



Cape York Land Council Aboriginal Corporation

ICN 1163 | ABN 22 965 382 705

22 November 2019

Joint Standing Committee on Northern Australia
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Dear Committee Members

Please find attached a supplementary submission from the Cape York Land Council regarding the *Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia*. Included with this submission are several attachments and maps.

Also attached is a recent Cape York Land Council submission to the Select Committee on the effectiveness of the Australian Government's Northern Australia agenda because this Inquiry is dealing with similar matters.

If you have any enquiries regarding this submission please do not hesitate to contact me.

Yours sincerely,

Richie Ah Mat
Chair
Cape York Land Council

Cape York Land Council Supplementary Submission to the Joint Standing Committee regarding the Inquiry into Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

Introduction

Economic development for Traditional Owners in Northern Australia, including Cape York, will substantially be based on the productive use of Indigenous peoples' rights and interests in land and sea. Generally speaking, land is Indigenous peoples' main asset and potential means of production in Northern Australia. Challenges exist to establishing economic uses of Indigenous land, but CYLC's experience in working with Indigenous land rights and interests on Cape York demonstrate that a set of arrangements can be established that enable and enliven the productive use of land and engage Traditional Owners in economic development, creating employment and wealth in the process. CYLC encourages the Joint Standing Committee to develop recommendations for its report based on the points raised in this submission.

On Cape York, realising the opportunities for economic development based on Indigenous peoples' rights and interests in land and sea requires reform and activity in two main areas – firstly, improving the governance capacity of Indigenous rights and interests holding corporations, and secondly, amending land use regulation so that land is ready for investment. The reforms required are achievable but require coordination and commitment from the Queensland and Commonwealth Governments to implement.

Over many years of experience CYLC has developed a good understanding of the challenges to TO participation in economic development on Cape York. This supplementary submission summarises and builds upon our previous submission, and responds to questions raised by the Committee at the Cairns public hearing.

Indigenous rights and interests in Cape York land fall into two main categories, the first being native title rights and interests recognised pursuant to the Commonwealth Government's *Native Title Act 1993* (Cth), and the second being statutory tenure, predominantly Aboriginal freehold, granted pursuant to the Queensland Government's *Aboriginal Land Act 1991* (Qld) (ALA).

The golden opportunity for Cape York Traditional Owners to engage in economic development is through the use of extensive areas of Aboriginal freehold land held by Aboriginal corporations. Enabling the use of Aboriginal freehold land is the focus of this CYLC submission and must be a key focus of the recommendations of this Inquiry. Realising opportunities in non-exclusive native title rights and interests is not addressed in any great detail in this submission.

However, the Committee should note that much Cape York land where native title has been determined, and therefore held and managed by Registered Native Title Bodies Corporate (RNTBCs), coexists with pastoral leases as non-exclusive native title. This is a common scenario across much of northern Australia. RNTBCs and Traditional Owners have little opportunity to make use of their non-exclusive native title rights and interests for economic development purposes. Identifying how non-exclusive native title rights can be used for economic development purposes must be a priority for this Inquiry.

Aboriginal rights and interests in Cape York land

As a result of the efforts of CYLC, native title has already been determined to exist in approximately 45% of Cape York land, and the rights and interests recognised through the determinations are held and managed by 14 RNTBCs (often called PBCs). Almost all of the remaining area of Cape York is under a native title claim known as the Cape York United Number 1 Claim. In Cape York seas, one native title claim has been determined, two claims are underway, and all Cape York seas will be

claimed in the foreseeable future. CYLC is seeking to maximise commercial opportunities in native title rights and interests associated with these current Cape York claims.

As of 2018, Aboriginal freehold tenure extended over 5,744,883 hectares of Cape York land, which is over one third of the land area of Cape York. This total includes 3,676,501 hectares of unencumbered Aboriginal freehold and 2,068,382 hectares of Cape York Peninsula Aboriginal Land (CYPAL) National Park. Unencumbered Aboriginal freehold provides significant potential for economic development because its ownership by an Aboriginal corporation is registered on the Queensland Land Titles Register, and the conditions of the tenure allow for the land to be used for economic purposes. Rights and interests created through the grant of Aboriginal freehold land are held in trust by Aboriginal corporations for the benefit of Aboriginal peoples. New land trusts are no longer being established under the ALA, land is now granted to corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSIA) (Cth)*, or existing land trusts.

As CATSIA corporations, RNTBCs may hold Aboriginal freehold land, and there are several examples where Cape York RNTBCs hold and manage Aboriginal freehold rights and interests as well as native title rights and interests. These include the Hopevale Congress, Ngan Aak Kunch, Wuthathi and Bromley Aboriginal Corporations. One Aboriginal corporation holding and managing native title and tenure rights and interests for a Cape York sub region is CYLC's preferred arrangement so that coordination and cooperation between the two sets of rights is most easily and efficiently achieved.

However, there are also examples of different Aboriginal corporations holding native title and Aboriginal freehold interests separately for the same area of land. The determination of native title under the Cape York United Number 1 Claim will mean that determinations will be made over extensive areas of Aboriginal freehold land already held and managed by an Aboriginal corporation or land trust. It is possible that some of these corporations may become the RNTBC when this claim is determined, but in several cases where the land holding entity is an ALA land trust, it cannot become the RNTBC. Reconciling and creating greater compatibility between the holding and managing of rights and interests in land created under the Commonwealth Government's NTA and the Queensland Government's ALA must be a key objective of this Inquiry.

Cape York Aboriginal rights and interests in land discussed above are illustrated by the following attachments:

- Table 1 shows Cape York RNTBCs and Land Trusts;
- Map 1 shows Cape York native title determinations and claims;
- Map 2 shows Cape York tenures, and
- Map 3 shows the combination of Cape York native title and tenure.

In summary, the table and maps show various combinations of rights, including:

- Where one corporation functions as both the RNTBC and the Land Trust for an area (CYLC's preferred arrangement);
- Where one corporation functions as the RNTBC, and a different corporation functions as the Land Trust for the same area;
- Where a RNTBC holds non – exclusive native title rights and interests for an area, and a pastoral lessees holds tenure for that area;
- Where a RNTBC holds exclusive native title rights and interests for an area, and a local government holds tenure, in the form of transferable DOGIT, for that area;
- Where a Land Trust holds tenure for an area, but there is no RNTBC because native title has been claimed but not determined

This situation is unnecessarily complicated and creates uncertainty for all parties about who does what. In turn, this complexity and uncertainty discourages parties from seeking to take up interests in land for economic development purposes.

Investment Ready People

Using land for economic development requires the effective engagement of people in making decisions and taking actions to combine people, land and resources in productive ways. For Cape York Aboriginal freehold land, decision making and management action responsibilities for dealings about economic development rest at several levels.

Local level governance

At its core, CYLC maintains the principle that “Traditional Owners speak for country”, meaning that the people who are traditionally connected to an area of land must be the people that make decisions about what activities happen on their land. Traditional rights and interests reside at this localised level, so clans must be empowered to effectively engage in decision making about land, including providing or withholding their native title consent for proposed land uses. Clans should also be the main beneficiaries of land use, such as through native title compensation or rent from the lease of Aboriginal freehold.

RNTBC and landholding entity level governance

However, native title and tenure rights and interests in land are held and managed by RNTBCs and other Aboriginal corporations such as Land Trusts. Often rights and interests in the country of multiple Traditional Owner clans are held and managed by an Aboriginal corporation. The responsibility of the corporation is to identify the correct TO group for an area where a land use decision needs to be made, inform the TO group of the issue, seek direction from the TO group about its decision and then relay that decision to the people seeking to use the land.

If the land use dealing is about leasing Aboriginal freehold land to a third party, and the corporation is both the RNTBC and the trustee of Aboriginal freehold land for that area, then the corporation has responsibilities under both the NTA and the ALA. Responsibilities as an RNTBC will include seeking and receiving a decision about native title consent from the native title holders. As the trustee of Aboriginal freehold, the corporation will be responsible for conducting the dealings to grant and register the lease (assuming native title consent was forthcoming), and managing and distributing benefits received for native title consent and the leasing of land. Cape York RNTBCs and Land Trusts therefore have substantial land dealing responsibilities that must be competently fulfilled if economic development is to occur on Aboriginal freehold land, and fulfilling this responsibility requires substantial internal governance and operational capacity, and external support as necessary.

Additional complications arise if an ALA-incorporated land trustee wishes to be the proponent of economic development because such corporations are not allowed to carry on a business, and any business activity must be undertaken by a separate corporation.

Regional level governance

Most Cape York RNTBCs and Land Trusts require external support and advocacy to fulfil their functions, including legal advice about their responsibilities as an RNTBC and/or land trustee, financial advice about managing and distributing income from land dealings, corporate governance support to fulfil responsibilities such as AGMs and reporting, and the resolution of disputes, amongst other things. Aboriginal corporations often do not have the internal skills base or the resources to obtain expensive legal, financial, corporate governance or dispute resolution services from mainstream providers, and mainstream providers often do not fully understand the context of Aboriginal corporations, and in some cases exploit the limited capacities of Aboriginal corporations by providing unnecessary, substandard and/or overpriced services.

To enable Cape York Aboriginal corporations to fulfil their responsibilities and engage in economic activities CYLC provides the services of a specialised regional provider with knowledge of the

operating environment and a commitment to Aboriginal advancement at a low or zero cost. The delivery of these services is the logical extension of CYLC's work to establish rights and interests in land and to establish Aboriginal corporations to hold and manage them. CYLC's services include building the internal skills base of corporations to be able to manage themselves, and to facilitate the generation of income from rights and interests in land so that corporations can be self-sufficient. CYLC works with Balkanu and Cape York Partnership in delivering some of these services. CYLC delivers these services using Commonwealth Government funding and performs an important role by ensuring accountability for RNTBC support funding. RNTBC service delivery quality, consistency, and financial efficiency and accountability would be far less certain if Commonwealth Government funding was provided directly to RNTBCs.

It is CYLC's aspiration that all Cape York Aboriginal corporations build capacity and become self-sufficient over time. Currently however, most Cape York Aboriginal corporations that hold and manage rights and interests in land require significant ongoing support and CYLC intends to keep on supporting them with an appropriate suite of services until they become self-sufficient. Importantly, and contrary to misconceptions presented to this Inquiry and in other forums, CYLC holds no rights or interests in land, and has no intention to control the incomes or decisions of Traditional Owners or Cape York Aboriginal corporations that hold and manage rights and interests in land.

In addition to the provision of free and suitable professional support services to their corporations, Cape York Aboriginal people also require a regional advocacy organisation. Many issues, including proposed land uses or regulations, affect much or all of Cape York so a regional response is required to reflect the collective interests of Cape York Aboriginal people. Examples of region-wide issues include legislation that affects land use, such as the *Vegetation Management Act 1999* (Qld), *Nature Conservation Act 1992* (Qld), the *Aboriginal Land Act 1991* (Qld), or the *Cape York Peninsula Heritage Act 2007* (Qld), or policies such as the Northern Australia agenda. A regional proactive capacity is also required so that Cape York people can themselves propose reforms to the regulation of land to enable its appropriate use, including for economic development. CYLC, along with its sister organisations Cape York Partnerships and Balkanu, fulfil this regional advocacy role. CYLC has a Board of Directors drawn from and elected by the Aboriginal people of Cape York, and CYLC operates at a regional scale and has operational capacity to analyse proposed land uses or regulations and articulate how this may affect the interests of Cape York Aboriginal people.

The brief descriptions provided above demonstrate that roles and responsibilities associated with using land for economic development exist at the local, sub regional and regional levels, and Aboriginal people and corporations require capacity at each of these levels to conduct necessary dealings and fulfil the roles and responsibilities attributable to each level. Local Traditional Owners must be the ultimate beneficiaries from economic use of their traditional lands, but they require functional corporations at the sub regional and regional levels to enable and empower them to be in a position to benefit from land use.

Contrary to misconceptions presented to this Inquiry, Pama Futures does not propose to control funding decisions on behalf of Cape York Traditional Owners. Pama Futures proposes a three level Indigenous governance model (local, sub regional, regional) to enable interface with the three levels of mainstream Government about the decisions that affect Indigenous people, including decisions about land and opportunities for economic development. Where it is advantageous and common interests exist, the Pama Futures model will enable the people of Cape York to come together and speak with one voice. For more information see:

https://issuu.com/cyinstitute/docs/180312_capeyork_partnership_submiss?e=8659167/65731877

Regional Approach

Regions are the political, social and environmental units that Aboriginal (and other) people relate to when planning for development. Across northern Australia the regions are already well recognised,

such as Cape York, Torres Strait, the Gulf, Arnhem land, the Kimberly, the Pilbara etc. Cape York has long been recognised as a discreet region by State and Commonwealth Governments. Over the years there has been the Cape York Heads of Agreement, the Cape York Peninsula Land Use Study, the Cape York Peninsula Heritage Act, Cape York NRM, Cape York Sustainable Futures to name a few Cape York regional manifestations.

The Northern Australia agenda should adopt a regional planning and implementation approach generally, and more specifically to facilitate the engagement of Traditional Owners in economic development across northern Australia. Regional Indigenous organisations such as Land Councils are well established, sub regional Indigenous representative bodies exist in the form of RNTBCs or other corporations to hold and manage rights and interests in land, and local Traditional Owner groups speak for and make decisions about their traditional country. This pattern of Indigenous governance structures generally exists across State / Territory jurisdictions. The Northern Australia agenda should seek to build upon these prototype arrangements to consolidate mature arrangements that fully facilitate TO engagement in economic development. The Cape York Land Council is working to improve on and consolidate a regional approach underpinned by sub regional and local governance structures, capacities and responsibilities, so Cape York would be a good region to pilot and prove the suitability of a regional approach.

Investment ready tenure:

Effective Aboriginal land governance is one essential key to enable the use of Aboriginal freehold land, the other essential key is making Aboriginal freehold land investment ready through appropriate land regulation arrangements.

The most effective model for land-based economic activity on Cape York is where the Trustees of Aboriginal freehold land utilise their ALA leasing powers to grant and register leases, thereby creating secure and certain tenures for land use proponents and economic activities. However, a range of land regulations and gaps in support services constrain the granting of leases on Aboriginal freehold. Although Aboriginal freehold is a suitable tenure for economic activity, the overlay of native title, statutory regulations and a sub-standard land administration system constrain its use. These constraints must be addressed in order for Cape York Aboriginal freehold land to be investment ready.

Statutory and policy reforms are necessary to enable the reasonable use of Aboriginal freehold land. These reforms are mainly the responsibility of the Queensland Government, although the Commonwealth Government also has a role to play. CYLC has discussed these reforms extensively in various submissions to policy reform processes, including in our initial submission to this Inquiry, and in the attached submission to the Select Committee inquiring into the effectiveness of the Australian Government's Northern Australia agenda. We have also proposed that regulatory reforms to create investment ready tenure should be piloted on Cape York.

In summary, the reforms and arrangements that should be put in place to enable the use of Aboriginal freehold land for economic development purposes on Cape York include:

1. Maximise the extent of Aboriginal freehold land on Cape York by completing processes to transfer land from existing tenures to Aboriginal freehold tenure. The ALA identifies categories of land that must be transferred to Aboriginal freehold tenure as soon as practicable. This has been a statutory requirement under the ALA since 1991 but many thousands of hectares remain to be transferred. Where possible Aboriginal freehold tenure should be held by the RNTBC that holds and manages native title rights and interests for that land. The Queensland Government must address this land transfer imperative and fulfil its statutory duty.
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2. Maximise the natural resources available for commercial use by Cape York Aboriginal people. This includes timber and gravel resources, water and fish. The Queensland Government has recently made significant quantities of water available in the Indigenous Reserve for use or trade by Cape York RNTBCs and Land Trusts. Similar arrangements must be made for other resources with commercial potential. For example, fishing arrangements for Cape York should be similar to Torres Strait whereby a substantial percentage of the Total Allowable Catch is reserved under quota for Traditional Inhabitants.
3. Determine native title claims on Cape York to confirm where native title continues to exist and establish RNTBCs to hold and manage native title rights. This will create certainty about where native title requirements must be satisfied in economic development processes, and provide a point of contact for external parties to engage with to satisfy native title requirements. CYLC's Cape York United Number One Claim seeks to achieve this outcome.
4. Where Aboriginal freehold coexists with native title, as is usually the case, the grant of a lease of Aboriginal freehold land, even to a Traditional Owner, is a future act that requires native title consent through an Indigenous Land Use Agreement (ILUA). CYLC recognises the negotiation of a separate ILUA for the grant of every lease presents a significant hurdle and discourages parties from seeking leases for commercial purposes or home ownership.

To substantially lower this hurdle CYLC has negotiated "process ILUAs" that set out simplified native title consent processes that apply to an agreed area. When a lease is sought in one of these areas the native title consent process is quick, easy and inexpensive for all parties, whilst still preserving Traditional Owners' rights to grant or withhold their consent. The ILUAs also provide cultural heritage protection processes. Areas of Aboriginal freehold land most prospective for economic development should be prioritised for the negotiation of such ILUAs.

5. To identify Aboriginal freehold land most prospective for economic development, land and resource assessments must be conducted. This need has been identified at several hearings of this Inquiry. Much of the research for soil type, terrain, rainfall and water availability, infrastructure etc has been conducted but the results have not been collated and completed for each Aboriginal freehold property. The results of assessments should be collated into a Prospectus for each Aboriginal land holding so that the Trustees can promote the value of their assets and be able to verify the commercial resource available. CYLC should oversee the preparation of Prospectuses.
6. Having identified the Cape York Aboriginal freehold land most prospective for economic development, actions must be taken to address statutory constraints on the use of this land, including land use planning and vegetation management constraints.

CYLC recognises the need for statutory controls over land use but objects to the broad and uninformed way these regulations blanket Cape York Aboriginal land. This is compounded by the Queensland Government's failure to meet its commitments to review the *Cape York Peninsula Heritage Act 2007* (Qld) to ensure that Indigenous Community Use Area provisions, which provide exemptions to some land use regulations, are workable.

7. Almost all Aboriginal freehold land has been involuntarily recruited to perform ecosystem services such as carbon sequestration, biodiversity conservation and Great Barrier Reef water quality improvement. Arrangements must be developed for Aboriginal land holders to receive payment in recognition for the ecosystem services provided by their land.

Aboriginal land holders are expected to manage their land to control pests and weeds, fire, erosion and undertake other actions to produce ecosystem service outcomes, but are provided

with limited support to perform these actions. Ecosystem services provision must be recognised as goods and services that must be paid for by the public that consumes them so that Aboriginal land may be used commercially to provide these services.

Economic use of native title rights and interests

This submission has focussed mainly on enabling economic use of the extensive areas of Aboriginal freehold land held by Aboriginal corporations across Cape York. However, rights and interests in much Cape York land are also characterised by native title coexisting with State-granted pastoral leases held by Indigenous and non-Indigenous corporations. Cape York pastoral leases held by an Aboriginal corporation, an Aboriginal local government or the Indigenous Land and Sea Corporation include Strathgordon, Geikie, Glengarland, Oriners, Sefton, Crocodile, Welcome and Merapah Stations.

Opportunities for Traditional Owners to realise economic benefits from native title coexisting with a pastoral lease are limited. Opportunities for Aboriginal corporations to realise economic benefits from their pastoral lease are also confined to the limited land uses permitted by the State's lease conditions. To improve Traditional Owner economic opportunities CYLC considers that State land under a pastoral lease held by an Aboriginal corporation, an Aboriginal local government or the Indigenous Land and Sea Corporation should be transferred to Aboriginal freehold tenure, on the condition that existing interests in land (ie the pastoral lease) are reconfirmed through the grant of an Aboriginal freehold lease.

Under this arrangement the economic uses of pastoral land could diversify because the conditions of the lease of Aboriginal freehold could allow for a wider range of land uses than a State-granted pastoral lease. Additional land uses on an Aboriginal freehold pastoral property could include things such as irrigated agriculture, eco-tourism, accommodation or retail outlets. This would be possible under an Aboriginal freehold lease because the Aboriginal land holding corporation could seek and receive native title consent for the diversified land uses and set the conditions of the lease accordingly (provided these uses are otherwise legal). The Queensland Government and pastoralists have generally been unsuccessful when they have sought to amend the conditions of a State-granted pastoral lease. Native title consent for land use diversification under a lease of Aboriginal freehold land is much more likely to be forthcoming because native title holders will also be the land owners and will benefit directly from this arrangement.

Other Traditional Owner economic development opportunities

Although most economic development potential for Cape York Traditional Owners is based in the productive use of their rights and interests in land, other potential opportunities also exist and should be promoted. Significant potential exists in contracting Indigenous service providers to provide goods and services to support government or private industry projects. Minimum levels should be mandated for procuring goods and services from Indigenous providers for all development in northern Australia.

For example, the Peninsula Developmental Road Agreement (PDR ILUA) negotiated between the Queensland Government and Cape York Traditional Owners, represented by CYLC with assistance from Balkanu, concerns the current PDR upgrade. The PDR ILUA was the winner of the Queensland Reconciliation Award in 2016.

A key plank in the PDR ILUA is an emphasis on sub-contracting opportunities for local Indigenous providers, in addition to the usual jobs, training, and scholarship programs. Indigenous sub-contracting opportunities are guaranteed in the ILUA and incorporated into head agreements.

Implementation of the PDR ILUA utilises Key Result Areas (KRAs) which include:

- Indigenous and non-Indigenous training and upskilling;
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- implementation of an Indigenous Economic Opportunities (IEO) Plan; and
- Local Industry Participation.

As a result, a base line contract requirement for the percentage of Contract Direct Cost to be expended on local Indigenous businesses and suppliers is mandated at 15 percent - an increase from 1.5 percent in 2015-16. Pro-rata incentives apply for performance above 15 percent, with maximum incentives payable at 20 percent. Essentially, the result has been that Indigenous sub-contractors have secured contracts that represent over 28% of contract direct costs - ie beyond that guaranteed under the minimal contracting arrangements. The requirements of the PDR ILUA created opportunities for Indigenous businesses overnight, and created direct incentives for companies to upskill and enter into joint ventures with Indigenous sub-contractors to deliver on the full range of contracting opportunities for this major Cape York infrastructure program.

In addition, the principle of free, prior and informed consent (FPIC) should be applied to all major development projects in Cape York. This principle requires that Traditional Owners speak for country and may withhold their consent for, and thereby veto, inappropriate development on their traditional land. However, if Traditional Owners consent to development then Traditional Owners should be a major partner in delivering outcomes. This approach is a significant move away from royalty-based outcomes and is being promoted in mining and related industries where Traditional Owners seek joint venture agreements to provide services and undertake other activities to support development.