includes a pipeline to Weipa, whose proposed route goes north through areas 14 and 15.

Area 25: Merapah Pastoral Lease

also see Coen Sub-Region analysis

- This pastoral station is approximately 750sq. miles in area and under the current pastoral lease until circa 2012. Merapah is less than three hours drive from Coen. The northern boundary is the Archer River.
- Also known as Coen River Holding
- ATSIC purchased this PL in 1990 on behalf of Wik Mungkan traditional owners; at the time of writing, ATSIC still holds the property in trust for traditional owners, but in conjunction with CYLC and ILC is taking steps to divest. ATSIC is not a party to the Wik and Wik Way Claim
- The traditional owners comprise four inland Wik groups, including three totemic clan groups, Mumpa (Old Man Devil), Panhtha (Sand Goanna), Nhompo (Wedge-tailed Eagle), and families for the area known as the Merapah Corridor, between the two parts of Mungkan Kaanju National Park (Martin 1996b). In earlier years the main spokespeople for this group were Rosie Ahlers (dec) and her younger brother, Wompoo Kepple. There is now an interim committee nominated for meeting with ATSIC regarding divestment of the pastoral lease. It seems that a couple of the people nominated on the committee are not actually TOs for the property, though they do have historical connections.
- Discussions are currently occurring between ATSIC, ILC, CYLC and traditional owners to set-up a land holding corporation to which ATSIC can divest the property. This will be set-up to take advantage of *Section 47 of the Native Title Act*. However, it looks like the State will accept that ATSIC bought and held the property on behalf of native title holders. Since this was done prior to the lodging of the claim, this means that Section 47 is applicable (provided the State agrees) in relation to the current Wik and Wik Way Claim. This means that if the Merapah people agree, their native title interests can be dealt with through the wider Wik and Wik Way PBC, so that the title holding body for the pastoral lease need not also be a PBC, which in turn means that it need not necessarily be incorporated under the ACA. Other possible options are that the wider Wik and Wik Way PBC might also be the title holding body for the lease, but this suggestion

was not received warmly at the meeting of 09/10/01. Another option is that the Merapah native title holders could form their own PBC, separate from the rest of the Wik and Wik Way Claim. Phillip Hunter thinks this can be done from within the existing Wik and Wik Way Claim (ie. It would not require any amendment). This could then also hold the pastoral lease – though there are reasons why keeping the two separate may be a good idea. From recent meetings, people seem to favour going in with the wider Wik and Wik Way PBC for their native title, but a company or corporation of their own for holding the lease, and then possibly another company for running the cattle. But no final decisions have been made as yet: (pers. comm., from P.B.12/10/01.) The title holding body is likely to be comprised of four Wik clan estate groups (pers. comm., from P.B. 12/10/01.)

- Property planning for Merapah has so far been funded. But both ATSIC and ILC indicate they are not able to fund a Management Plan – though it is a requirement from ATSIC before it will divest. ILC will not fund because its legislation explicitly prevents its funding property management planning for properties held in trust by ATSIC. Why ATSIC has not been willing to fund is not clear to the authors. ILC and CYLC are developing TOR and a budget which will then be used to seek funding from DATSIP and DSD, as well as once again from ATSIC. The Management Plan will have three components (at least) – community planning (by David Martin), financial due diligence and membership, structure and type of title holding body incorporation. (P.B. 12/10/01.)
- In terms of N.T. negotiations, connection is signed off; exclusive possession is agreed, and other negotiations are to be finalized.
- Initially Merapah was managed by Aurukun Community Incorporated (now defunct) who purchased cattle and built up the herd. In the last few years the management of Merapah was transferred to CRAC. It is proposed that funds generated from a future muster will go to the Merapah account, providing working capital for the cattle enterprise aspirations of TOs. (CS of ATSIC pc to RS 25.7.01)
- Outstations on Merapah in 1989 included Middle Camp Yard, Boyd's Lagoon and near Scrubby Junction. At the time Aboriginal people expressed interest in refurbishing and living in these dwellings (von Sturmer 1989:6). It seems there is nobody at these outstations now, and it is not clear what infrastructure now exists at any of these locations.

- There is an existing Aboriginal corporation, Wayngk Kampan, which was set up in 1994 for the purpose of operating a cattle enterprise on Merapah. It is not suited to being a land-holding body for the purposes of native title, but may be retained as a separate cattle operating entity. (Blackwood 2001.) (But see also comments above re. PBCs etc.)
- In 1989 there was a Moomba Aboriginal Corporation of which Wompoo Kepple was the president (von Sturmer 1989:1). Membership was not exclusively confined to inland Wik Mungkan-side people. This is still incorporated but its objectives are cattle not land-holding interests (CS). According to P.B., Moomba was wound up some years ago and replaced by CRAC (but interestingly, Peter Callaghan of CRAC has discovered that Moomba still owns some land in Coen!).

#### Area 26: Holroyd River Holding

- Non-Aboriginal owned pastoral lease.
- Lease ownership recently changed hands.
- Traditional owners include Ayapathu people.
- At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA are well progressed

#### Area 27: Denman Holding (also known as Southwell Holding)

- Non-Aboriginal owned pastoral lease
- Owned by Richard 'Nooky' Price
- Contains H.S. named 'Southwell'
- At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA are well progressed

#### Area 28: Strathburn P.L.

- Non-Aboriginal owned pastoral lease
- The pastoralist is John Frazer who is also head of the local Cattlemen's Association.
- At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA are well progressed

#### Area 29: Lecons Field P.L.

- Also known as Crystalvale.
- Non-Aboriginal owned pastoral lease.
- Traditional owners include Ayapathu people
- At the time of writing, negotiations with this lessee towards an agreed determination and a use and access ILUA are well progressed

#### Area 31, 32 & 33: Tidal Land and Sea

- There are no Consent determination negotiations occurring for this part of the claim because the Commonwealth is opposed to granting sea rights.

Adjacent Map Areas not currently in the Wik and Wik Way Claim Area but part of the Wik Sub-region (some were removed from the Claim):-

Area 22: Mungkan Kaanju National Park (Archer Bend side)

- Has been subject to an ALA Claim.
- It was claimed on behalf of the Wik Mungkan and Wik Ompom people including, but not limited to, the descendants of Short Charlie, Jimmy Lawrence and George Brody and his siblings
- See Coen sub-region analysis (Ch 4).

Area 23: Mungkan Kaanju National Park (Rokeby side)

- Has been subject to an ALA Claim. Was formerly Rokeby P.L.
- Has been claimed on behalf of the Southern Kaanju, Wik Mungkan and Ayapathu people. Wik Mungkan claimants include the people described as the Archer River Kepple, the Brody families and the Merapah Kepple family.
- See Coen sub-region analysis (Ch 4).

Area 27A: Strathgordon P.L.

- Part of Southwell pastoral holding, aka 'Strathgordon'.
- Strathgordon was purchased by ILC in August 1999 and divested to Poonko Strathgordon Aboriginal Corporation in August 2000.
- Strathgordon is subject to a Native Title claim by the Olkolo-Bakanh people (QG6127/98; QC97/01)
- Wik and Wik Way Claim has been amended to remove overlap with Olkolo-Bakanh claim area (27A).
- Contains H.S.s named 'Old Strathgordon' and 'New Strathgordon'.
- The ILC has provided financial assistance for the cattle business and infrastructure. Balkanu has also provided assistance.

Area 27B: Strathgordon P.L.

- Outside of the Wik and Wik Way Claim Area.
- Also known as 'Southwell'.

### Aboriginal Groups and Land Tenure in the Wik Region

The following section on aspects of Aboriginal social and territorial organization draws largely (almost entirely) from the writings of anthropologist-linguist Dr Peter Sutton, whose work in turn builds on the work of other anthropologists, particularly David Martin, John von Sturmer, John Taylor and Athol Chase, as well as that of earlier researchers such as Ursula McConnell and Donald Thomson.

#### Overview to the Wik Identity and Language Group

The Aboriginal peoples whose land lies west of the Great Dividing Range have been referred to by anthropologists as the 'Wik tribes' or 'Wik-speaking peoples' or more recently the 'Wik' (Thomson 1936: 374; McConnel 1939:62; Sutton 1978; von Sturmer 1978; Martin, 1993, 1997b).

"The Wik peoples are a regional Aboriginal cultural group. Like other regional groups of similar type, which are often called 'nations' or 'confederacies', this one consists of a number of subgroups.

The Wik subgroups share cultural heritage, exercise a mainly common system of custom and law in relation to land, and engage in a set of active interrelationships that mark them as distinctive, although they have until recently had no autogenous collective name for this relative regional unity. Since the present legal action began in 1993 as a common law case, a number of Wik people have begun using this term as a way of identifying themselves." (Sutton 1997a:35.)

In the centre of the Cape linguists have referred to the languages of clans with estates in the region roughly from the mid Archer River, south to Moonkan Creek (just north of Pormuraaw), inland to the headwaters of the Holroyd and Kendall Rivers and (in the case of Ayapathu) even to the east coast, as the 'Wik group' of languages. (Chase et al 1998:58.)

The use of the term 'Wik peoples', however, refers not just to a set of related languages and dialects, but also to the fact that there are broad cultural similarities across the region. Nevertheless there are particular principles of social and political organisation, totemic and religious geography, and land tenure which differentiate the inland groups from those whose lands lie within the more heavily populated Wik regions on the western coast. However, in common with many other areas of Aboriginal Australia, the Wik bloc is more sharply defined in terms of its subgroups and boundary points at the comparatively resource-rich coast, but is less so in the inland. The scarcer the extent of resources, the more mobile was the Aboriginal population and the more outward looking was their approach to inter-group relations. (Sutton and Rigsby 1982; Chase et al 1998:58-9.)

"The model presented by early ethnographers of the Wik region was essentially of patrilineal land-owning clans which combined to form dialectal tribes, with territories containing sites relating to species or phenomena which were the totems of the particular clan. Later work has clearly shown that in the coastal Wik regions it is not possible to map political and social units isomorphically on to linguistic affiliation (Sutton 1978; von Sturmer 1978). There is evidence, however, that along the Archer River and in the sclerophyll forest country in the upper reaches of the Kendall and Holroyd Rivers, there was to some degree isomorphic mapping of land-holding clan estates and sites relating to their own totems, and a lower degree of linguistic diversity than along the coast. In the inland region, then the ideological Aboriginal model tends to be that of patrilineal totemic clan with unique bounded estates." (Chase et al 1998:59.)

Sutton has researched the complex pattern of language distribution in the Western Wik region.

“Language affiliation is often shared by clans which have non-contiguous estates and belong to different sub-regional political groupings such as riverine groupings and regional ritual groups. The distribution of any one language can be mosaic-like, cropping up here and there across the landscape, separated by other languages at the level of clan/estate units. Earlier ethnographers did not know enough about the details of land relationships and language affiliation to know this, and produced a ‘one language per area’ model on maps. Specific languages are not coterminous with political or social groups in the region.” (Sutton 1997a:33.)

“While on occasion the fact of sharing the same language may be adduced as evidence of some form of unity of identity with someone else, this is far less common here than in most parts of Aboriginal Australia. In short, the Wik show little commitment to the notion of the ‘language group’ as a geopolitical unit of much salience, and do not normally use these language names as names of land-based identities with proprietorial significance, although they always have sub-regional connotations.

“It is true that cover-terms such as Wik Way (referring to a variety of languages between the Archer and Embley Rivers) and Wik-Ngencherr (self-named Kugu-Ngancharra, the southern Wik peoples whose language names begin with Kugu-), do have geopolitical substance in the region, and refer to sets of languages, even if these sets are not uniquely and highly bounded. Non-Wik people have long recognised the people from between the Archer and Edward Rivers as having a certain unity, one that they mark by calling them ‘Mungkan’ or ‘Mungkan-side’ people, as is the case at Pormpuraaw (Taylor 1984) and at Coen and Port Stewart (Sutton, Rigsby and Chase 1993).” (Sutton 1997a:33.)

### Linguistic Sub-Groups

“All the languages of Cape York Peninsula belong to a single generic grouping, which is known as Paman (after the word *pama* ‘person’). Within this, the Wik languages, associated mainly with the area between the Archer and Edward Rivers and inland to near Coen, form a distinguishable subgroup. Together with their southern neighbour Thaayorre and the languages of eastern central Cape York Peninsula (eg. Kaantju, Kuuku-Ya’u, Umpila), they form the Middle Paman group. To their immediate north, from about Archer River to the tip of Cape York, are languages belonging to the Northern Paman group.” (Sutton 1997a:4.)

Despite the linguistic complexity in this region it is worth trying to define a small number of the linguistic

sub-groups whose names regularly appear in the land claim and land planning literature, particularly ‘Wik Way’ and ‘Wik Mungkan’, and the distinction between the latter term and that of ‘Mungkanhu side.’

### Wik Way

The Wik Way territory is located in the north-west of the Wik Sub-region:

“From Albatross Bay to just south of Archer River, along a narrow coastal strip, are the estates of the Wik Way people (in the modern sense – see below), whose clans own a set of closely related languages which are radically different from those to the south of them but middlingly related to those of the Mapoon area. In earlier times it seems clear, from Hale’s and Tindale’s work for example, that ‘Wik-Way’ was a term applied, from a south-of-Archer perspective, to any language to the north, including the inland ones such as Mbiywom and Nggoth”. (Sutton 1997a:36.)

Similarly Chase et al comment as follows:-

“From the perspective of contemporary Aurukun people, however, ‘Wik-way’ (literally language-bad/difficult in Wik Mungkan) has a narrower reference to the coastal languages and groups from estates between the Archer and Embley Rivers. A slightly different meaning again is given by Mungkan-side claimants to the Mungkan-Kaanju National Park, who refer to the language spoken between the upper Archer and Watson Rivers (Mbiywom/Wik Ompom) as well as those further west as Wik-way. This latter is in fact more in accordance with the usage of Hale. (Chase et al 1998:59.)

Wik Way people are today largely resident at Aurukun and Napranum (Weipa South).

### Wik Mungkan

In the classical land tenure sense, ‘Wik Mungkan’ is one of the Wik languages and also refers to the groups who spoke it, occupying the centre and central west of the Wik and Wik Way Claim Area, as Chase et al describe:-

“In the early ethnographies of the area, ‘Wik Mungkan’ has been used both of one particular Wik language and of the ‘tribe’ nominally speaking it. In fact, dialect names throughout this region are commonly prefixed by a term meaning ‘language’ (e.g. Wik) together with a lexical item that typifies the particular dialect. Thus ‘Wik Mungkan’ can be seen as referring to “those who say ‘mungkan’ to mean eating.” Dialects referred to by their speakers as Wik Mungkan were spoken in such areas as the middle Archer River west of Archer Bend, the pericoastal sclerophyll forests between it and the Kendall River, and by two related groups with coastal territories to the south of Cape Keerweer.” (Chase et al 1998:58.)



However the term ‘Mungkan’ has over the last 100 years come to be used more broadly and loosely, as further explained by Chase et al:-

“The Mungkan claimant groups similarly retain a strong sense of localised land affiliation. In the Coen Region, as in Pormpuraaw (Edward River), people from the Wik cultural bloc are commonly termed ‘Mungkan’ or ‘Mungkan-side’ people. The name comes from one of the languages of the region, Wik Mungkan, to which...clans from the mid Archer River region and certain other pericoastal and coastal estates are affiliated. Over the past century, Wik Mungkan has become a *lingua franca* for many Wik peoples, and ‘Mungkan’ has thus become both self-designation and an appellation by others. However, while people may collectively be identified by others as ‘Mungkan’, this is only at a broad level, and finer-grain distinctions, including those relating to affiliations to land, are also applied in specific circumstances, as in the “Archer River Mungkan people”. It is specific sub-sets of Mungkan people, rather than the language-named tribe, who have traditional affiliations to tracts and areas of land within the wider Mungkan bloc”. (Chase et al 1998:41-2.)

### Wik Ompom

The lands of the Wik Ompom peoples lie between the Archer and Watson Rivers (Chase et al 1998:59).

### Wik liyeny or Mungkanhu

On the upper reaches of the Kendall and Holroyd Rivers and mid-upper reaches of the Archer, were the territories of clans identifying as Wik liyeny (or Mungkanhu) (Chase et al 1998:58). Mungkanhu is the self-referential name given to the language while ‘Wik liyeny’ is the name use to refer to the same language by Wik people to the west (coastal and peri-coastal groups). It is a dialect of Wik Mungkan. (D.Martin, pers. comm., 22/11/01).

### Wik-Ngencherr

The Wik-Ngencherr (self-named ‘Kugu-Ngancharra’) were southern Wik peoples who used the term ‘Kugu-’ (= speech) to refer to their languages (Sutton 1997a:33).

### Ayapathu

The Ayapathu are a Wik type language albeit one with a distinct group identity of their own (Chase et al 1998: 58). Ayapathu people claim territory in the south-east of the Wik and Wik Way Native Title Claim Area on the headwaters of the Holroyd River and its tributaries (see map in Figure 15).

### Wik Clans and Estates

The Wik clan is the land-holding unit whose membership is based on the principle of descent. It is an abstract concept. The clan, unless it has been reduced to only a handful of people, would rarely or never be seen as a physical collection of people. Descent was classically, and for the most part remains, patrilineal descent. “That is, a person at birth acquires a primary landed estate, a set of clan totems, and a set of clan totemic names (differing according to gender), plus a set of totemic names that they may use for their own dogs (again differing by gender), through her or his father.”(Sutton 1997a:16.)

A household, camp or ‘band’, by contrast, is an on-the-ground camping, residential, hunting, resource utilising group or other form of social action group. Classical Wik bands, were usually made up of individual members drawn from several or even many clans at any one time. Since clans were, and in principle continue to be out-marrying, or exogamous, at the core level of the married couple, at least two clans would normally be represented in any camp in which there was such a couple. There may be visitors from other neighbouring estates, and those whose kin ties to the core residence group give them legitimate rights to be there. (Sutton 1997a:18; Chase et al 1998:60.)

### Small Estate Clusters

There are a range of kinds of classification for localised clusters of Wik clan estates and their traditional owner groups. Those dealt with below are ‘nickname’ groupings, spirit-image centre groupings, cremation countrymen groupings, and localised totemic cult groups.

### Nickname groupings

Clans with adjacent estates often share what is locally referred to in English as a ‘nickname’ based on a local environmental feature of one or several estates or a major local placename (Sutton 1978:126-8; 1997a:28).

### Spirit-image centre groupings

Clans who send the spirit images of their recent dead to a common image-centre can also be categorized as small clusters of groups with adjacent estates (Sutton 1997a:29).

### Cremation countrymen groupings

Sets of clans with adjacent estates whose members were cremated in common cremation grounds, prior to the introduction of burial as a result of mission influence, constitute sets of ‘countrymen’ at a certain localised level (Sutton 1978: 128, Map 12; Sutton 1997a:29).

### Localised totemic cult groups

The clan members of some small clusters of estates share a localised totemic cult affiliation, such as Shark in the lower Kirke River area and Dog in the lower Knox River area (Sutton 1978: 140; Map 11; 1997a:29).

### Outstation groups

“Under present conditions, the clans holding the estates closest to a particular outstation also form clusters for whom the name of the outstation has become a common badge of identity” (Sutton 1997a:29).

### Large Estate Clusters

Sutton identifies two principal forms of large estate clusters – riverine identity groups and ceremonial groups. These are larger units than the previous types of clusters and, as such are the most eligible forms of social structure on which to base the broad basis for a PBC membership structure.

### Riverine Identity Groups

‘Riverine identity groups’ comprise affiliated clans whose estates lie on the same drainage basin.

“Clans with estates on the same riverine drainage system are typically significant allies who for a long time past have closely intermarried and who identify with each other, both in times of conflict and at other times, by reference to their common river of origin. Before the advent of English, the riverine group names appear in the main to have been based on an extension of the scope of the name of a principal site close to the mouth of the river, except where the relevant grouping was based on just the upper reaches of a large river system”. (Sutton 1997a:29-30.)

Sutton lists (1997a:30) the main active riverine groups as follows:-

- ‘Archer River’ (subdivided into, ‘Small Archer’ and ‘Main Archer’, the latter again subdivided into ‘Top Archer’ and ‘Bottom Archer’; ‘Archer Bend’; ‘Running Creek’ area may be referred to broadly as ‘Ku’-aw’ or, further up, ‘Meripah’);
- ‘Love River’ (subdivided into ‘Bottom Love’ and ‘Top Love’);
- ‘Cape Keerweer’ (lower Kirke River system), ‘Kencherrang’ (middle Kirke River, an outstation name), ‘Oony-aw’ (upper northern Kirke tributary, a site name), ‘Ti Tree’ (upper eastern Kirke River tributaries);
- ‘Knox River’;
- ‘Kendall River’ (subdivided into ‘Top Kendall’, ‘Bottom Kendall’ and ‘South Kendall’, the latter being the ‘Holroyd River’ of official maps);
- ‘Thuuk (Snake) River’ (the Hersey Creek of official maps);
- ‘Christmas Creek’ (the Balurga Creek of official maps); and
- ‘Holroyd River’ (the Christmas Creek of official maps, subdivided into ‘Top Holroyd’ and ‘Bottom Holroyd’).” (Sutton 1997a:30.)

### Ceremonial groups

The members of each of the five ceremonial groups share common affiliations to a particular ceremonial tradition and occupy a particular sub-region of the Wik area. They are locally referred to as the ‘five tribes’ of Aurukun (Sutton 1997a:31).

“This refers just to the regional cult-ceremony with which the clan and its estate is most closely associated....this form of categorization works most neatly for clans with estates between the Embley and Holroyd Rivers, where the ceremonial groups, running from north to south, are Shivirri (Saara), Winchanam, Apelech, Puch and Wanam. There are sub-categorizations for some such affiliations, such as Three Stripe Winchanam or Thu’-Apelech.” (Sutton 1997.)

This mode of classification is today more commonly employed by the people who have their estates in the Aurukun Shire and the area immediately to the south.

- (i) The Shivirri (also known as Shivri, Chivirri, Saarra) group is more or less coextensive with the category of Wik Way, and relates to the sub-region from the Archer to the Embley River (Sutton 1997a:31).
- (ii) The Winchanam, being the northern inland group, include the majority of the ‘topside’ people within the Wik universe, whose estates are located on the middle and upper Archer basins and Small Archer south via the heads of major watercourses to the upper Kendall-Holroyd area (Sutton 1997a:31).
- (iii) The Apelech group members have estates on the upper and lower Love, lower and middle Kirke, and lower Knox Rivers (Sutton 1997a:31).
- (iv) The Puch (also known as ‘Key-elp’) estates are on the lower Kendall and Thuuk Rivers (Sutton 1997a:31).
- (v) The Wanam estates are on the Holroyd River and Christmas Creek (as named in local usage) (Sutton 1997a:31).

Some individuals have affiliation to more than one ceremonial group calculated on the basis of descent from different ancestors, but also due to their territorially intermediate estate location as Sutton details.

“These groups have unambiguous core memberships, but some of their core members’ estates border on those of neighbours whose inclusion in the same ceremonial group is less definite or central, or who have dual identification with adjoining ceremonial groups..... Thus between the coast proper and inland proper there are sometimes estates, and estate-holders, who are intermediate between the two in terms of certain aspects of cultural identity and alliance patterns.” (Sutton 1997a:31.)

## Inland/Coast Division

“The broadest and most powerful internal geopolitical distinction among the Wik is the coast/hinterland division (often referred to locally as ‘bottomside/topside people’, ‘saltwater/freshwater side’ etc.).” (Sutton 1997a:32.)

Calculation of membership in these larger groupings described above, if contested, will usually involve tracing back by descent or adoption to clan membership.

“Membership in any of the higher level Wik groupings above the clan level depends critically on one’s clan membership. Socially recognised descent is the cornerstone of clanship. Riverine group, ritual group and nation memberships flow ultimately from the most local of affiliations to clan and estate. It is these ancestral ties that link individual Wik people back to the countries their forebears held and occupied before their residential arrangements were significantly altered in the last century, mainly through centralisation.” (Sutton 1997a:34.)

The clan estate is thus the building block of the customary land tenure system.

### Kinship

Kinship is one aspect of social organization that does not translate readily into territorial patterning but nevertheless permeates political alliances in the Wik universe to the extent they will inheritably impact on the PBC operations.

“The web of kin ties, traced bilaterally, was and is much more important in mundane life, however, than is clan solidarity, which is realised mainly in such events as major conflicts, and in mortuary rituals...There are minor variations in the kinship system within the various Wik groups. Essentially terminology is of a simple Dravidian type, with grandparents divided into parallel and cross varieties. There are no moieties amongst the Wik groups, although there is some evidence that eastern Wik groups knew of their existence amongst neighbouring groups such as the Kaanju to the east.” (Chase et al 1998:60.)

## Some Wik History

The following summary of Wik history is taken directly from Martin (1997a:1-2):-

“Population estimates for the region before European settlement are difficult to make with any degree of accuracy. There could have been some 2000 Wik in the less ecologically diverse inland sclerophyll forest zone, assuming a population density of one person per two square miles here. At least this number could have lived in the much richer coastal zone between the Archer and Edward Rivers. There was rapid depopulation from the

latter part of the 19th century from such factors as measles and influenza epidemics, punitive expeditions by cattlemen, and forced labour in pearling and fishing vessels. Today, there would be some 1200 or so Wik people in the settlements of the region. There has been a high birth rate over recent years...

While the Cape York region could originally have been a major route along which migration into the Australian landmass occurred, little detailed archaeological or prehistoric research has been conducted in the area occupied by the Wik. Linguistic and other evidence demonstrates the existence of links between various Wik groups and their neighbours on the coasts and inland. Direct contact with Macassan fishermen or with Torres Strait islanders appears to have been minimal on the west coast of Cape York. The first Europeans known to have contacted Wik peoples were the Dutch early in the 17th century. Pressures from the outside world began in earnest for the inland Wik with the encroachment of cattlemen in the latter part of the 19th century and a consequent history of dispossession from lands and punitive expeditions which continued well into the present century, in living memory of some of the older Wik. Along the coasts, there had been intermittent contact with itinerant timber cutters for many years, but it was the beche-de-mer fishermen working in the Torres Straits and looking for labour which caused the greatest depredations. In part in response to public disquiet about the situation, missions were established in the remote areas of Cape York from the early 1900s, operating under the assimilationist policies and legislative framework of the Queensland government. These saw the gradual sedentarization of the Wik, with systematic attempts to inculcate a social, political and economic regime based on settled village life rather than the pre-contact dispersed semi-nomadic groups. The 1970s saw the establishment of a large bauxite mining town just to the north of the Wik area, at Weipa, and a major controversy over bauxite exploration on Aurukun land itself. A fundamental set of changes were set in train in 1978 with the institution of a secular administration under the state local government model, and by a concomitant massive increase in funding, capital development, and bureaucratic involvement which have led to severe pressures on Wik internal social mechanisms...”

“Most Wik people today are living in three small townships and settlements situated on the fringes of what were their traditional lands. There are some 900 Wik people living in Aurukun, with perhaps 200 in Edward River and a few dozen in Coen. Smaller numbers live in other settlements and

towns throughout northern Queensland.” (Martin 1997a:1-2)

According to ATSIIC (2001), the population of Aurukun is in the order of 862 (probably based on the 1996 Census).

### Historical Notes on Some Former Aboriginal Organizations

Aurukun Community Incorporated was formed in 1974; its goal being to promote economic development, provide support for outstations, and a variety of commercial services (O’Faircheallaigh 1996:37). At its peak it owned and operated the community store, take-away shop, and owned several charter planes. It sought funding for outstations and implemented construction programs. Major setbacks occurred in 1993 and 1994 with two of its aircraft crashing, killing 13 Wik claimants, including the then ACI chairperson. The final demise of the company was brought about by gross over expenditure of their grants. (pers. comm. P. Hunter, August 2001)

Manth Thayan Association was created in July 1992 by ATSIIC and the North Australian Research Unit of ANU (Darwin), as a community-based organisation. It was governed by a committee of one rep from each of 18 land-owning groups but there was also a smaller executive. Manth Thayan was primarily a community development organisation. (O’Faircheallaigh 1996: 37.) It is no longer operational, having been wound up in 1999.

An Aboriginal Ranger service was established by the Aurukun Shire Council in c1994. However when the current Land and Sea Management Co-ordinator was engaged by the Council, he found a ‘black hole’ in terms of existing admin records, plans, documentation etc. This highlights the difficulty of preserving and maintaining planning resources in remote Indigenous communities in the face of a high turnover of staff.

### Land Management Programs and Projects

In 2001, a number of programmes were being planned/undertaken by ASC in response to the wishes of Traditional Owners (pers. comm., R.B., 09/07/01), viz:-

- (i) A fire management programme.
- (ii) A special contract with C.Y.P. Development Association using funds from the Natural Heritage Trust Grant (NHT) to develop applications of the traditional use of fire and to compare traditional burning patterns with the actual distribution of burning at present within the Shire boundaries. The project uses satellite photography, with the aim of formulating a Fire Management Plan incorporating both a traditional and western scientific approach.
- (iii) A \$100,000 contract with Queensland Parks and

Wildlife to conduct a bird survey at 100 sites during 2001.

- (iv) Development and Implementation of Visitor Access and Camping Policy of Aurukun Shire Council so that Traditional Owner Rights can be protected and maintained. The policy is addressing issues such as: Who wants tourists on their land camping? Where? How many at a time? What of right-of-way access across other countries?) Previously a camping and access fee was collected at Weipa. In July 2001, ASC was collecting the money in Aurukun (for Aurukun people) under a new permit system. Visitors were told that Wik people were controlling access and that there were rules and a fee. People either paid at the ASC office or gave the fees to the Rangers out on country. The fees were similar to those charged in Mapoon: \$20 per vehicle, \$6 per person per night (children under 6 free).
- (v) Weed and Feral Animal Eradication Strategy. Funding was being negotiated through the N.H.T. Note that this is a A.S.C. legal obligation.
- (vi) Ethnobiological Study conducted by Nick Smith (of Balkanu?? With what funding?) with Traditional Owners.
- (vii) A.S.C. have been funded to build a Land Management Centre on the Archer River to include accommodation, workshop and training facility, at a site known as ‘Blue Lagoon’. This aims to provide support for outstations, bush enterprises, and land and sea management training. It is proposed that it be funded with NHT money granted to ASC. It will be operated by the Land and Sea Management Agency via its coordinator (See later notes on this.)

### Perceived Land Management Problems/Issues for particular areas

Re Area 13

This area contains the Pecheney Mining Lease but lies within the Aurukun Shire boundary. A tacit approval has been received from this company for Aurukun Shire to carry out land management functions. There is a place called Beagle Camp in the north-west corner of this area where there is an ASC Ranger’s base, occupied two or three nights per week. There are Council plans to also re-develop a market garden here and a Juvenile Correction Centre (mainly for petrol sniffers in Aurukun).

Re Area 12

Aurukun Shire. There is a plan to develop a Land and Sea Management Centre at Blue Lagoon combined with a village of sorts to support the Centre with residential facilities. This would service that part of the Shire to the south and south-east of the Archer River basin.

Re Area 17

This is a lease held by Wik Claimant and Pormpuraaw Councillor, Eddie Holroyd in this area, obtained from the Queensland Government. The Traditional Owners at Aurukun want to exercise management control over this area and have such land management administered from Aurukun. There is a real or perceived tension here and a need for mediation/negotiation with Eddie Holroyd and the Pormpuraaw Council to resolve this issue.

Re Area 3

This north-west area is part of Comalco's lease and lies within the Cook Shire. The area is subject to the Western Cape Communities Co-existence Agreement. Once again there is an issue of whether Aurukun can provide land management services for the Wik Way and come to some sort of agreement with Cook Shire Council.

Wik Way people wish to achieve the immediate return to them of land along the coastal strip from the mouth of the Embley River to Aurukun, through the excision from Comalco's lease of a band between two and three kilometres wide inland from the coast, although, on-the-ground survey work would be required to delineate the precise areas in relation to the cultural landscape and the richer bauxite deposits. There is a corresponding willingness to have mining proceed in areas inland as long as appropriate environmental and site protection controls are put in place to ensure that the coastal environment is not damaged and that cultural heritage is protected as a result of mining activity. (O'Faircheallaigh 1996:48, 49.)

Re Areas 3, 4 & 5

There are many issues relating to the proposed Western Cape Community Co-existence Agreement with Comalco that have been raised in a report by Ciaran O'Faircheallaigh (1996). These fall under the following broad headings: the need for effective environmental monitoring and controls and the proper rehabilitation of mined land; proactive approaches to employment, training and education of Aboriginal people in the operations of the mine including environmental planning and monitoring activities; facilitating opportunities for Indigenous people to establish business ventures to supply goods, and services to Comalco and its employees; upgrading transport infrastructure to increase employment of Aurukun people by Comalco; the need for Comalco to educate its workers in relation to Aboriginal culture and history and in relation to appropriate conduct when they visit Aboriginal traditional lands; the formalisation of Traditional Owner access to mining lease areas that are not in use for mining.

**ASC Land and Sea Management – Consultation and Engagement Principles**

The ASC cannot impose land and sea management on people. Any programs must be in response to perceived/agreed needs of the people. They follow a principle of attempting to consult with people on country, in order to get focused attention on specific problems. This results in better collection of information on country and more effective outcomes. Experience has shown that there is too much other cross-cutting and distractive activity when consultation is undertaken in town. Further, carrying out in-depth consultations and negotiations with family groups on their countries, in turn helps to get people back on country.

**Methodological**

**Problems or issues with the current planning proposal that need to be addressed**

- (i) The need for negotiation with the Pormpuraaw Community Council and Wik Native Title Holders in Pormpuraaw. There are a few hundred Wik people residing at Pormpuraaw who are from throughout the Wik Sub-region (eg Wik Iiyeny) and certainly not confined to just the Wanam Sub-group (pers. comm. D.M. February 2002).

Issues to be canvassed at Pormpuraaw include (a) whether the proposed PBC structure is acceptable; and (b) resolving the relation between the PBC and Eddie Holroyd as lease holder in Area 17.

“A major issue in any resultant PBC (and in subsequent land management, outstation resourcing etc) is the administrative division between Aurukun and Pormpuraaw (and to a lesser extent, Aurukun and Napranum). While populations with interests in the relevant lands are dispersed across the three residential communities, and while we might (accurately and appropriately) distinguish place of residence and community council of residents from traditional land ownership, contemporary political realities are that the community councils have a significant role within Aboriginal politics of the region. Thus, for example, while those with native title interests between the Kendall River and Pormpuraaw live in both Pormpuraaw and Aurukun (and indeed in other centres, including Coen), Pormpuraaw Wik residents know full well that in day-to-day political relations with other Aboriginal people, the Pormpuraaw Council (currently almost all Thaayorre) plays a very significant role. The non-Aboriginal people associated with the Councils play a major role in this....Put another way, PBCs will be situated not only in the ‘traditional owner’ or native title holder landscape, but within an institutional landscape to which

Aboriginal people may be equally committed. Almost certainly, administrative and other support for any Wik PBC will have to bring in the Aurukun and Pormpuraaw Councils in some way.” (pers. comm. David Martin, July 2001.)

Furthermore, “it may be necessary for both political and logistical reasons to have KSN services in the Southern Wik area, ie. south of the Kendall River to be sub-contracted through the Pormpuraaw Community Council (pers. comm. D.M. February 2002).

Note that meetings of the Puch and Wanam groups of Aurukun held in 2001, there was a consensus with regard to having Puch/Wanam representatives on the PBC who were from both the upper and lower river areas (Kendall/Holroyd); and a mix for these representatives to comprise of young and old people. However this issue has not been addressed at Pormpuraaw where there are further members of these two groups. Some are of the view that once the Pormpuraaw perspective is gained and considered the outcome will be to retain separate representation on the PBC for these two groups (pers. comm. to P.M. from P.H. 25/9/01).

On behalf of the Aurukun-based Puch/Wanam people, Ms Gladys Tybingoompa requested (25/07/01) that the Aurukun Shire Council establish a MOU with the Pormpuraaw Council for the ASC to look after in the Puch area. A representative of ASC explained to this group that the Aurukun Council would need an agreement with the Pormpuraaw Council to provide services to the Kendall River outstations.

These are all issues that need to be taken up at Pormpuraaw.

- (ii) The need for negotiation with Native Title Holders in Coen. Issues to be addressed here include:- (a) Whether the PBC structure is acceptable; (b) the relation of the PBC to Merapah; and (c) the relation of the PBC to the Mungkan Kaanju National Park.
- (iii) Location of Administration Centre for Merapah Land Business. Although Merapah lies wholly within the Wik Native Title area and is claimed by the Wik Mungkan (or Mungkanu), a recognized Wik sub-group, the Traditional Owners reside at both Aurukun and Coen, with some at Merapah itself. Whilst there are some key Elders at Aurukun, the stronger body of TO leadership is probably at Coen, and it is the current view that the administration centre for Merapah Land Management should be at Coen, which is closer and more accessible.  
A number of circumstances could alter however. If the Kaolin Mine were to go ahead at the Kendall

River Holding (Area 24), the Mining Company would undoubtedly construct a good quality road from the mine site to the main highway; the road junction would probably be some distance south of Coen. A subject of preliminary negotiation with Wik Traditional Owners is the upgrading of the road from the mine to Aurukun, or at least to Archer Bay at the ferry landing. Furthermore the Aurukun Shire Council has plans to construct a Land and Sea Management Centre at Blue Lagoon which is on the Archer River, about 60kms to the west of Merapah homestead; this could well become an administration centre for Merapah Land business. In addition, the CEO of the Aurukun Shire Council has stated that he would not be opposed to opening a small Council office in Coen if viability issues were resolved. Given these circumstances it is conceivable that the Merapah group may recognize the advantages of working through Aurukun.

An alternative is the possibility of two or three service agreements between the Wik PBC and LSM Agencies, the main one being with ASC but others with the LSM Agencies in Pormpuraaw and Coen concerning Sub-regional boundary matters.

- (iv) The need for negotiation with Native Title Holders in Napranum. Relevant issues are (a) whether they agree with this PBC model, and (b) the legal relation between Wik Way people as a party to the West Cape Communities Co-existence Agreement and the PBC. At present the Coordinating Committee of the Western Cape Community Co-existence Agreement has two representatives from each Traditional Owner group. The ACS CEO (10/07/01, pc) is concerned that it will contain politically oriented Aboriginal representatives from the more northern groups who will dominate over and thereby disadvantage the Wik Way interests. However this Committee is only an interim one for the time being until a formal Trust is established. The CEO believes that the constitution is such that it could recognize multiple traditional owner groups within the Wik Way area, each of which could have its own representatives.  
At the meeting of 25/07/01, some discussion occurred on it being a good idea for Wik Way to have a representative who lived in Napranum or Weipa so as to make sure relevant Native Title information gets back to people; and a similar proposal for the Ayapathu in Coen, and the Wanam in Pormpuraaw.
- (v) The need for further work at Aurukun. It would seem worthwhile to conscript the support of the Justice Group of Elders. This is an active Elders group who would be useful in assisting to facilitate customary meetings of the Ceremonial Groups for Native Title consultations.

**The need for Native Title consultation to be well supported and facilitated**

It is noted that one of the authors (PM) made two visits to Aurukun and on both occasions was readily able to facilitate an informal meeting of the Puch/Wanam groups. On the second visit, Phillip Hunter readily facilitated a meeting of the Archer/Watson Rivers Winchenem groups. Two attempts were made to hold Wik Way or Shiverri meetings and both failed, with nobody turning up at the agreed place and time. The author's impression (PM) is that there is a lack of capacity amongst certain groups to readily have meetings at Aurukun. This was reinforced by the CEO of the Aurukun Shire Council who made the following comments on community consultation at Aurukun (10/07/01):- He said the days of 'community meetings' are gone at Aurukun. Here he was referring to a tradition of the Missionaries to have weekly or monthly meetings of all the community members to provide communal information and obtain their views. During the State Government takeover at Aurukun (1978) these meetings were particularly rigorous. The CEO also said that 90% of Aurukun representatives on

community committees or corporations provide negligible feedback to the community at large; even though they may be competent politicians and orators to some extent.

**Capacity for ASC to contract with PBC for LSM Services**

The CEO of ASC believes the ASC has the legal capacity under the Local Government Act to be contracted to provide services (a service contract) outside of the Shire and considers there is potential for ASC to service Wik NT Holders where land is outside the Shire boundary. This is not a foreign concept to Council as during the inquiry by the Electoral and Administrative Review Commission (EARC) the ASC applied to have its Shire boundary moved eastwards as far as, and encompassing Coen. But even without moving the Shire boundaries, it would still be feasible for ASC through its Land and Sea Management Agency to establish a service centre at 'Blue Lagoon' or even in Coen itself to service the eastern part of the Wik region. However the economic feasibility is a key issue. (pers. comm., ASC, CEO 10/07/01.)

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## **APPENDIX 7: FURTHER MATERIALS ON THE CAPE YORK PLANNING ENVIRONMENT**

Further background information is contained in this Appendix on the following organizations:-

- Apunipima
- Tharpuntoo
- Centre for Appropriate Technology
- Aboriginal Co-ordinating Council
- Registrar of Aboriginal Corporations
- Natural Heritage Trust
- Great Barrier Reef Marine Park Authority
- Environmental Protection Agency
- Department of Primary Industries.

### **Apunipima**

Apunipima's primary role is to improve the health of Cape York Aboriginal people. It shares with Balkanu, CYLC and ATSIC Regional Council a vision for the improved welfare of people living in Cape communities. It works through government departments to refine and improve program delivery so that they are more easily understood and accessed by people on communities, and better tailored to their needs. It strives to achieve greater participation and ownership of health and the health related issues for Cape York Communities, by promoting community control of health service provision and the integration of healthy approaches in all community activities. (CYLC 2001.)

Apunipima is recognised as a Public Benevolent Institution (PBI) for tax purposes. Its role is to identify deficiencies in health care services and push for solutions that ultimately result in a better quality of life and longer life expectancy for Cape York Aboriginal people. ('Cape York Partnerships' 2001.)

### **Tharpuntoo**

Tharpuntoo is the Aboriginal legal service set up by Cape York people to provide legal services to Aboriginal people in the region. Much of its work is dealing with criminal matters. However, in the past, it was also instrumental in lodging several of the early native title claims in the region. Representation for these claims has since been transferred to Cape York Land Council on the instructions of the relevant native title groups. Tharpuntoo no longer has carriage of any native title applications in the region, and supports Cape York Land Council as the NTRB for the region. (CYLC 2001.)

### **Centre for Appropriate Technology**

The Centre for Appropriate Technology's (CAT) vision is to empower Indigenous people living in remote

communities to achieve self determination and enterprise leading to social and economic development. (CAT n.d.)

CAT's 'purpose' is to provide appropriate technology services through:

- Practical research, design, planning, education, information and development services that contribute to lifestyle improvements in remote communities.
- Maximum participation and involvement of Indigenous people
- Working with other organisations and individuals locally, nationally and internationally. (CAT n.d.)

As an organisation CAT values include: innovation and forward thinking; practical achievement and striving for success; the fact that all people are equal; technology as a means to an end, not an end in itself; and the commitment of the CAT staff to working creatively with all stakeholders (CAT n.d.)

CAT's goals include:-

- To provide specific task oriented technical training programmes that respond appropriately to the expressed needs of communities of Indigenous people.
- To conduct technical research, review and design products and processes, and undertake planning which are technically and cultural appropriate.
- To be a resource and clearinghouse for information and advice on appropriate technology and to exchange information and knowledge between identified groups locally, nationally and internationally.
- To provide products, project management and planning services that contribute to the empowerment and development of individuals and communities.
- To provide appropriate facilities and quality personnel and financial services which attract and maintain staff and clients in an equitable, supportive and safe environment.
- To monitor and evaluate the performance of the Centre for Appropriate Technology to ensure that the operations are in accordance with the vision and goals of CAT. (CAT n.d.)

In the Coen Sub-region, CAT has developed with TOs a Community Development Plan for the Lamalama people living at Theethinji and Moojeeba camps. The plan pays special attention to healthy places for kids and families, protecting cultural sites and the



environment. The plan was awarded a prize by the Institute of Planning in 1998. CAT has also documented proposals for two Land Management Centres in the Wik Region (see Chapter 5).

### Aboriginal Co-ordinating Council

The Aboriginal Coordinating Council (ACC) is the Statutory Peak Body for the Queensland remote Aboriginal Deed of Grant in Trust (DOGIT) Communities. The ACC was established under the Queensland *Community Services (Aborigines) Act 1984*. The legislation established Aboriginal Community Councils to become local government bodies for Aboriginal Communities that were previously reserves or missions (Qld, ACC 2001a). The council comprises fifteen DOGIT communities but has also a number of Affiliate member communities including two Aboriginal Shire Councils (one being Aurukun) and eight other Aboriginal Housing Organisations and Co-operatives located within remote Queensland mainstream townships and falling within the ATSI funding structure. (Qld ACC 1997.) Of these members, eleven of the DOGIT communities and five of the Housing organizations are located in Cape York. CRAC is an Affiliate member.

The Aboriginal Coordinating Council Mission Statement is:

- To enhance the quality of life for our Aboriginal DOGIT Community residents.
- To carry out its functions as defined in the Act.
- To generate revenue and increase the capacity of the ACC and the Member Councils.
- To assist Councils to identify viable revenue generating opportunities.
- To become a model organization.
- To ensure that there is an effective administration system that can respond quickly and effectively to internal/external demands placed upon it. (Qld, ACC 2001)

The Aboriginal Coordinating Council has instigated and maintained services and programs in the communities in the following areas: Housing, Infrastructure, Environment, Women's Issues and Health, Youth Projects, Community Justice, Consumer Affairs, Internal Audit and Financial Services. (Qld, ACC 2001b).

### Registrar of Aboriginal Corporations

The Registrar of Aboriginal Corporations is an independent statutory office holder appointed by the Minister for Aboriginal and Torres Strait Islander Affairs. The *Aboriginal Councils and Associations Act 1976* (the Act) confers a range of functions and powers on the Registrar. Amongst other things the Registrar is required to:

- advise Aboriginals and Torres Strait Islanders on

- procedures for establishing Aboriginal councils and for the incorporation of Aboriginal associations;
- process applications for incorporation and subsequent changes to names, objects and rules;
- maintain public registers of Aboriginal councils and incorporated Aboriginal associations;
- arbitrate in disputes within corporations in so far as they relate to the Act and the regulations, or the rules of corporations;
- conduct special general meetings as provided under the Act and if considered necessary by the Registrar, particularly in relation to the resolution of disputes; and
- enforce compliance with the Act by:
  - monitoring the filing of documents and annual reports; examining corporate records; issuing statutory notices; seeking injunctions; initiating examinations into the operations of corporations; appointing (with prior ministerial approval) administrators to conduct the affairs of corporations; and petitioning for the winding-up of corporations.

(Aust, Office of the Registrar of Aboriginal Corporations, 2000)

### Natural Heritage Trust

At the Commonwealth level, the Natural Heritage Trust is administered by a Ministerial Board comprising the Minister for the Environment and Heritage, and the Minister for Agriculture, Fisheries and Forestry. Advice is provided to the Board by a range of experts such as the Australian Landcare Council, the Biological Diversity Advisory Council, the Endangered Species Advisory Committee, and the Council for Sustainable Vegetation Management. (Aust, NHT 2001.)

### Ideology (Aust, NHT 2001a)

The resources of the NHT are to be used to foster partnerships between individuals, industry and all levels of government. It combines the knowledge and resources of scientists, farmers, Aboriginal people, community and environmental groups, governments and our agricultural industries, working with each other to manage our natural heritage responsibly.

NHT is intended to promote a faster, more effective shift to ecological sustainability in Australia. The Trust draws together a number of complementary programs so the Commonwealth can better target its investment in biodiversity conservation and sustainable agriculture. Evaluations of the Trust at project, program and national levels are used to ensure that the Trust's policies and strategies remain appropriate and relevant.

The Natural Heritage Trust is to be managed in accordance with the following principles:

- Trust investment will be used to stimulate significant improvement and greater integration of

biodiversity, land, water and vegetation management on public and private land;

- Trust funds will be used to address the causes of problems rather than their symptoms;
- Interaction between local communities and government agencies will be transparent, integrated and readily understood;
- The Trust will encourage management systems that bring long-term environmental, economic and social benefits;
- Because they have prime responsibility for managing their land, individual landholders will be encouraged to make the necessary investments to achieve high standards of performance in natural resource and environmental management; and
- The States and Territories have primary constitutional responsibility for natural resource and environmental management, in keeping with the goals of the National Strategy for Ecologically Sustainable Development.

The Natural Heritage Trust will deliver assistance at four levels:

(i) Community Projects

The Natural Heritage Trust encourages community groups to develop proposals in response to problems confronting them at the local and regional level. Community groups are able to lodge a single application for assistance in the areas of Landcare, Bushcare, Rivercare, Wetlands and the Murray-Darling 2001 programs.

(ii) Regional Strategies

The Regional Strategies component of the Natural Heritage Trust provides assistance to implement regional strategies which integrate biodiversity conservation and sustainable agricultural management. These major regional scale projects are to be developed in cooperation with State and Territory and local governments.

(iii) State/Territory Component

Through the State/Territory Component, the Commonwealth, States and Territories co-operate to deliver Natural Heritage Trust programs that are best undertaken on a State-wide basis or across States and Territories. They also cover activities funded through State agencies to support community group initiatives.

(iv) Commonwealth Activities

Natural Heritage Trust activities that will be directly funded by the Commonwealth include projects which have national strategic benefits, such as national education activities, and national research and development programs.

“The Indigenous Protected Area program provides funding support for Indigenous

organisations and State or Territory Conservation Agencies to develop cooperative management arrangements over existing protected areas. Support is available for a limited time, usually one or two years, to assist the parties to identify the management issues and to negotiate a decision making and management structure which accommodates the needs of both..... Some cooperative management projects involve the development of a formal agreement between the Indigenous interests and the State or Territory agency and other authorities. Such an agreement might identify cultural heritage management issues in the protected area which require special attention, appropriate interpretation of the features of the area or employment or enterprise concessions for the Indigenous Community..... The emphasis in the co-management project component of the IPA program is to be a catalyst for developing cooperative relationships which can benefit both parties.” (Aust, EA n.d.b.)

Indigenous Protected Area projects across Australia are at different stages of development. A number of Projects have resulted in IPA declaration while others are in the process of developing plans of management and consulting with the Indigenous community and other organisations which may provide assistance.

The Cape York Natural Heritage Trust Plan funding aims to catalyse the implementation of an integrated regional strategy for the protection of natural and cultural values across the Cape in accordance with the principles of ecologically sustainable development. The Plan also takes into account the recommendations relating to environmental and cultural protection that were proposed through the Cape York Peninsula Land Use Strategy (CYPLUS) Stage II report.

## Great Barrier Reef Marine Park Authority

### Further GBRMPA aims

- To involve the community meaningfully in the care and development of the Marine Park.
- To achieve competence and fairness in the care and development of the Marine Park through the conduct of research, and the deliberate acquisition, use and dissemination of relevant information from research and other sources.
- To minimise regulation of, and interference in, human activities, consistent with meeting the goal and other aims of the Authority.
- To achieve its goal and other aims by employing people of high calibre, assisting them to reach their full potential, providing a rewarding, useful and caring work environment and encouraging them to pursue relevant training and development opportunities.

- To make the Authority's expertise available nationally and internationally.
- To adapt actively the Marine Park and the operations of the Authority to changing circumstances. (Aust, GBRMPA n.d.a)
- To minimise costs of caring for and developing the Marine Park consistent with meeting the goal and other aims of the Authority.

The Authority provides assistance and services to members of the public and stakeholder groups in the following areas:

- assessment and issue of permits to undertake commercial activities in the Marine Park
- advice and assistance, both nationally and internationally, on marine environmental management
- provision of information and educational resources related to the Reef
- operation of the Great Barrier Reef Aquarium in Townsville, which aims to enhance community understanding and appreciation of the Great Barrier Reef. (Aust, GBRMPA n.d.b.)

The following four Critical Issues Groups exist as part of GBRMPA

- Fisheries
- Tourism and Recreation
- Water Quality and Coastal Development
- Conservation, Biodiversity and World Heritage.

The Authority also comprises a Program Delivery Section (including Permits and Marine Park Management areas), an Information Support Group (providing a variety of Information Services) and other corporate services. (Aust, GBRMPA n.d.b.)

Guide to GBRMPA Zones:-

- General Use 'A' Zone- the least restrictive, provides for all reasonable uses including shipping and trawling.
- General Use 'B' Zone -provides for reasonable use, including most commercial and recreational activities.
- General Use Zone – provides areas of Marine Parks for a diverse range of recreational and commercial activities.
- Marine National Park 'A' Zone – provides for appreciation and recreational use, including limited line fishing.
- Habitat Protection Zone – provides areas of Marine Parks free from the effects of trawling, while allowing for a diverse range of recreational and commercial activities.
- Estuarine Conservation Zone – provides for estuarine areas free from loss of vegetation and disturbance and from changes to the natural tidal flushing regime, while maintaining opportunities for commercial and recreational activities.

- Conservation Park Zone – provides areas of Marine Parks which allowing limited recreational fishing.
- Marine National Park 'B' Zone – provides for appreciation and enjoyment of areas in their relatively undisturbed state. Fishing is prohibited.
- Marine National Park Buffer Zone – normally 500 metres wide, this zone provides for trolling for pelagic species around reefs which have been given a level of protection which prohibits all fishing.
- Buffer Zone – provides protected areas of Marine Parks and allows opportunities for their appreciation and enjoyment.
- National Park Zone – provides protected areas of Marine Parks of high conservation value.
- Scientific Research Zone – set aside exclusively for scientific research. Entry and use for other reasons is prohibited.
- Preservation Zone – provides for the preservation of the area in an undisturbed state.

(Aust, GBRMPA n.d.e)

Objectives of plans of management are identified in Section 39Y of the *Great Barrier Reef Marine Park Act 1975* and are as follows:

- To ensure, for particular areas of the Marine Park in which the Authority considers that nature conservation values, cultural and heritage values, or scientific values, are, or may be threatened, that appropriate proposals are developed to reduce or eliminate the threats;
- To ensure that species and ecological communities that are, or may become, vulnerable or endangered, are managed to enable their recovery and continued protection and conservation;
- To ensure that activities within areas of the Marine Park are managed on the basis of ecologically sustainable use;
- To provide a basis for managing the uses of a particular area of the Marine Park that may conflict with other uses of the area or with the values of the area;
- To provide for the management of areas of the Marine Park in conjunction with community groups in circumstances where those groups have a special interest in the areas concerned;
- To enable people using the Marine Park to participate in a range of recreational opportunities.

(Aust, GBRMPA n.d.e.)

## **Environmental Protection Agency**

### **Divisional roles and responsibilities – Sustainable Industries (Qld, EPA n.d.c)**

The Sustainable Industries Division is a solutions-driven EPA initiative aiming to achieve higher levels of environmental performance for Queensland industry

while boosting profitability and competitiveness. Through partnership arrangements, business assistance programs and information facilities, the Sustainable Industries Division will help industry better integrate business and environmental decision-making in the achievement of eco-efficiency, innovation and business growth. The Division has three functional areas:

- (i) Sustainable Industries Partnerships and Projects provides Queensland industries with environmental management advice and expertise, supplier networks, financial assistance programs, and recognition of achievements in best practice.
- (ii) Environment Industry and Technology assists the development of Queensland's environmental management industries and their capabilities through support for innovation, public-private sector collaboration, and enhanced market awareness.
- (iii) Sustainable Management Systems facilitates new and innovative management approaches for integrating business growth and environmental protection, through measurable strategies for reducing material and energy intensity in industry, extending product durability and serviceability, and maximising the sustainable use of renewable resources.

Specific initiatives to be delivered by the Sustainable Industries Division include best practice environmental management information packages, and remote location renewable energy demonstration projects.

#### **Environmental management of mining (Qld, EPA n.d.e)**

Responsibility for the environmental regulation of mining in Queensland was transferred from the Department of Natural Resources and Mines (DNR&M) to the EPA on 1 January 2001.

The Department of Natural Resources and Mines will concentrate its activities on the facilitation of the mining and resources sector. In respect to

environmental performance aspects, DNR&M will:

- accept and process all mining tenure applications and refer the relevant sections to the EPA for environmental impact assessment;
- continue to issue tenures under the Mineral Resources Act 1989;
- promote and facilitate industry commitment to environmental best practice; and
- monitor and manage rehabilitation of abandoned mine sites.

The main features of the new system include:

- a process for environmental impact statements under the Environmental Protection Act 1994;
- a regulatory system with shortened assessment time frames and an integrated approval process;
- new codes of environmental compliance to provide a simple system to regulate smaller mining projects;
- greater public input into the public notification and objection process for mining projects; and
- a newly established Land and Resources Tribunal, an independent and impartial body to consider all disputes about whether new mining projects should proceed.

#### **Department of Primaries Industries**

##### **DPI Office of Rural Communities (Qld DPI, 2001a)**

DPI is committed to ensuring that rural and remote Queenslanders have equal access to government services and improved social and economic opportunities. Close contact is maintained with community groups, primary producers, town and country residents, small business operators, local governments and regional development organisations. Through the network of the Office of Rural Communities (ORC), information is collated and advice is provided to the Minister for Primary Industries and Rural Communities and other Government Departments on rural issues and the potential effect of Government decisions on rural communities.

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## **APPENDIX 8:**

# **A GENERAL DESCRIPTION OF TRADITIONAL DECISION MAKING PROCESSES, DEVELOPED BY THE CAPE YORK LAND COUNCIL TO SUPPORT AUTHORISATION OF NATIVE TITLE CLAIM APPLICATIONS IN CAPE YORK.**

Note: The current authors have suggested that this could be adapted for the purposes of PBC rules on how native title decision-making should be conducted. However Native Title Holders should seek advice from their Lawyer and Anthropologist on how to adapt this description as a model for local practices.

### **Traditional Laws and Customs relating to authorisation of native title claim applicants by the native title claimant group.**

According to the traditional law and custom of the native title claim group, the descent group (commonly referred to as 'family' in the Cape York Peninsula region) is the principal structural unit through which decision-making takes place.

Characteristically, the process of authorisation involves the group coming to a collective decision through a process of consultation, discussions and meetings in which each family is given the opportunity to be involved, with the final decision being one of consensus among those present. Key members of families have the opportunity to participate, acting on behalf of their family to come to a collective decision on behalf of the wider group.

Such a process involves several levels of "authorisation".

1. Firstly, there are internal processes within the family to determine who may have the authority to participate and to what extent that person or persons may be able to speak for the family or for part of it (for example, for a particular branch of the family). While this is essentially an intra-family matter, it is the case that others from the native title group, and especially senior and authoritative individuals, must also recognise the individual's authority if they are to have credibility and to carry authority within the decision making process.

Arriving at who should or may speak for a descent group is often complex and contested. For example, a family may have several individuals involved, representing firstly their own sub-family group, then collectively the family group. This system of representation is not exclusive; any individual who wants to participate is free to do so, however, the weight given to their views will depend upon the authority they carry within the family and within the wider native title group.

There are a number of customary principles entailed in this process, including the following:

#### ***Seniority***

Age is a factor, but not the only nor necessarily the most important one. Genealogical precedence; knowledge of country, stories, genealogy, language, traditional law and custom; life experience, maturity, wisdom, acting in the interests of the group and other personal qualities often associated with seniority in years are all considerations in recognition as a senior person who may speak for others. On Cape York, these individuals are often referred to as Elders, though they are not necessarily of great age.

#### ***Specialist knowledge, experience or skills***

It is customary that individuals possessing particular skills and experience relevant to the native title claim process (e.g. in legal, political and bureaucratic processes) may be accorded authority in this particular sphere.

#### ***Acting in the interests of the group***

Those participating in the authorisation process must be seen by both those within their family group and in the wider native title group to be acting in the interests of everyone within their group. This involves finding a balance between acting in the interest of their family group (and sometimes sub-family group) and acting in the interests of the native title group as a whole.

#### ***Transparency***

The process must be transparent to all in the native title group. While not every body need be directly involved, to be legitimate, the process itself must be open. This means that everyone from the wider group has a right to participate; and everyone has a right to be informed about the issues, options, outcomes, and so on. There is also room for revision of a decision, and for individuals or family groups, not previously involved, to come in a later date and to be accorded the same rights as everybody else. An important aspect of transparency is time to allow what is a flexible and negotiated process to unfold. This is particularly relevant where members of the claimant group are widely dispersed in different communities, including those outside Cape York Peninsula.

**Consensus**

At all levels of the process, people strive to come to a decision through consensus. Because it is combined with a system of representation which is established by principle and negotiation, rather than being normative, any consensus is inherently fragile and vulnerable to same underlying stresses which are a condition of the emergence of spokespersons.

2. The second level of “authorisation” is the collective decision by families and their spokespersons to authorise the claim and the applicants

There is no single or formally constituted procedure whereby this happens; nor is it a process that is necessarily either separate from or subsequent to the process of family representation. It happens, for example, that a meeting attended by family representatives may be unable to come to a decision because of the absence of particular families or individuals of standing from those families. On the other hand, however, such a meeting may sometimes come to a decision, despite the absence of some members, perhaps because alternative representation has been previously arranged, or more pragmatically, because the family or individuals in question are considered to have failed to take up the opportunity to attend. The degree to which either of these alternatives will be played out will depend upon the nature of the decision to be made, the importance of particular individuals or family representatives for that decision (based upon the principles listed above such as their seniority or particular knowledge) and the extent to which it may or may not directly affect their interests.

The final authorisation of a claim is one reached by consensus among those who, through the process itself, come to be accepted as holding authority. There are no predefined steps to reaching consensus. This depends on a variety of factors such as the size of the claimant group, the number of families or other sub-groups involved, how widely dispersed the claimants are, availability of particular individuals, and so on. The process is characteristically flexible and evolves over time to a point at which there is a consensus that the process itself has been sufficient and that there is a commonly accepted decision.

Overall the authorisation process combines a number of different mechanisms. These include informal discussions among individuals within families and sub-families; larger meetings at this level; more formally convened meetings among several families at the local community level; larger meetings again where family representatives from several communities are brought together. Outside of the meetings there may be consultations between key individuals both within families and among them. The process may culminate in a final meeting where there is a more or less formal decision made, or through a series of meetings.

The process described above, though applied to a contemporary and “non-traditional” situation, is nonetheless one that applies the group’s traditional laws and customs pertaining to the process of group decision making. This puts the emphasis on process and the application of a number of customary principles relevant to group representation and decision making, rather than normative rules about representation and individual authority.

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## ABBREVIATIONS AND ACRONYMS

AC	Aboriginal Corporation	K.M.	Kevin Murphy, Native Title Services, Queensland Government
ACA	Aboriginal Councils and Associations Act 1976 (Cth)	LSM	Land and Sea Management
ACAA	See 'ACA'	LIO	Local Indigenous agency or organisation
ACI	Aurukun Community Incorporated	LT	Land Trust
AIA	Arts Interpretation Act 1954 (Qld)	M.E.	Mary Edmunds, NNTT
AL Act	See ALA	NCA	Nature Conservation Act 1992 (Qld)
ALA	Aboriginal Land Act 1991 (Qld)	NHT	Natural Heritage Trust (EA)
ALR	Aboriginal Land Regulation 1991 (Qld)	NP	National Park
ALR (NT)A	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	N.Pe.	Noel Pearson, C.Y.L.C.
ALT	Aboriginal Land Tribunal, Qld	NRM	see DNRM
ASC	Aurukun Shire Council	NT	Native Title
ATSIC	Aboriginal and Torres Strait Islander Commission	NTA	Native Title Act 1993 (Cth)
ATSIC Act	Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)	nth (or NTH)	native title holder
CRAC	Coen Regional Aboriginal Corporation	NTRB	Native Title Representative Body
CSA Act	Community Services (Aborigines) Act 1984 (Qld)	NTS	Native Title Services, Qld Department of Premier and Cabinet
C.S.	Christine Stucley, ATSIC, Cairns	P.B.	Peter Blackwood, C.Y.L.C.
CSC	Cook Shire Council	PBC	Prescribed Body Corporate
CY	Cape York	pers. comm.	personal communication
CYLC	Cape York Land Council	P.D.	Peace Declé, C.Y.L.C.
CYP	Cape York Peninsula	P.H.	Phillip Hunter, of Ebsworth and Ebsworth, Lawyers
DATSIP	Department of Aboriginal and Islander Policy (Qld)	P.Ha.	Paul Hayes, C.Y.L.C.
D.M.	David Martin, Anthropologist	PL	Pastoral Lease
DNR	Qld Department of Natural Resources, since renamed 'DRNM'.	P.M.	Paul Memmott, P.M.A.
DNRM	Qld Department of Natural Resources and Mines	PMA	Paul Memmott and Associates
DOGIT	Deed of grant in trust 'for Aboriginal inhabitants'	QFS	Queensland Fisheries Service
D.Y.	David Yarrow, Legal Consultant	QPWS	Queensland Parks and Wildlife (part of EPA)
E.A.	Environment Australia	RNTBC	Registered Native Title Body Corporate
EARC	Electoral and Administrative Review Commission (Qld)	R.S.	Rachael Stacy, of P.M.A.
EPA	Environmental Protection Authority	RTN	The 'right to negotiate' under the NTA.
FNQ	Far North Queensland	THB	Title Holding Body
GRMPA	Great Barrier Reef Marine Park Authority	TO	Traditional Owners
HS	Homestead	TOR	Terms of Reference for the current project
ILC	Indigenous Land Corporation	TRG	Tenure Resolution Group, Qld Government
ILUA	Indigenous Land Use Agreement	USL	Unallocated State Land
IPA	Indigenous Protected Area	WCCCA	Western Cape Community Co-existence Agreement (ILUA)
KULLA	Kaanju Umpila Lama-Lama Ayapathu		





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