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Australian Institute of Aboriginal  
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# RESEARCH DISCUSSION PAPER

Holding Title and Managing Land in Cape York  
– Two Case Studies

Paul Memmott and Peter Blackwood

NUMBER 21

## **Holding Title and Managing Land in Cape York – Two Case Studies**

**Paul Memmott and Peter Blackwood**

First published in 2008 by the Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

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CATALOGUING-IN-PUBLICATION DATA:

Memmot, Paul.

Holding title and managing land in Cape York: two case studies / Paul Memmott and Peter Blackwood.

ISBN 9780855753290 (pbk.)

Research discussion paper (Australian Institute of Aboriginal and Torres Strait Islander Studies) ; no. 21.

Aboriginal Australians--Land tenure--Queensland--Cape York Peninsula.

Land tenure--Law and legislation--Queensland--Cape York Peninsula.

Native title (Australia)--Queensland--Cape York Peninsula.

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346.94380432

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## List of Abbreviations and Acronyms

ABN	Australian Business Number
ACA	<i>Aboriginal Councils and Associations Act 1976</i> (Cth)
AGM	Annual General Meeting
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALA	<i>Aboriginal Land Act 1991</i> (Qld)
ANU	Australian National University
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research
CATSI	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)
CBE	Coen Business Enterprises
CDEP	Community Development Employment Program
CRAC	Coen Regional Aboriginal Corporation
CYLC	Cape York Land Council
DEEWR	Department of Education, Employment and Workplace Relations, Commonwealth
DNRM	Department of Natural Resources and Mines, Queensland
DOGIT	Deed of Grant in Trust Lands
DOTARS	Department of Transport and Regional Services, Queensland
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency
EPMs	Exploration Permits for Minerals
FaHCSIA	Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs
GST	Goods and Services Tax
ICA	Indigenous Commercial Arrangement
ICC	Indigenous Co-ordination Centre
ILUA	Indigenous Land Use Agreement
LSM	Land and Sea Management
MDL	Mineral Development License
MOA	Memorandum of Agreement
NHT	Natural Heritage Trust
NGO	Non-Governmental Organization
NNTT	National Native Title Tribunal
NT	Northern Territory
NTA	<i>Native Title Act 1993</i> (Cth)
NTPC	Native Title Protection Conditions
NTRBs	Native Title Representative Bodies
ORATSIC	Australia, Office of the Registrar of Aboriginal and Torres Strait Islander Corporations
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Bodies Corporate
PBI	Performance Based Incentive
PJCNT	Aust, Parliamentary Joint Committee on Native Title
PNG	Papua New Guinea
RAC	Registrar of Aboriginal Corporations
RNTBC	Registered Native Title Body Corporate
SIA	Social Impact Assessment

## Introduction

With a growing number of successful native title determinations under the *Native Title Act 1993* (Cth) (NTA), attention is increasingly turning to the administration of the actual rights and interests in land which flow from these determinations and the operations of Prescribed Bodies Corporate (PBCs), the title holding entities into which native title holders are obliged to incorporate to manage those rights and interests. This paper is concerned with the effective design and operation of PBCs, as well as other types of corporate bodies utilized by Indigenous groups in Queensland to hold the different forms of Aboriginal land title obtainable under State and Commonwealth legislation.

Native title exists in a complex legal, administrative and cultural environment of intersecting and sometimes conflicting interests. While this complexity tends to be viewed by the wider Australian public in terms of Indigenous versus non-Indigenous rights, what is less well appreciated is that many Aboriginal groups find themselves caught within this same web, trying to integrate and reconcile their newly recognised native title rights with other forms of traditional and non-traditional Aboriginal land ownership. This is especially the case in remote northern Australia where, as a result of state and territory based statutory land rights schemes introduced over the past thirty years<sup>1</sup>, many Aboriginal groups have acquired land under a variety of titles. These include pastoral leases, statutory Aboriginal freehold and trustee arrangements. Much of this land is also now subject to native title claim, often by groups comprised of or including those who at the same time already hold, or in the future may hold, the same land under these other forms of title. What these forms of title all have in common is that, in their own ways, they are attempts at drawing systems of Aboriginal land tenure into the broader Australian system of land ownership while at the same time giving recognition to particular Aboriginal cultural connections to the land. But this transition has a high potential to distort and even rigidify the Indigenous system, both in its description and in its practice, in order for it to 'fit' the legal requirements of the various statutory schemes and their requisite land-owning corporations.<sup>2</sup>

This complexity offers both opportunities and challenges. In Queensland, for example, native title claimants and the State Government have taken the opportunity to resolve native title claims through a 'tenure resolution' process whereby the land needs and aspirations of Aboriginal people in a particular area may be settled through a combination of native title determination and the grant of Aboriginal freehold land

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<sup>1</sup> These Schemes are based on various State and Commonwealth Government Acts and are specific to the particular States and Territories to which they apply, and therefore quite variable in their legislative nature. During the same period there have also been a number of land acquisition programs, mostly funded by the Commonwealth Government through which Aboriginal groups have been able to purchase land, especially pastoral leases.

<sup>2</sup> Smith has elucidated a number of aspects of the complex and often uneasy relationship between Indigenous forms of knowledge, governance and land management in the Coen Region with those of Government and outside agencies, including regional Aboriginal organisations, seeking to incorporate Aboriginal perspectives into their operations: Smith, B. R. 2000 *Between Places: Aboriginal Decentralisation, Mobility and Territoriality in the Region of Coen, Cape York Peninsula* (Australia) PhD dissertation, Department of Anthropology, London School of Economics and Political Science, London; 2002 'Decentralisation, population mobility and the CDEP scheme in central Cape York Peninsula' CAEPR Discussion Paper No. 238, CAEPR, Australian National University, Canberra, viewed 29 April 2008, <[http://www.anu.edu.au/caepr/Publications/DP/2002\\_DP238.pdf](http://www.anu.edu.au/caepr/Publications/DP/2002_DP238.pdf)>; 2003 'A Complex balance: mediating sustainable development in Cape York Peninsula', *The Dreaming Board: An Australian Review of Public Affairs*, Vol. 4, pp.99-115; 2005 'We got our own management': local knowledge, government and development in Cape York Peninsula' *Australian Aboriginal Studies*, 2005/2, pp.4-15.

under Queensland's statutory land rights legislation, *Aboriginal Land Act 1991* (ALA).<sup>3</sup> In addition to Indigenous forms of tenure, these land settlements may also involve the granting of other forms of conventional tenure, including freehold, leasehold, trusteeship of reserves and joint management of nature protected areas. The challenge is to find ways of more effectively and efficiently integrating the ownership and management functions of the multiple Aboriginal land-holding entities which result.

This paper extends the findings of two earlier publications<sup>4</sup> which were based upon research undertaken in 2001-02 into practical aspects of the ownership and management of native title and other forms of Indigenous land ownership in the Aboriginal regions of Aurukun and Coen in western and central Cape York Peninsula<sup>5</sup>, where there are multiple and overlapping Aboriginal entities for the ownership and management of lands and waters.

The Coen and Wik regions were selected on the basis of variation in the complexity of local land tenure and co-existing land and sea management regimes. Between them, they offer a gradation of scenarios, which we believe provide exemplar models for the operation of Aboriginal land-holding corporations that are adaptable to other regions and other Aboriginal groups in Australia.

The first report<sup>6</sup> was a comprehensive review of the ethnographic and planning environment in the two regions; it proposed practical models for harmonising the various corporate entities required to hold land under different tenures in order to simplify compliance and other administrative requirements, and to maximise the effectiveness of the limited resources available to Aboriginal landowners. Models were proposed for the successful operation of the various registered title-holding bodies in each of the regions, namely native title PBCs<sup>7</sup> and Aboriginal Land Trusts set up to hold title under the NTA and ALA respectively, as well as Aboriginal corporations holding pastoral leases and other forms of title.

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<sup>3</sup>As of 2005, this tenure resolution approach was a matter of State policy: Qld, Department of Natural Resources and Mines (DNRM) 2005 *Review of the Aboriginal Land Act 1991 (Qld)*. Discussion paper. State Government of Queensland, Department of Natural Resources and Mines, Brisbane. March 2005, viewed 15 April 2008, <<http://www.nrm.qld.gov.au>>, 16. While the authors' experience is mainly in Queensland, we understand similar mechanisms for negotiated land settlements operate in other states.

<sup>4</sup> This paper is based upon research begun in 2001 for the report Memmott, P. and McDougall, S. 2004 *Holding Title and Managing Land in Cape York. Indigenous Land Management and Native Title*. National Native Title Tribunal, Perth, accessed 29 April 2008, <<http://www.nntt.gov.au/research/reports.html#Commissionedreports>>. The current paper updates developments in the case study areas since the 2001 study, up until July 2007. Aspects of the research were also the subject of an earlier paper, which examined the role of anthropologists in helping to frame land holding entities in the native title era: Memmott, P., Blackwood, P. and McDougall, S. 2007 'A Regional Approach to Managing Aboriginal Land Title on Cape York', in Weiner, J.F. and Glaskin, K. (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives*, Asia-Pacific Environment Monograph 3, ANU E Press, The Australian National University, Canberra, pp.273-297, accessed 18 September 2007, <[http://epress.anu.edu.au/customary\\_citation.html](http://epress.anu.edu.au/customary_citation.html)>. Significant parts of the current paper appear in these earlier two publications. The update was made possible by funding from AIATSIS.

<sup>5</sup> Cape York Land Council (CYLC) 2001 *Three Year Strategic Plan 2001-2004*, Cape York Land Council, Cairns.

<sup>6</sup> Memmott and McDougall 2004.

<sup>7</sup> PBCs must be set up by claimants to hold their native title. Following a successful determination, the PBC is registered as a Registered Native Title Body Corporate (RNTBC). Throughout this paper we adopt 'PBC' to describe both PBCs and RNTBCs.

The second paper<sup>8</sup> argued that there is an important role for anthropologists to advise claimants and their legal representatives about the adaptation of customary Aboriginal land tenure and decision-making processes in the design of Aboriginal land-holding corporations.<sup>9</sup> We draw liberally on these two earlier works to develop our argument in the current paper.

The research to date has therefore focused on the options for rationalising and possibly combining Aboriginal land trusts and native title PBCs, and models for cost effective co-ordination of Aboriginal land management at a regional level. In this paper we update our findings on the two case study regions and address the following research questions:

1. How is the cultural integrity of the native title holder community supported in the design of the PBC?
2. How effective is the integration of PBC decision-making and land management functions within regions having multiple Aboriginal land-holding entities?
3. What are successful strategies for the effectiveness of such integration?
4. Do the corporate structures of the land-holding entities meet the aspirations of the native title holder community? and
5. What is the effectiveness of native title holder community engagements with third parties in such regions, especially capitalist developers?

This paper commences by briefly reviewing the forms of Aboriginal land tenure in Cape York. It then addresses the issues of PBC design, moving to the structural options for integrating PBCs and other Indigenous land-holding entities. This is followed by an analysis of each of the two case study regions (Wik, then Coen), profiling the Indigenous and statutory land tenure systems and reviewing the most recent progress of the Aboriginal land holding entities in engaging with capitalist developments, as well as the integration of their aspirations for land and sea management administration.<sup>10</sup> A re-evaluation is then made of the ongoing potential application of the proposed land and sea management structures in the two study regions, before discussing the findings on the above research questions in the conclusion.

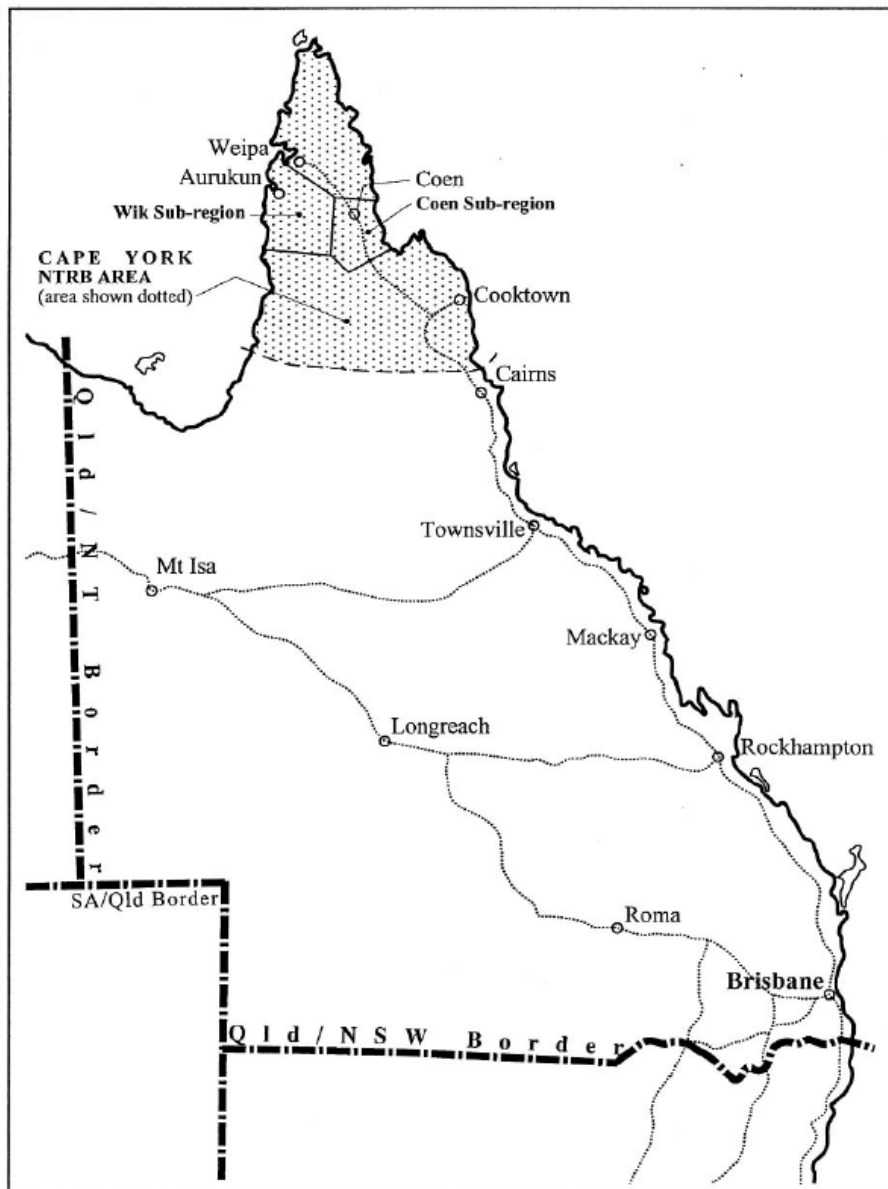
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<sup>8</sup> Memmott et al 2007.

<sup>9</sup> Smith has made much the same point in relation to economic development in the Coen Region, arguing that, 'the social and cultural dimensions of development projects need to be stressed in order to prevent assumptions about the compatibility of such values with Aboriginal community aspirations, and to identify the complexities of intercultural articulation': Smith 2003, p.112.

<sup>10</sup> Building on Memmott and McDougall 2004, Memmott et al 2007.





**Figure 1:** Map of Queensland showing the Cape York Native Title Representative Body's area of administration in which the two study sub-regions of the current chapter are located (Wik and Coen).

## Forms of Aboriginal Land Tenure on Cape York

Native title is one of several categories of Aboriginal owned land on Cape York (see Figure 1), each of which is associated with its own particular corporate land-holding entity, and each of which may also sustain co-existing native title rights over the same land.

In 1991 a form of inalienable Aboriginal freehold title was introduced in Queensland under the ALA. This provides for land to be granted on the basis of either 'traditional affiliation' or 'historical association'.<sup>11</sup> The land title, once granted, is held by a land trust, which is usually comprised of a representative group of the beneficiaries of the grant. As of 2005, approximately five per cent of Cape York Peninsula was ALA Aboriginal freehold, held by 19 land trusts<sup>12</sup>. This freehold may be granted as a result

<sup>11</sup> Land may also be granted for economic and cultural reasons, but these provisions have not been used in Cape York where traditional affiliation as a grounds for grant has taken precedence. Readers are referred to Memmott and McDougal 2004 for more detailed explication of the operation of the ALA.

<sup>12</sup> See map, Qld, DNRM 2005:Appendix 2.

of either a claim process requiring claimants to prove their traditional or historical connection before a judicial tribunal, or by a more expedient administrative process referred to as ‘transfer’. Both mechanisms rely upon the government to make the land available by gazettal, and this provision has enabled some creative tenure resolutions to be negotiated between the Queensland Government and native title claimants (see below). In time, ALA freehold will replace an earlier form of Aboriginal tenure known as Deed of Grant in Trust Lands (DOGIT), which was introduced into Queensland in 1984 over even older forms of land reservation for Aborigines and Torres Strait Islanders in Queensland, originally established to create protective reserves, missions and government settlement areas.<sup>13</sup>

A number of Aboriginal-owned pastoral leases also occur in each study region. The favoured structure for pastoral lease land-holding entities are Aboriginal corporations formed under the same Commonwealth legislation under which native title PBCs are incorporated. Until July 2007 this was the *Aboriginal Councils and Associations Act 1976* (Cth) (ACA Act), recently replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (CATSI Act).

Significantly for groups on Cape York, the NTA provides that any extinguishment of native title by the grant of previous land tenures must be disregarded over pastoral leases owned by native title-holders as well as over DOGIT and Aboriginal Freehold tenures. Demonstration by a claim group of ongoing native title connection over such areas may result in successful determinations (up to and including the recognition of exclusive possession). In these circumstances native title groups will hold co-existing rights (and responsibilities) as native title holders, with the owners of Aboriginal freehold under the ALA and/or leaseholders under conventional tenure. Under existing regulatory arrangements, the management of these overlapping interests necessitates the duplication of land-holding entities in the form of land trusts, Aboriginal corporations and PBCs.

### **Native Title - Prescribed Bodies Corporate**

The native title PBC is the effective face of a successful native title claim, being the corporate entity through which the native title community may interact with the wider economic and legal system, and providing the mechanism by which native title is both protected and managed. The introduction of new legislation covering the incorporation of PBCs and recent policy changes enabling Commonwealth funding of PBC administrative costs either through Native Title Representative Bodies (NTRBs) or directly to PBCs<sup>14</sup> are important changes in the operating environment and can be expected to have positive effects on the viability of PBCs.

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<sup>13</sup> In 1984 Queensland established special Deed of Grant In Trust Lands (DOGIT) in respect of Aboriginal residential settlements and surrounding lands which had formerly been government or church-run missions and reserves. DOGITs are inalienable and are held in trust by the local Aboriginal Council on behalf of its community (which characteristically comprises a mixture of traditional owners for the area and other Aboriginal residents with historical ties, going back several generations): Memmott and McDougall 2004, p.24. Over 11 per cent of Cape York is comprised of DOGITs and there is a large DOGIT area in each of the Wik and Coen regions. Under the ALA, all Aboriginal DOGIT land must be granted as Aboriginal freehold to land trusts as soon as practicable (through the ‘transfer’ process).

<sup>14</sup> Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) 2007, *Guidelines for Support of Prescribed Bodies Corporate (PBCs). Policy and Legislative Framework*. Funding Applications, Land Branch Native Title Program, Canberra, p.16.

Until recently PBCs were required to incorporate under the ACA Act. This Act proved to be less than suitable for the purposes of PBCs because it was unable to successfully incorporate customary group recruitment mechanisms and decision-making processes.<sup>15</sup> In July 2007 the ACA Act was replaced by the CATSI Act legislation which the Commonwealth Government claims will better serve the contemporary requirements of Indigenous corporations, including PBC functions.<sup>16</sup> All PBCs incorporated after this date will do so under the new CATSI Act, while existing PBCs will be automatically registered under the new Act and will have a further two years to make necessary changes to their rules and internal governance for compliance with the new Act<sup>17</sup>

The new Act includes clauses specifically relating to PBC functions to ensure that there is no conflict between members' obligations under the CATSI Act and under the NTA. Thus, for example, it avoids imposing conflicting duties on directors, officers or employees of a PBC by providing that where they act in good faith to comply with the NTA, they will not be in breach of any CATSI Act provisions (thereby giving precedence to obligations under the NTA). Another pragmatic change is to allow for office holders to be elected for periods longer than one year, and for 'rolling' appointments (for example, two-year terms with half of the office holders elected each successive year).

The first of these changes should ensure there is greater flexibility for decision-making within the PBC, and assist directors to more clearly separate corporate governance responsibilities from native title management responsibilities. The changes to the tenure of directors should result in greater continuity, better skill development amongst directors and less likelihood of PBC governance being dominated by individual or factional interests. The CATSI Act also distinguishes between 'small', 'medium' and 'large' corporations according to the size of their operating income, assets<sup>18</sup> and number of employees, with 'small' and 'medium' having less onerous reporting and compliance requirements than 'large' corporations.<sup>19</sup>

These easier reporting and compliance functions are likely to benefit the majority of PBCs on Cape York, which will fall into the 'small' category. They will only have to provide basic corporate details in their annual reports and will not have to provide audited financial statements. Such PBCs may apply to submit these reports in at their annual general meetings only every second year.

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<sup>15</sup> See AIATSIS 1996; Mantziaris, C. and Martin, D. 2000 *Native Title Corporations: a legal and anthropological analysis*, The Federation Press, Sydney, pp.183-232; Memmott and McDougall 2004, pp.14-15.

<sup>16</sup> Registrar of Aboriginal Corporations (RAC) 2005 *Meet the Bill. A guide to the introduction of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*. Australian Government, Registrar of Aboriginal Corporations, Canberra. June 2005, accessed 15 April 2008, <<http://www.orac.gov.au>>.

<sup>17</sup> Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC) 2007a 'Frequently asked questions: Corporations (Aboriginal and Torres Strait Islander) Act 2006', accessed 1 October 2007, <[http://www.orac.gov.au/about\\_orac/legislation/FAQ\\_CATSI-Act-2006.aspx](http://www.orac.gov.au/about_orac/legislation/FAQ_CATSI-Act-2006.aspx)>; 'Interaction between the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and the Native Title Act 1993', accessed 5 October 2007, <[http://www.orac.gov.au/about\\_orac/legislation/CATSI\\_Act.aspx#3](http://www.orac.gov.au/about_orac/legislation/CATSI_Act.aspx#3)>.

<sup>18</sup> Native title rights and interests will not be included in determining the value of the assets of a PBC for reporting purposes. Thus corporations which only hold and manage native title rights and interests will not find themselves determined as large for reporting purposes. ORATSIC 2007a.

<sup>19</sup> ORATSIC 2007.

PBCs incorporated under the old ACA Act have two years to make the necessary changes to their constitutions and to implement the compliance provisions of the new legislation. In the short term, therefore, there is likely to be a need for external financial and organisational assistance from NTRBs and the Office of the Registrar of Indigenous Corporations to assist PBCs to meet these requirements.

The lack of government funding to support the operations of established PBCs was highlighted as a significant constraint in the previous reports of this research as well as in other recent reviews such as the 2006 *Report on the Operation of Native Title Representative Bodies* by a Parliamentary Joint Committee.<sup>20</sup> Previously, NTRBs could assist claimants to incorporate their PBCs prior to determination and up to and including their first annual general meeting, but were specifically prevented from providing ongoing financial support beyond this point.

NTRBs and PBCs may now apply to Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) for funding for the administration and day-to-day operational costs of PBCs in their areas. Under the FaHCSIA guidelines funding will normally not exceed \$100,000 per corporation per year, and PBCs are encouraged to seek funding also from other government, industry and private sources. One of the criteria used to assess applications will be the availability of alternative funding and whether or not this has been sought by the PBC.<sup>21</sup>

The funding will be for recurrent costs of administration and compliance, specifically excluding employment and training, except where a real and ongoing need can be demonstrated; and funding will in any case be on an annual basis with no guarantee of continuity. At the time of writing it was too soon to be able to make a meaningful assessment of how successful these changes had been for the viability of native title land management, either in the case study areas or elsewhere on Cape York, though it is known that FaHCSIA has declined to fund at least one recently established PBC on Cape York for the current 2007/2008 financial year.

## **PBC design**

The 2004 report identified three key dimensions of PBC design, each relating to different but complementary aspects of PBC operations.<sup>22</sup> These are:

- Trustee or agency functions, a choice required by the NTA which relates to legal obligations and internal decision-making;
- Participatory versus representative, which relates to the breadth of membership and consequent size and organisational complexity of the PBC; and
- Active versus passive models, which relates to the extent to which the PBC is directly involved in management of native title land and the consequent level of decision-making and operational activity involved.

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<sup>20</sup> Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (PJCNT) 2006 *Report on the Operation of Native Title Representative Bodies*, accessed 5 October 2007, <[http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/report.pdf](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/report.pdf)>, pp.32-36).

<sup>21</sup> FaHCSIA 2007.

<sup>22</sup> See Memmott and McDougall 2004, Chapter 6.

The NTA requires successful claimants to make a choice between a trust or agency type of PBC. While the preference of the Wik native title-holders in 2002 was for an agency PBC, recent legal advice suggests that there is little practical difference in the operation of trustee and agency PBCs, since native title decisions for both types rests with the native title group as a whole<sup>23</sup> and the PBC, whether a trust or agency, must consult with and implement the decisions of the native title-holders.<sup>24</sup> The essential difference between the agency and trustee types of PBC relates to liability and decision-making within the organisation (as distinct from native title decisions relating to the land). An agency PBC acts as an agent of the native title-holders and it must consult with them not only on matters concerning their native title to land, but also in relation to the internal operations of the corporation, such as day-to-day administration and so on. A trustee PBC, though legally holding the native title on behalf of the wider group of native title-holders, in practice is still required by the PBC regulations to consult with and seek the consent of the native title group in relation to native title land matters, but is not so bound when it comes to the internal operations of the PBC.

Under an agency model, the native title-holders, rather than the PBC are liable and may be sued for actions carried out by the PBC consequent to their decision-making. Whereas a trust structure, whilst it may have some additional legal responsibilities by virtue of being a trust, offers native title-holders protection against personal liability for the PBC's actions.<sup>25</sup>

The choice of representative or participatory composition has implications for the size and complexity of the PBC, which in turn may be a significant factor in the level of resources required to meet compliance and operational requirements. A participatory model allows membership of all adult native title holders, thereby maximising the level of individual participation; because this has the potential for every native title-holder to be a member, it risks becoming operationally unwieldy. Representative PBCs on the other hand, aim to keep the membership to the minimum required for the PBC to function and to provide an acceptable level of representation of the wider native title group (for example, by having an agreed number of representatives from each clan or descent group within the native title group).

The choice of participatory or representative may make the difference as to whether the PBC is categorized as being small, medium or large under the CATSI Act criteria, with consequent differences in the level of reporting necessary; it will influence the cost and frequency of annual general meetings and the like; and it may affect the ease or the level of conflict surrounding decision-making. Under the CATSI Act it is now more straightforward to form a corporation with less than 25 members which, in conjunction with the size criteria, may encourage more PBCs to opt for representative membership.

The distinction between passive and active relates not only to the way in which a PBC functions (for example, whether it is an agency or trustee PBC) but also to its

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<sup>23</sup> See Memmott et al 2004, Ch. 6 and Memmott et al 2007, pp.280-81 for discussions on this earlier legal distinction between the trust and agent models.

<sup>24</sup> Personal communication, legal consultants, CYLC to P. Blackwood, 2007.

<sup>25</sup> Personal communication, legal consultants, CYLC to P. Blackwood, 2007.

membership and its general mode of operation.<sup>26</sup> A PBC with a passive role is best obtained through an agency type PBC with a representative structure, since it will not itself hold the native title interests and can only relay and implement the native title decision of the whole group, which may continue to exercise customary decision-making practices. The PBC's role is to consult with and implement the group's decisions, and its membership may be limited to that necessary to meet the minimal regulatory requirements. It will have limited demands for resources for internal administration, but is likely to be reliant on the support of regional representative bodies, such as regional resource agencies (like that described below which currently operates in the Coen region), to assist it in carrying out its consultation functions.

In contrast, an active type of PBC assumes greater responsibility for the making of decisions. The trustee PBC type is better suited to an active role, because it 'holds' the native title and has greater authority to make decisions on behalf of the native title-holders provided it discharges the consultation and consent procedures of the PBC regulations. Active PBCs could adopt either 'representative' or 'participatory' membership structures.

The decision as to the balance of these three dimensions in any particular case will depend upon a variety of factors, including the PBC's responsibilities in relation to other entities through which the group holds land (for example, if it also acts as a trustee or holds land under conventional freehold tenure), levels and sources of funding, and how best to minimise discrepancies between traditional decision-making processes and those of the PBC, whether it be an agent or a trustee type. The interplay of these options can be seen in the case studies below.

## Structural Options for PBCs in relation to Land Trusts and other Indigenous Land-holding Entities

It is anticipated that eventually the majority of Aboriginal owned land on Cape York Peninsula will have at least two co-existing types of titles and the consequent establishment of two land-holding corporations for each area: either (a) Aboriginal freehold and native title, with a Land Trust and a PBC; (b) a DOGIT and native title, with a Community or Shire Council and a PBC, or (c) leasehold and native title, with an Aboriginal corporation and a PBC.<sup>27</sup> As it is possible to lease land from the trustees on both DOGIT and Aboriginal freehold, there is further potential for a third level of Aboriginal landholding entity on these tenures, all of which may have substantially the same membership of traditional owners – namely a land trust, a native title PBC and an Aboriginal corporation or individual holding a lease.

The prospect of having to have both a land trust and a PBC operating independently of each other over the same land is a source of concern and frustration to traditional owners, and was recognised by the Queensland State Government as one of a number

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<sup>26</sup> This material is partly drawn from Memmott and McDougall (2004:Ch.6), which includes an in depth discussion on the design and function of PBCs. Note here that what we are referring to as passive models are akin to the way in which Land Trusts work in the Northern Territory under the NT Land rights Act.

<sup>27</sup> PBCs may hold leasehold land, and conversely, existing Aboriginal Corporations set up to hold pastoral leases may, with appropriate rule amendments to their objects and membership clauses, be adapted to become PBCs.

of practical matters needing to be addressed in order to improve the articulation of the State and the Commonwealth legislation.<sup>28</sup>

In the Coen region, for example, there are six existing land trusts and three undetermined native title claims, the membership of whose PBCs will overlap those of the land trusts<sup>29</sup>. Given the importance of both the native title and ALA regimes to the traditional owners of Cape York Peninsula, there is a need to reconcile the practical day-to-day operations of the land-holding and managing entities to reduce not only the confusion and frustration of traditional owners, but also that of external parties trying to engage with the land owners. It is expected that similar situations occur in other Australian States and Territories with their own forms of State land rights legislation.

Recent amendments to the Queensland ALA now enable an existing PBC to be appointed the grantee of 'transferred' Aboriginal freehold land, without the necessity of incorporating a separate land trust; that is, the PBC becomes the trustee in its own right<sup>30</sup>. This is a significant development which, for the first time in Queensland, allows as a matter of course the integration of native title and 'transferred' Aboriginal freehold within a single corporate ownership entity. For large-scale socio-geographic units such as the language-based tribes in the case of the Coen region, such integration will not only simplify arrangements and reduce confusion but should also reduce the administration costs through a more effective (larger) scale of economy.

Another option is one which mirrors the appointment of a PBC as grantee; that is, the determination of a land trust as a PBC. On the face of it, this would likewise have the advantages of a single corporate entity holding both types of tenure. However it remains unavailable without amendments to the PBC Regulations by the Commonwealth Government and possibly further amendment to the ALA by the Queensland State Government.<sup>31</sup>

Because there are differences in the criteria for ALA land grants and for determination of native title, as well as differing legal responsibilities to be discharged by successful grantees on the one hand and native title holders on the other, combining the two sets of responsibilities into a single entity may not always be the preferable option because of resultant conflicts of interest by members.

Where there are reasons for retaining both a PBC and a Land trust as distinct entities, there are nonetheless mechanisms by which their operations may be streamlined and harmonised. One option is to appoint a PBC as the sole trustee of the land trust. In the

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<sup>28</sup> DNRM 2005.

<sup>29</sup> See Memmott and McDougall 2004, p.93.

<sup>30</sup> The *Aboriginal and Torres Strait Island Amendment Act 2008* was passed by the Queensland parliament in May 2008. The relevant section is Pt. 2 S.17. This provision applies only to 'transferred' land, not to Aboriginal freehold resulting from the ALA claim process. The reasons for changing one class of Aboriginal Freehold but not the other are not known to the authors.

<sup>31</sup> Recognising similarities in the structure and intent of ACA corporations and ALA Land Trusts, the Queensland Government recently canvassed the option of doing away with Land Trusts altogether and granting land directly to ACA Aboriginal Corporations, which could include PBCs, thereby avoiding the duplication of organisations with almost identical functions. It also acknowledged that the integration of land trusts and corporations may be facilitated by allowing land trusts to be formed prior to the granting of the land: DNRM 2005, pp.33-34. Notably, neither of these options made their way into recent (May 2008) amendments to the ALA which now enable transferred Aboriginal freehold land to be granted to PBCs.

past the Queensland Government has declined to accept corporate entities as members of ALA land trusts. However, in 2007 for the first time it agreed to appoint a native title PBC as the sole member of an ALA land trust for the Eastern Kuku Yalanji people of south-east Cape York Peninsula who in 2007 finalised a comprehensive set of ILUAs which included both a native title determination and the grant of several Aboriginal freehold titles under the ALA.<sup>32</sup> The claim group formed two entities: the Jabalbina Yalanji Aboriginal Corporation as a trust type PBC to hold its native title, and the Jabalbina Yalanji Land Trust to hold title to the freehold grants. The rules of the land trust specify the PBC as its sole member, and the PBC rules include complementary clauses to enable both it and its officeholders to function as the land trust, as and when required.

Unlike the PBC as grantee model provided for in the recent ALA amendments (which results in a single corporate entity) the PBC as sole trustee model adopted for the Kuku Yalanji still entails the formation of two distinct corporate entities, each requiring careful drafting of rules to ensure they intermesh without conflict and unnecessary complexity. The following table sets out how two such entities may be harmonised within a single operational structure.

**Table 1. Model of harmonised rules for a PBC as Trustee of a Land Trust**

<b>Issue</b>	<b>Land Trust Rules</b>	<b>PBC (as Grantee) Rules</b>
Objects	Objects are for purposes set out in the <i>Aboriginal Land Regulations</i> 1991 (Qld).	Objects to include acting as grantee/trustee of land trust and as a PBC.
Membership	Limited to one grantee member, with the membership defined as the relevant PBC	Open to adult native title-holders only.
Committee	Provides for appointment of PBC Board and officeholders as the committee and officeholders of the Land Trust	By election at Annual General Meeting.
Meetings	Annual and General Meetings to be held on the same day as PBC and convened before, during or after the PBC meeting Committee must meet quarterly.	Annual and General Meetings (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 or as schedule to the 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.

<sup>32</sup> The Jabalbina Yalanji Aboriginal Corporation PBC was incorporated under the new CASTSI Act. Its rules are available on the ORIC web-site at <http://www.orac.gov.au/Document.aspx?documentID=147450andconcernID=202074>, accessed 15 April 2008. The Jabalbina Yalanji Land Trust was incorporated under the ALA regulations; land trust rules are not publicly available.



A final but more complex and potentially less workable option is for the PBC and land trust to operate as independent entities over the same land, coordinated through formal agreements, such as Memoranda of Understanding, setting out their respective roles and responsibilities in relation to land use and consent. In practice, because the membership of the two entities may be substantially the same, members of the land trust will have to make agreements with themselves as members of the PBC! This option is the least efficient and provides the greatest scope for conflict and the fragmentation of Indigenous interests. However it may remain the default option where 'claimed' rather than 'transferred' aboriginal freehold is involved, or where there are differences in the membership of the native title group on the one hand and traditional and/or historical owners of aboriginal freehold on the other.

## The Wik Region

The Wik region is comprised of coastal flood plains and forested inland country drained by several major westward flowing rivers on the central western side of Cape York. It contains an Aboriginal Land lease held by the Aurukun Shire Council, on which are located the township of Aurukun itself and a number of outstations that are seasonally occupied by Wik families. The region is occupied predominantly by the Wik-speaking peoples<sup>33</sup>, the majority of whom live in the Aurukun township and the Aboriginal DOGIT settlements of Pormpuraaw and Napranum, as well as the towns of Coen and Weipa which lie just outside the region. This region and its people are well known through the Wik Native Title High Court Action<sup>34</sup> which established that native title may co-exist with a pastoral lease. The Wik and Wik Way Native Title Claim, which gave rise to that case and which covers a large area of the region, was at the time of publication ongoing: while there have now been determinations over areas of crown land, the Aurukun Shire lease and some pastoral leases, determinations over several pastoral leases and areas of the bauxite mining leases were yet to be achieved.

The building block of the Wik land tenure system<sup>35</sup> is the clan estate, and such estates can be aggregated into various types and levels of configuration, the most inclusive of which are 'large estate cluster' identity systems, including riverine groups, ceremonial groups and language groups. These are differentiated by particular principles of social and political organisation, totemic and religious geography, and language and land tenure.<sup>36</sup> Eight of these larger cluster groups comprising the Wik and Wik Way

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<sup>33</sup> See Thomson, D. 1936 'Fatherhood in the Wik Monkan tribe', *American Anthropologist*, Vol. 38, p.374; McConnel, U. 1939 'Social organization of the tribes of Cape York Peninsula, North Queensland [part 1]: Distribution of tribes', in *Oceania* Vol. 10, p.62; Sutton, P. 1978 *Wik: Aboriginal society, territory and language at Cape Keerweer, Cape York Peninsula*, Australia, PhD dissertation, Department of Anthropology and Sociology, University of Queensland, St Lucia, Brisbane, Von Sturmer, J. 1978 *The Wik Region: Economy, Territoriality and Totemism in Western Cape York Peninsula, North Queensland*, PhD Thesis, Department of Anthropology and Sociology, University of Queensland, St Lucia, Brisbane; and Martin, D. 1997 'The 'Wik' peoples of western Cape York', *Indigenous Law Bulletin* 4(1), pp.8-11; 1993 *Autonomy and Relatedness: An ethnography of Wik people of Aurukun, Western Cape York Peninsula*. PhD Thesis, Australian National University, Canberra, for an ethnographic history of these peoples.

<sup>34</sup> See *The Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>35</sup> The Wik people comprise a broad linguistic grouping sharing a range of cultural similarities, within which there are a number of identifiable linguistic sub-groups, namely Wik Way, Wik Mungkan, Wik Ompom, Wik Iyanh or Mungkanhu, Wik-Ngencherr and Ayapathu (Sutton 1997:36, Chase et al 1998:59). The distribution of languages is often mosaic-like and language affiliation may be shared by clans with non-contiguous estates. Further, languages are not necessarily 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 political or social identity (Sutton 1997:33).

<sup>36</sup> Sutton 1978, pg.126-8,140 and 1997, pp.28-32.

claim group are the social units on which the Wik PBC representative membership structure is based. These include five ceremonial groups and three based on either language or geographic affiliation.<sup>37</sup> Two representatives from each group make up a PBC Governing Committee of 16 members.<sup>38</sup>

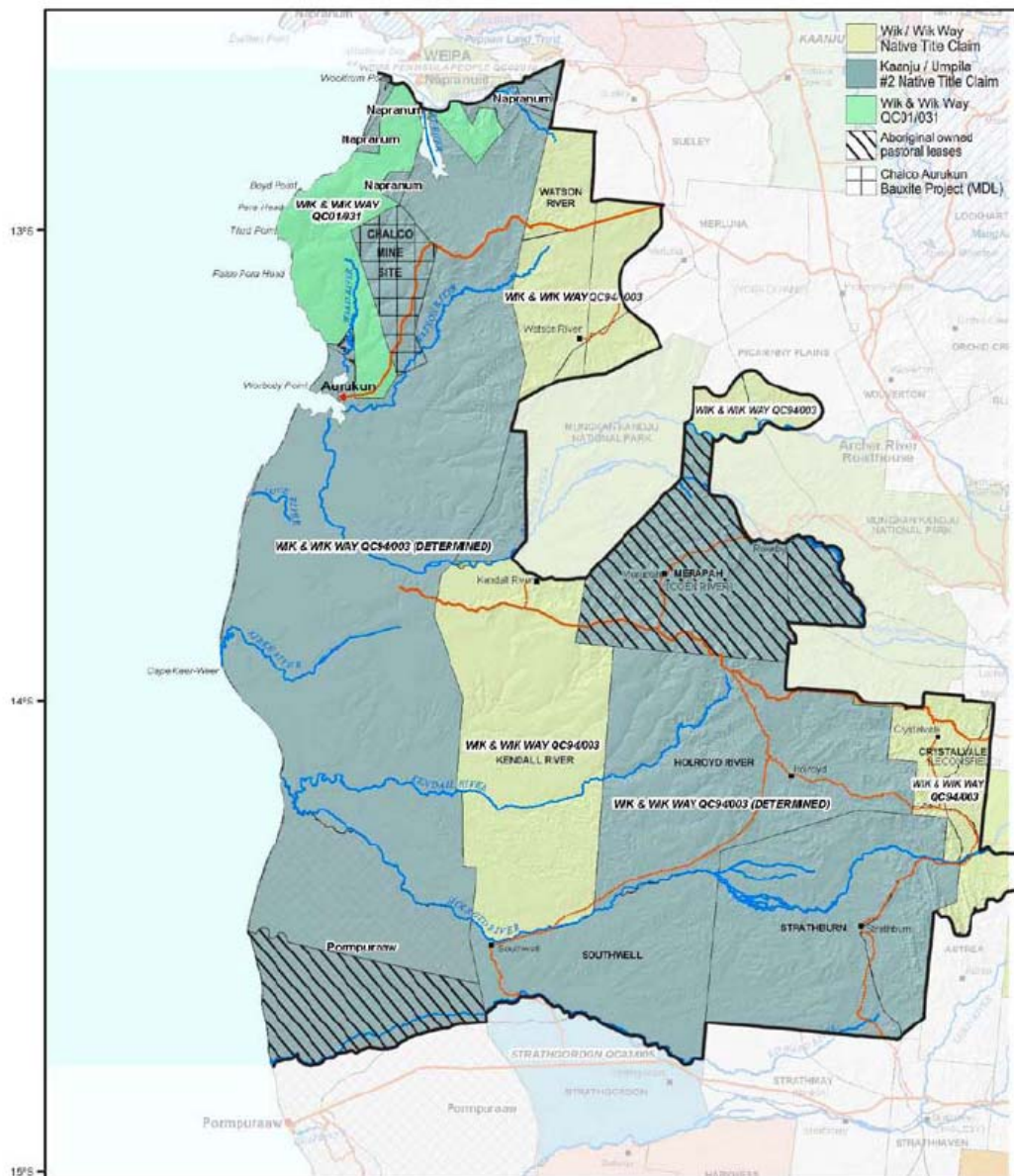
As of 2006, within the native title claim area, there were at least 33 parcels of land of coexisting (but non-extinguishing) tenure – see Figure 2. These included parcels of DOGIT land at Pormpuraaw and Napranum, the Aurukun Aboriginal land lease, pastoral leases under both Aboriginal and non-Aboriginal ownership, and areas under mining leases. Outside the claim area, but still potentially subject to future native title claims, were two large national parks which had been successfully claimed under the ALA (but which have not as yet been granted), and further pastoral leases.

In addition to the PBC for the determined areas of the Wik and Wik Way claims, there were two DOGITs held by the Pormpuraaw and Napranum Shire Councils, the Aurukun Shire lease held by the Aurukun Shire Council, and at least two proposed land trusts.

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<sup>37</sup> Memmott and McDougall, 2004, pp.96,125.

<sup>38</sup>Ngan Aak Kunch Aboriginal Corporation 2002 'Rules of Ngan Aak Kunch Aboriginal Corporation' [constitution], Ebsworth and Ebsworth Lawyers, Brisbane, 5/9/02, accessed 29 April 2008, <<http://www.orac.gov.au/document.aspx?concernID=104097>>.



**Figure 2:** Map of Wik and Wik Way Native Title Claim in the Wik Region. (Adapted from map “Cape York Peninsula Claim Activity”, Edition 10, 1/9/2007, Qld Dept. of Natural Resources and Water, courtesy of the Department.)

Wik interest in maintaining rights in country precedes native title and is reflected through a history of decentralization and land management initiatives. A mature outstation movement exists in the region with some 24 or more outstations. Most of the outstations are serviced from Aurukun, with a smaller number being serviced by an Aboriginal resource agency in Coen (Coen Regional Aboriginal Corporation – see later). Almost all of the outstation locations are on the Aurukun Shire lease or on Aboriginal-owned pastoral leases. Throughout the early and mid 2000s, the Aurukun Shire Council employed a Land and Sea Management (LSM) Coordinator as well as between four and ten Aboriginal Rangers employed on the Community Development Employment Program (CDEP).

Environmental management problems perceived by the traditional owners included a mixture of both customary concerns relating to their traditional responsibilities for

looking after their land, as well as seemingly more contemporary worries relating to access and security: over-exploitation of fish stocks and fishing industry impact on dugongs and crocodiles; lack of coastal management and dune damage; poor road access to country; cultural heritage protection; and impacts of visitors to country including littering, theft and vandalism at outstations.

To develop and implement land and sea management programs across Wik traditional owners' lands, two resource centres known as Land and Sea Management Agencies had been proposed by the Aurukun Shire Council for the Wik region in 2001. These were to provide a base for research into the environmental impacts of mining, and post-mining rehabilitation, aimed primarily at generating real options for Indigenous people to gain economic and employment opportunities from lands impacted by bauxite mining. They were to become a hub for the training of a skilled Indigenous workforce that would build land management capacity across all Wik country.<sup>39</sup> By 2007 only one of these LSM centres had come to fruition, located to the south-east of Aurukun at Blue Lagoon. This also functioned as an outstation resource centre. The second LSM centre at Beagle Camp some 80 kilometres north of Aurukun was still on the drawing board, awaiting funding.

#### Progress of the Wik PBC<sup>40</sup>

The Wik established the Ngan Aak Kunch Aboriginal Corporation and registered it as their PBC in late 2002 (the Wik PBC). The Governing Committee of the PBC has 16 appointed members comprising two members from each of eight representative groups. Each representative group has native title rights and interests in its respective region and is affiliated to a ceremonial or language group.<sup>41</sup> The Objects of the PBC clearly identify it as an agency and that it cannot make a native title decision unless it is authorised by the native title holders. The PBC is required by its rules to ascertain the identity of affected native title holders and ensure they understand the nature and purpose of proposed native title decisions as well as any associated liability.<sup>42</sup>

However five years after its incorporation, the Wik PBC has conducted no training for its Governing Committee, has no office, has no financial capacity to hold AGMs, has no ABN number, has made no tax returns or annual returns for some years, and had no process in place for the distribution of any Aboriginal benefits. Since its establishment in 2002, it has held only two AGMs due to the lack of resources for organizing and transporting participants spread over a wide region, and for administering proceedings. We suspect this lack of resources and capacity is much the case for many other PBCs in Australia<sup>43</sup>, and time will tell whether the recent changes to funding policy noted above will lead to improvements in the future.

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<sup>39</sup>Aurukun Shire Council 2001 'Wik Waya Land and Sea Management Centre' [Application for a Project Grant from the National Heritage Trust 2001-2001], Aurukun, 29/01/01.

<sup>40</sup>Based on interviews with Philip Hunter, Ebsworth and Ebsworth Lawyers on the Aurukun PBC and the Chalco Development, 24/7/07.

<sup>41</sup>Ngan Aak Kunch Aboriginal Corporation 2002, pp.10,11.

<sup>42</sup>Ngan Aak Kunch Aboriginal Corporation 2002, pp.7-9.

<sup>43</sup>The reader is referred to discussions on a range of case studies on PBCs that were canvassed in two workshops of the Australian Institute of Aboriginal and Torres Strait Islanders, viz Strelein and Tran 2006, Bauman and Tran 2007.

The solicitor who negotiated the Wik Native Title settlement<sup>44</sup> has continued to provide limited pro bono services to the PBC, despite his firm's office being located in Brisbane, 1700 kilometres from Wik land. Although not receiving any fees from the PBC, he has been at times able to recoup fees from third parties who require the services of the PBC for commercial activities. To date these parties have comprised the Aluminium Corporation of China Ltd or 'Chalco' which is a bauxite mining company taking up a mining lease in the region, and various other mining companies conducting exploration activities.

The solicitor coordinates and provides secretarial support for occasional governing committee meetings. Thus the PBC has signed an enormous number of agreements (for example, mining and Future Act agreements). The solicitor has held four PBC meetings during the Chalco negotiation in the space of twelve months. The solicitor keeps copies of agreements and the PBC Corporate Seal in his office. The absence of any dedicated administration facility or premise for the PBC at Aurukun precludes sending such items up to Aurukun, as they would not be secure.

At the time of writing, the Wik PBC had accumulated about \$40,000 of funds from Exploration Permits for Minerals (EPMs). The granting of an EPM provides a capacity for a native title group to charge a mining company incremental fees. In the case of a voluntary contract, the size and timing of such fee payments are controlled by whatever is stipulated in the contract. In the absence of such a contract, the size and timing for EPM fee payments is imposed by standard form default conditions set under state statutory law by the NTPC (Native Title Protection Conditions). Under most agreements, including NTPC, the onus is on the native title group to raise a tax invoice to procure their money. One problem for such groups in issuing a tax invoice for EPM fees, is the necessity to have an ABN number. Obtaining an ABN number through online website instructions may seem relatively easy for a computer-literate business-person, but for an Aboriginal corporation with a board whose literacy skills are poor, this may be a difficult and intimidating task without appropriate professional assistance. Many native title groups and PBCs do not have an ABN number, including the Wik.

Even the apparently basic step of opening a bank account for a PBC can be problematic. In the case of the Wik, there was fortunately a bank agency at Aurukun which alleviated some of the problems of registering signatories. However the residence of some members in other parts of the region prolonged this process. The solicitor has since been able to transfer all accumulated money out of the Wik's Trust accounts that he maintained, into the PBC bank account.<sup>45</sup>

The PBC, via its governing committee, should decide what happens to such moneys received. The Wik PBC has not had the capacity to do this yet. For example, five mining tenancies at Merapah Pastoral Station<sup>46</sup> have recently been generating a flow of fees to the PBC. This money should benefit the local families of an eastern sub-group of the Wik but there is no administrative mechanism for the distribution of such fees.

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<sup>44</sup> Philip Hunter of Ebsworth and Ebsworth, Solicitors, Brisbane.

<sup>45</sup> At the time of writing, the PBC had only spent money on one occasion, for an air charter to a funeral.

<sup>46</sup> In the central east of the claim area; shown as Area 5 in the claim map: Memmott and McDougall 2004, Fig.15.

At the time of writing, the PBC thus consisted of a group of people, a corporation agreement and seal, a bank account of \$40,000 and the human resource of a solicitor who had to retrieve his costs in some way for any visit or meeting at Aurukun. It can be seen then, that in the first five years of its life, the Wik PBC has barely been able to sustain itself in a corporate sense, and has, to a large extent, relied on the goodwill and guidance of its trusted professional outsider, the solicitor. This notion of the trusted outsider acting as a broker in the inter-ethnic field has received recent analytic attention in the literature on Aboriginal governance in Australia<sup>47</sup> and is a point to which we shall return. However what has been achieved of substance by the Wik PBC is a mining agreement (with Chalco) that should allow the leverage of a future stable set of corporation resources once royalties and other benefits start flowing. This unique opportunity merits brief profiling.

### Advent of the Aurukun Bauxite Project

In the early 2000s, the former Pechiney Mining Lease<sup>48</sup> within the Wik Native Title Claim Area was terminated by the Queensland Government due to lack of development and re-offered to the mining sector. It was successfully taken up by Chalco, which was appointed as the State Government's 'preferred developer' in September 2006.

A Joint Steering Committee was established for the Project with three representatives from Chalco, two from the State of Queensland and eight from the Indigenous Parties who comprised the Aurukun community (represented by the Mayor and Chief Executive Officer) and the native title-holders (six Wik and Wik Way members). This Committee has a coordination rather than a decision-making role; its functions include review and collaboration on employment and training, business development, community infrastructure development, regional planning, impact monitoring and reporting, rehabilitation, cross-cultural awareness and induction, governance support, Aboriginal Cultural Heritage Management and a Community Development Fund.<sup>49</sup>

Stage 1 of the project has been agreed under an Indigenous Land Use Agreement (ILUA) between the parties which was registered in mid-2007.<sup>50</sup> This will run for two years (2007-2009), incorporating a feasibility study with environmental and socio-economic impact assessment studies (EIA, SIA). During this period monetary contributions in the order of \$7.5million from Chalco and the State are expected to flow to the Aurukun community and the native title-holders. Chalco retains a right to withdraw from the project during or at the end of this stage.

Principles of sustainable development in the ILUA include recognition that (a) the Wik and Wik Way have ultimate responsibility for the land, and (b) that the Project must enhance the long-term social, economic, cultural and physical well-being of the Wik and Wik Way Peoples and the Aurukun Community.<sup>51</sup>

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<sup>47</sup> See for example, Moran, M. 2006 'Practising Self-Determination: Participation in Planning and Local Governance in Discrete Indigenous Settlements', PhD dissertation, School of Geography Planning and Architecture, University of Queensland, St Lucia, March, pp.256-58,277.

<sup>48</sup> The extent of this lease area is shown in Memmott and McDougall 2004, Fig.15 as Areas 13 and 15. It is referred to in the current ILUA as the Mineral Development License (MDL) Area or Restricted Area 315.

<sup>49</sup> State of Qld et al 2007:Cl. 24.3.

<sup>50</sup> Ngan Aak Kunch Aboriginal Corporation 2002, pp.7-9.

<sup>51</sup> State of Qld et al 2007:Cl.13.

At the time of writing, Chalco had constructed a project office in Aurukun to provide a clear and direct channel of communication between Chalco, the Wik and Wik Way Peoples and the Aurukun Community so as to ensure Aboriginal engagement and participation in the feasibility study and ongoing project. The Office accommodated Chalco's employees as well as several local support positions funded by Chalco through the Aurukun Shire Council. These staff will coordinate the cultural heritage management and EIA contracts. The office facilities (at capital cost of about \$2 million) include visiting consultants' accommodation and a public meeting area. The ILUA specifies that the native title group and/or the PBC will be able to negotiate ownership and future use of this infrastructure at the end of the project.<sup>52</sup>

An EIA sub-committee had an oversight role of the EIA and SIA functions. Chalco and the State had agreed to seek regular review and consent from native title-holders on all deliverables of the EIA, including feedback on draft and final report findings. The budget included money for the Wik to seek independent advice on such issues. There was an employment package for Wik and Wik Way People for positions including for general field support during the feasibility study. Resources were included to employ locals in investigation activities (data collection and research) which incorporate the monitoring and management of Aboriginal cultural heritage as well as aspects of the natural environment: flora and fauna, turtles, streams, groundwater, and coastal seas, in response to project developments (mine, mineral processing plant, access roads, power plant, office complex, camp, airport expansion, freshwater dam, tailings dam, bores, port and wharf).<sup>53</sup>

Resources are to be provided to ensure Aboriginal participation in the EIA through 'Outstation Centre field work'; funding is to be provided to the Outstation Centre for priority regional environment management initiatives during the Feasibility Study.<sup>54</sup> This concept of the 'Outstation Centre' corresponds with the Aurukun Shire Council's 'Land and Sea Management Centre' and the reader will recall that only one of two planned Centres had come to fruition (Blue Lagoon) at the time of writing. The site for the proposed Beagle Camp Centre is located near the northern end of the Chalco Lease.

The ILUA provides for a sustainable development plan, including a state-funded employment and training officer and a business development officer for Stage 1 to assist in recruitment and employment opportunities, and several Chalco-funded programs, including: training to promote job readiness and career development; business and enterprise awareness activities and initiatives; housing and infrastructure survey informing on local workforce accommodation and retention; and establishing and resourcing the project office for the period of the feasibility study.<sup>55</sup>

For the Aurukun Bauxite Project, there will be a potential long-term demand for both cultural awareness training and the environmental monitoring work (especially with respect to stream water and ground water). The Wik will need to develop their own Wik cultural awareness training program and induct every person employed in the project. Conversely awareness training will be provided by Chalco in its Chinese

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<sup>52</sup> State of Qld et al 2007:Cl.17,17.10,19.3.

<sup>53</sup> State of Qld et al 2007:Cl.20,21, Sched. 3.

<sup>54</sup> State of Qld et al 2007:Sched. 6, Nos. 28,30.

<sup>55</sup> State of Qld et al 2007:Sched. 6.

background and the culture of mining for the Wik.<sup>56</sup> There is a potential business in this alone; for example in Stage 2 the project will generate 700 jobs including for the construction of the mine and the port.

## Relation of the Wik PBC to the Chalco Agreement

The PBC was a party to the ILUA to set up Stage 1 of the project. In the Stage 1 agreement, there are no prescribed profits payable to specific people or entities (such as the PBC), only an overheads budget to meet the actual costs of specific activities. A broad aim in Stage 1 is to prepare the Wik community to take advantage of the opportunities presented by Stage 2 (when the mine construction commences) and beyond, including preparing the PBC. The Wik Solicitor has indicated that the PBC has an ambition to set up a different Stage 2 contractual relation with Chalco, one that has the PBC taking a more integrated role in the project. It is expected that this will be discussed during the negotiations for Stage 2 implementation with a view to seeking tangible benefits for the PBC. The ILUA also provides for an Indigenous Commercial Arrangement (ICA) to provide financial consideration for the Indigenous Parties. And a third fund, the Community Development Fund, has been set up with State and Chalco contributions amounting to half a million dollars over two years. It will be up to the Aurukun Shire Council and the Wik and Wik Way native title holders to decide how to spend this funding that could be used in part for preliminary PBC operations.<sup>57</sup>

With proper coordination, strong leadership and vision, it would then seem that the Chalco Mining Project and its ILUA could provide the basis for the following progressive steps for the Wik and the Wik Way:

- To re-establish a stable PBC administration with office once a flow of benefits is in progress;
- To establish the second Wik Land and Sea Management Centre at Beagle Camp; and
- To provide long-term employment and training for Wik Rangers in environmental management and cultural awareness training.

The relation between the PBC, the Land and Sea Management Centre and the Rangers will be discussed in a later section of the paper.

## The Coen Region

The Coen region is located on the east of Cape York Peninsula and contains the small service township of Coen as its regional centre, as well as a number of Aboriginal outstations. It straddles the Great Dividing Range, and includes the uppermost tributaries of the western-flowing Coen and Archer River basins, and the easterly flowing streams drawing from the Geikie and McIlwraith Ranges. Aboriginal people of the Coen region reside in Coen and in some ten outstations, the largest of which is at Port Stewart on the eastern coast. Many of the traditional owners and native title-holders live outside the actual Coen region at such large Aboriginal communities as Lockhart River, Hopevale, and Aurukun, and in the town of Cooktown.<sup>58</sup>

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<sup>56</sup> State of Qld et al 2007:Cl.22.

<sup>57</sup> State of Qld et al 2007:Cl.25,26,27.4.

<sup>58</sup> Queensland, Aboriginal Land Tribunal 1996 'Aboriginal Land Claim to Lakefield National Park' [Report of the Land Tribunal established under the Aboriginal Land Act 1991 to the Hon. the Minister for Natural



There are four language groups with native title interests in the Coen region: the Kaanju, Umpila, Lamalama and Ayapathu. These groups maintain their distinct linguistic identities and strong local affiliations to their respective language tribe territories. In this respect, the Coen region presents a more complex and heterogeneous cultural and administrative mix than in the Wik region. Nonetheless, they share a system of traditional land tenure<sup>59</sup>, laws and customs which is regional in character<sup>60</sup> and have a history of co-operation which is reflected in the success of joint land claims prosecuted in the past decade<sup>61</sup>, and in the regional resource agency, the Coen Regional Aboriginal Corporation (CRAC), which has been supporting an outstation movement and providing planning, management, welfare and economic development support to all groups in the region for more than 15 years. CRAC has also been at the centre of a process of the progressive integration of the Aboriginal economy with non-indigenous economic interests in the region throughout this period, to the extent that, as Smith observes, 'The [Coen] township's non-indigenous population is now economically dependent on income generated by local Indigenous population through direct transfer payments and via provision of local services (including CRAC and the local school and clinic), as well as seasonal tourist business and local cattle enterprises'.<sup>62</sup>

### Aboriginal Land Tenure in the Coen Region

There are substantial areas of Aboriginal Freehold land in the Coen region held by six separate land trusts. These are listed in the table below (see also Figure 3.). In addition there is one Aboriginal-owned pastoral lease (Geikie) and some areas of conventional freehold owned by Aboriginal groups. There are also two large national parks in the region that have been recommended for grant by the Land Tribunal following successful hearings in 1994 and 1998, but are yet to be granted. These are Mungkan Kaanju and Lakefield/Cliff Islands which together include traditional lands belonging to three of the Coen region language groups, namely Lamalama, Ayapathu and Kaanju. At the time of writing there were ongoing negotiations between Aboriginal representative organisations and the government that could result in additional areas of leasehold and freehold being transferred to Aboriginal ownership.

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Resources], Land Tribunal, Brisbane; and Queensland Aboriginal Land Tribunal 2001 'Aboriginal Land Claims to Mungkan Kandju National Park and Unallocated State Land near Lochinvar Pastoral Holding' [Report of the Land Tribunal established under the Aboriginal Land Act 1991 to The Hon. The Minister for Natural Resources and Mines], Queensland Department of Natural Resources and Mines, Brisbane, May.

<sup>59</sup> The Aboriginal system of customary land tenure in this region has shifted from a predominantly patrilineal clan estate system toward that of cognatic descent groups and the 'language-named tribe' as the primary social structural units by which people identify with country and around which their traditional ownership of land, including native title, is organised and conceptualised (Chase et al 1998:35-39). Thus, for example, the native title claims in the region are known by the names of the language tribes involved.

<sup>60</sup> Chase, A., Rigsby, B., Martin, D., Smith, B., Winter, M., and Blackwood, P. 1998 *Mungkan, Ayapathu and Kaanju Peoples' Land Claims to Mungkan Kaanju National Park and Lochinvar Mineral Field*. Unpublished Claim Book. Cairns, Cape York Land Council on behalf of the claimants, p.37.

<sup>61</sup> See for example, Queensland Aboriginal Land Tribunal 1996 and 2001.

<sup>62</sup> Smith 2003, p.102; see also Smith 2000, 2005.

**Table 2: Land Trusts in the Coen Region holding Aboriginal freehold land granted under the *Aboriginal Land Act*<sup>63</sup>**

Land Trust Name	Local Name	Area (Ha)	Incorporation Date
Wunthulpu Aboriginal Land Trust	Coen Aboriginal Reserves	11.769	4/06/1997
Yintjingga Land Trust	Port Stewart and Marina Plains	3,111.1	21/05/1992
Kulla Land Trust	Silver Plains	193,000	6/12/2000
Wathada Land Trust	Birthday Mountain	2,460	25/11/1997
Pu Pul Land Trust	Part of Lockhardt DOGIT	4,860	10/10/2001
Mangkuma Land Trust	Part of Lockhardt DOGIT*	349,262.7	10/10/2001

\* Northern and eastern sections of the Mangkuma Land Trust lie outside the Coen Region and are administratively linked to the Lockhart River Aboriginal Council.

In 2000 there were five native title claims in the region, but in the intervening years three of these claims were withdrawn, and a new claim lodged, resulting (by 2007) in three active claims and no native title determinations. The withdrawal of claims was partly on the basis of prior extinguishment which would have meant their prospects of success were very slight, but also as a result of agreement with the State Government over alternative tenure arrangements for claimants over parts of the original claims. For example, the Marina Plains Lamalama claim<sup>64</sup> was newly lodged at the time of the original research was withdrawn in 2005 after a tenure settlement resulting in approximately 20 per cent of the claimed land being rolled into the Port Stewart (Yintjingga) land trust as Aboriginal Freehold, and the remainder going into the adjacent Lakefield National Park.

The two remaining claims from that period are over substantial areas of timber reserve and Aboriginal freehold; both were lodged in the mid 1990s by Kanju/Umpila and Kanju/Umpila/Lamalama/Ayapathu groupings respectively. In 2003 a third claim was lodged by a grouping of Ayapathu and Olkola (another language group from south of the Coen Region), directly south of Coen and adjacent to the south western boundary of the Kanju/Umpila/Lamalama/Ayapathu claim.

**Table 3: Native Title Proceedings in the Coen Region**

N.T. Application Name	Tribunal No.	Fed. Court No.	Approx. Area (sq. km)	Date Filed	Status	RNTBC Status
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<sup>63</sup> Data on existing land trusts courtesy of Aboriginal and Torres Strait Land Acts Branch, Queensland Department of Natural Resources and Water.

<sup>64</sup> QC99/022; Q6021/99.

Kanju/Umpila people	QC95/14	QUD6236/98	100 000 sq. km	30/10/95	Active	Registered
Kaanju, Umpila, Lamalama, Ayapathu peoples #2	QC97/7	QUD6117/98	2235.6045 sq. km	12//03/97	Active	Not Registered
Ayapathu and Olkola peoples	QC03/012	QUD6012/03	1,211 sq. km	8/10/2003	Active	Registered

Without a determination of native title in the region, there have been no PBCs established. This apparent lack of progress is not a reflection on the merit of the claims so much as the outcome of sophisticated land tenure negotiations. A State Land Dealings Project undertaken between the State Government and the claimants, involving the Cape York Land Council, Balkanu Cape York Development Corporation and the State's Cape York Tenure Resolution Task Force, has been running for several years; involving the resolution of tenure on a number of properties in the region through negotiated ILUAs, and aimed at achieving practical tenure solutions that address conservation, economic, and cultural factors while at the same time maximising Aboriginal participation as owners and managers of land in the region.<sup>65</sup> These negotiations are ongoing, and it is expected that there will be further rationalisation of the existing claims, including amalgamations and boundary revisions.

Claim design in this region has been and continues to be directed by the availability of land which may be claimed or parleyed through negotiation with the State, rather than by language group affiliation and tribal boundaries. While this is proving a successful strategy for getting land into Aboriginal ownership, it generates future complexities for setting up land-holding entities and management regimes which must encompass multi-tribal membership while at the same time ensuring there are representation and decision-making processes enshrining the constituent groups' expectations of maintaining high levels of autonomy in relation to those areas for which they have particular traditional affiliation.

<sup>65</sup> Cape York Land Council (CYLC) 2006 *Newsletter*, Vol. 1, No. 1 Nov 2006. Cape York Land Council, Cairns.

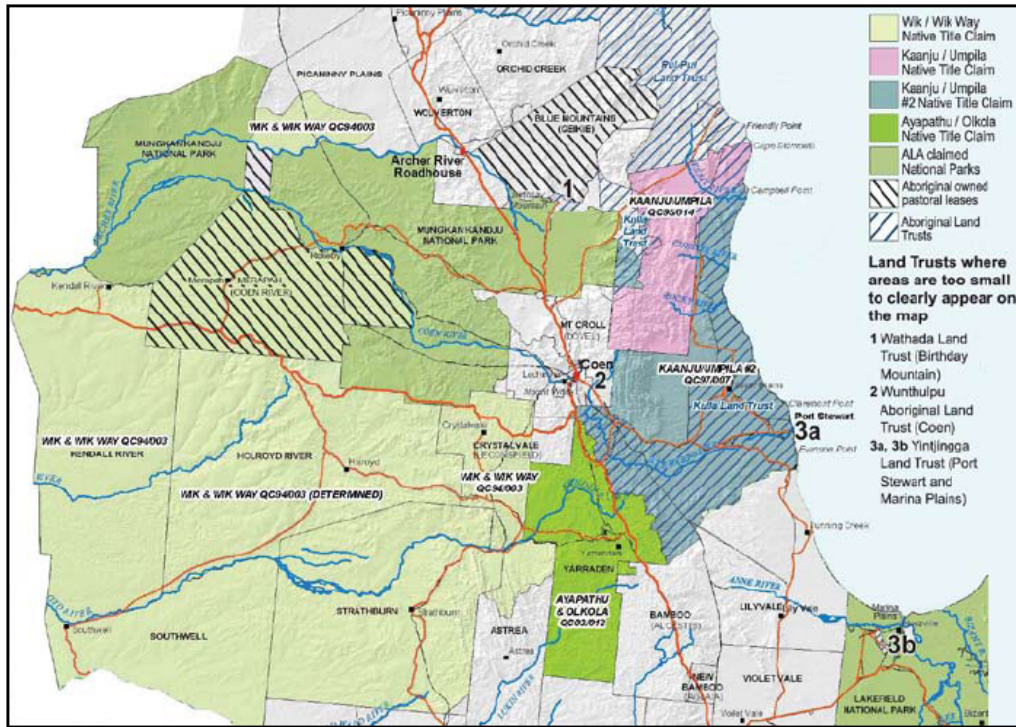


Figure 3: Map of existing and likely future Aboriginal land tenures in the Coen Region. (Adapted from map "Cape York Peninsula Claim Activity", Edition 10, 1/9/2007, Qld Dept. of Natural Resources and Water, courtesy of the Department)

## The Coen Regional Aboriginal Corporation (CRAC)

The regional planning environment has at its centre an Indigenous service Agency, the Coen Regional Aboriginal Corporation. In the absence of PBCs and operational land trusts, CRAC strives to provide support and to co-ordinate the resourcing of outstations and land-owning bodies, performing the functions at a regional level which might, in other circumstances, fall to PBCs. It serves as a model of how a centralised land management agency might operate in a region characterised by a high number of land-owning corporations which operate under several different legislative regimes and which are affiliated with different language or tribal groups and/or coalitions of such groups. It is also an example of how such organisations may develop income generating enterprises which lessen their dependence on public funding and enable them to provide a wider set of services to address the economic and social aspirations of Indigenous land holders.

CRAC was established in 1993 as a non-statutory corporation under the ACA Act in 1991. It was founded to administer CDEP, and structured to represent all Aboriginal people whose traditional lands lay in the region, and from the start was viewed by them as a means of reestablishing a presence on their own land.<sup>66</sup> It is participatory in composition with membership open to all Aboriginal residents of the region. However, its board is structured along representative lines, with members nominated from each of the language groups associated with the different outstation communities and with the township of Coen. In addition to the four language groups mentioned above, there is also Wik Mungkan and Oikola representation through the affiliation of

<sup>66</sup> Smith 2002.

outstations on two Aboriginal owned pastoral leases, Merepah and Glen Garland, which are technically outside the region, but have historically relied upon CRAC to provide administrative support.

CRAC these days derives its funding from three main sources. It receives core funding from the Commonwealth Government to cover its recurrent administrative costs; program funding from the State, Commonwealth and other sources for housing, employment and training; and it generates its own income through a number of local enterprises developed over the past four years. In 2005/2006 CRAC's total budget was approximately \$3.4 million, of which around 80 per cent was basic management and operations funding from the Department of Employment and Workplace Relations (now the Department of Education, Employment and Workplace Relations, DEEWR) and the Commonwealth's Indigenous Co-ordination Centre (ICC), and 20 per cent from program funding and non-grant income generated by CRAC services and enterprises.<sup>67</sup>

With the demise of ATSIC and the Commonwealth Government's shift away from Indigenous-specific funding programs, CRAC in recent years has deliberately moved to strengthen independent income sources through the development of several commercial operations. Four years ago it formed a proprietary limited company called Coen Business Enterprises (CBE) as a wholly owned commercial arm in order to put the organisation on a more sustainable footing and lessen its reliance upon government grant funding.

By establishing CBE as a private company, CRAC was able to preserve its status as a public benevolent institution (PBI)<sup>68</sup>, and the taxation advantages which this provides, such as competitive employee benefits. It will also ensure CRAC falls into the small or medium categories under the CATSI Act and benefits from the compliance and cost saving advantages that follow. In this and other ways it has effectively leveraged its public funding base to build up an enterprise and asset base that generates a growing income stream for the organisation through the provision of a range of services to both the Aboriginal and wider communities.<sup>69</sup> For example CBE holds a Queensland Building Services Authority licence which enables it to tender for building and construction jobs in the region. Under CBE's umbrella are also a mechanical workshop, a catering business and a screenprinting and art enterprise based in the CRAC-owned Visitors Centre at the southern entrance to Coen. In its first year of operation CBE made less than \$10,000 profit, the second year it made \$32,000 and for 2006/2007 it was expected to make over \$100,000 profit, mainly from the building and catering businesses which are proving to be the most profitable of its enterprises.

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<sup>67</sup> ORATSIC 2007b.

<sup>68</sup> Australian taxation law allows a range of tax advantages to organisations with PBI status. These include exemptions and concessions in relation to income tax, goods and services tax (GST) and fringe benefits tax relating to employees. To qualify, an organisation must have as its dominant purpose the provision of services to people requiring benevolent relief and it must be non-profit. For further information, see the Australian Tax Office web-site at <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/26553.htm&pc=001/004/031/005&mnu=1445&mfp=001/004&dst=andcy=1> accessed 15 April 2008.

<sup>69</sup> See Smith 2003.

CRAC has also invested directly in property in the Coen township by establishing a five-office commercial centre which now houses the Commonwealth Government's Rural Transaction Centre. CRAC bought the block of land; with funding from the Department of Transport and Regional Services (DOTARS) and using its CBE building team, it constructed a low maintenance building, which is now fully rented out to local organisations. The building provides office space for a number of Indigenous welfare initiatives, including the Family Income Management scheme, the local Aboriginal Justice Group, a child protection facility and a Department of Employment and Training officer. Approximately \$80,000 of CBE profits were put into the building project, and with all five offices now rented out, this investment is already generating further income for the organisation.

Two of CRAC's main functions are supporting outstations established on Aboriginal-owned land and acting as a housing organisation for those living in the township and on outstations, for which purposes it receives various Commonwealth and State grants. CRAC also employs about 100 people on CDEP. In the past it administered the National Heritage Trust (NHT) Ranger Program, a two-year grant to employ and train Indigenous rangers in the Coen area; and in recent times it has been funded by the Environmental Protection Agency (EPA) to assist settling groups on land acquired through negotiation with the State Government as part of the State Land Dealings Project.

CRAC services approximately a dozen residential outstations established on the various areas of Aboriginal land in the region, and assists the operations of several Aboriginal land trusts in the region. It has provided the foundation for a dramatic increase in the 'outstation' or 'homelands' movement in the region over the past decade, with many more Aboriginal people now able to use the semi-permanent camps they have established on their traditional lands.<sup>70</sup>

Recurrent funding for outstations comes from FaHCSIA through the ICC, and in 2006 CRAC received just over \$100,000 for an outstation coordinator and other outstation related services. It is able to use its work crew and plant to maintain access roads and provide trade services such as plumbing and building. The CRAC Board usually determines the division of 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. An example of a recent successful program negotiated by CRAC and funded through FaHCSIA on behalf of the outstations, has been 'Bush Light', which installs solar power into remote area communities. In the first round of funding, Bush Light was installed at four outstations, and in 2007 another three will receive it.

There are certain outstations which FaHCSIA will not acknowledge as outstations, because the outstations are without recognised services such as access to education, roads, water, transport and health. Thus in 2007, funding was only forthcoming for five of the region's outstations. One outstation was excluded because it is on a national park and has no secure tenure; and housing funding for another outstation had to be re-directed because the trustees of the Aboriginal Freehold land, on which it

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<sup>70</sup> Cape York Land Council n.d.

is located, argued that its current leader, who would have been the beneficiary of funding for the outstation, is not a traditional owner for the area where it is located<sup>71</sup>. Funding for these and the other outstations falling outside the FaHCSIA criteria must be found from other sources.

CRAC has developed a positive working relationship with Cook Shire Council such that, because it runs its own work crew and has its own plant and equipment, it wins a variety of small-scale civil contracts in the region; for example, it recently won the contract for operating the Coen garbage run and maintaining the town dump. Cook Shire Council also consults with CRAC concerning the Indigenous position on any new developments in the area.

## The need for a Coen Region Land and Sea Management Agency

Land and sea management issues of concern to the traditional owners of the Coen region include: cultural heritage protection; fire management; the problem of non-squatters encroaching into remote areas on Aboriginal land, often associated with illegal marijuana cropping; feral pigs; fisheries management; and under-developed infrastructure limiting access to country.

CRAC has persisted as the principal and favoured support organisation at the local level, and on the basis of its past history and its structure, it is well located to take on a more formal role in land and sea management for PBCs (once they come into being), Land Trusts and other land-owning entities in the region. The Land and Sea Management Centre was built and staffed with a co-ordinator in Coen in the early 2000s under NHT funding. However, it operated for only a few years before the Commonwealth government redirected the money elsewhere and the centre finally closed down in 2006, leaving some projects incomplete. In practice, the role has fallen to CRAC which continues to provide de facto land and sea management support, though not specifically recognised or funded to do so. For example, CRAC has taken on the task of administering meetings of the Aboriginal land trusts in the region and of organising transportation for attendees from Coen, Lockhart River, Port Stewart, and Cairns.

While some funding is sought by and goes directly to outstations, they have also historically relied on CRAC because they have had neither the resources nor the knowledge to seek funding themselves. In the view of the current Chief Executive Officer of CRAC, a priority for the region is a functional land and sea management unit which can be dedicated to providing a broad range of administrative, management and financial services to outstations and enterprises, such as cattle, on Aboriginal owned homelands.

A persistent criticism of the ALA regime in the past has been that, as with the establishment of PBCs, there has been no funding available for the recurrent operations of the land trusts established to hold and manage the land.<sup>72</sup> This has been partly addressed for those land trusts newly established under the State Government's

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<sup>71</sup> Smith (2005:9) alludes to a similar, possibly the same, dispute in relation to a disagreement about the appropriate procedure for granting access permission to a non-Indigenous researcher by a Land Trust in the Coen Region.

<sup>72</sup> Memmott and McDougall 2004, p.42.

land tenure resolution negotiations, for which the EPA now provides significant seed funding for getting the organisations up and running. Because of concerns about conflict of interest, this funding is currently administered by a private accountancy practice rather than by CRAC; it is a function which could be assumed if CRAC had formal recognition as a Land and Sea Management Agency or if there were a fully fledged agency established in the region.

## Regional Agency Models for Land Use and Management

### The Wik PBC model

The Wik and Wik Way claimants have consistently expressed a strong preference for having all Wik people represented on a single PBC ('All Wik people have spoken as one'). Their preference was for an agency type PBC with participatory membership and a Governing Committee based upon representation of the eight regional and ceremonial sub-groups from across all Wik and Wik Way country. There was an additional need to ensure that some of the Committee representatives resided 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. Thus the translation of customary membership into contemporary landholding corporations, had to take into account those post-contact historical factors that have taken people away from their country.

A key feature of the Wik PBC design was that each of the represented groups would have the capacity to meet by themselves on occasions in accordance with their customary methods of decision-making, to make decisions about critical events affecting native title in their respective regions. This aspect of the PBC is critical to ensuring that Wik and Wik Way law and custom are incorporated into decision-making on land and sea issues. However, this was also identified as a vulnerable aspect of the PBC design, with potential problems including the difficulty of individual groups having a viable meeting when key personnel may be residing in dispersed centres (for example, in Aurukun, Coen, Pormpuraaw), the need to raise funds to facilitate transport for adequate consultation, and the possibility of members being unable or disinclined to attend meetings.<sup>73</sup>

It should also be noted that decision making within each of these Wik sub-groups may still have to devolve to the clan or extended family level, before being brought back to the sub-group level, because these ceremonial and regional entities are not landholding units, nor are they units of political, social, or economic action. They do 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 each of the eight sub-groups.<sup>74</sup>

It has never been proposed that any of the representational groups be separately incorporated for business activities (as was the case for the four language-named tribes of the Coen 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

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<sup>73</sup> Memmott and McDougall 2004, p.110, Ch.7.

<sup>74</sup> D. Martin pers. comm. February 2002.



commonplace feature of the political dynamics in the Wik universe, both socially and corporately.<sup>75</sup>

Whereas in our earlier reports<sup>76</sup> we had suggested that in the absence of PBC resources, it made sense for the Wik PBC to outsource its administrative functions to the Aurukun Shire Council's Land and Sea Management Unit, it would seem now with the advent of the Chalco ILUA, that the PBC could establish its own administrative office with a Manager and secretariat. This could be based in the Chalco office complex at Aurukun (particularly if it reverts to the control of the community). The PBC's visiting consultants (for example, solicitor) would be able to reside in the adjacent accommodation area. The minimal administration services required of such a secretariat would include: dealing with correspondence; holding bank accounts, minutes, legal documents and the like; calling meetings for decision making, elections among the representative groups and information dissemination; providing feedback to native title holders; representing the PBC at meetings with development companies, government departments and authorities; and raising funds to fulfil such services.

In addition, the PBC could contract out a range of land and sea management services to the Council's Land and Sea Management Unit on behalf of the native title holders, including: land and sea management planning; provision of outstation services; provision of rangers to monitor country and carry out management projects in country; cultural heritage assessments and socio-economic impact studies prior to land developments; and employment of native title holders to participate in the range of land and sea management activities.

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<sup>75</sup> Memmott and McDougall 2004, p.111, Ch.7.

<sup>76</sup> For example, Memmott et al 2007, p.289.

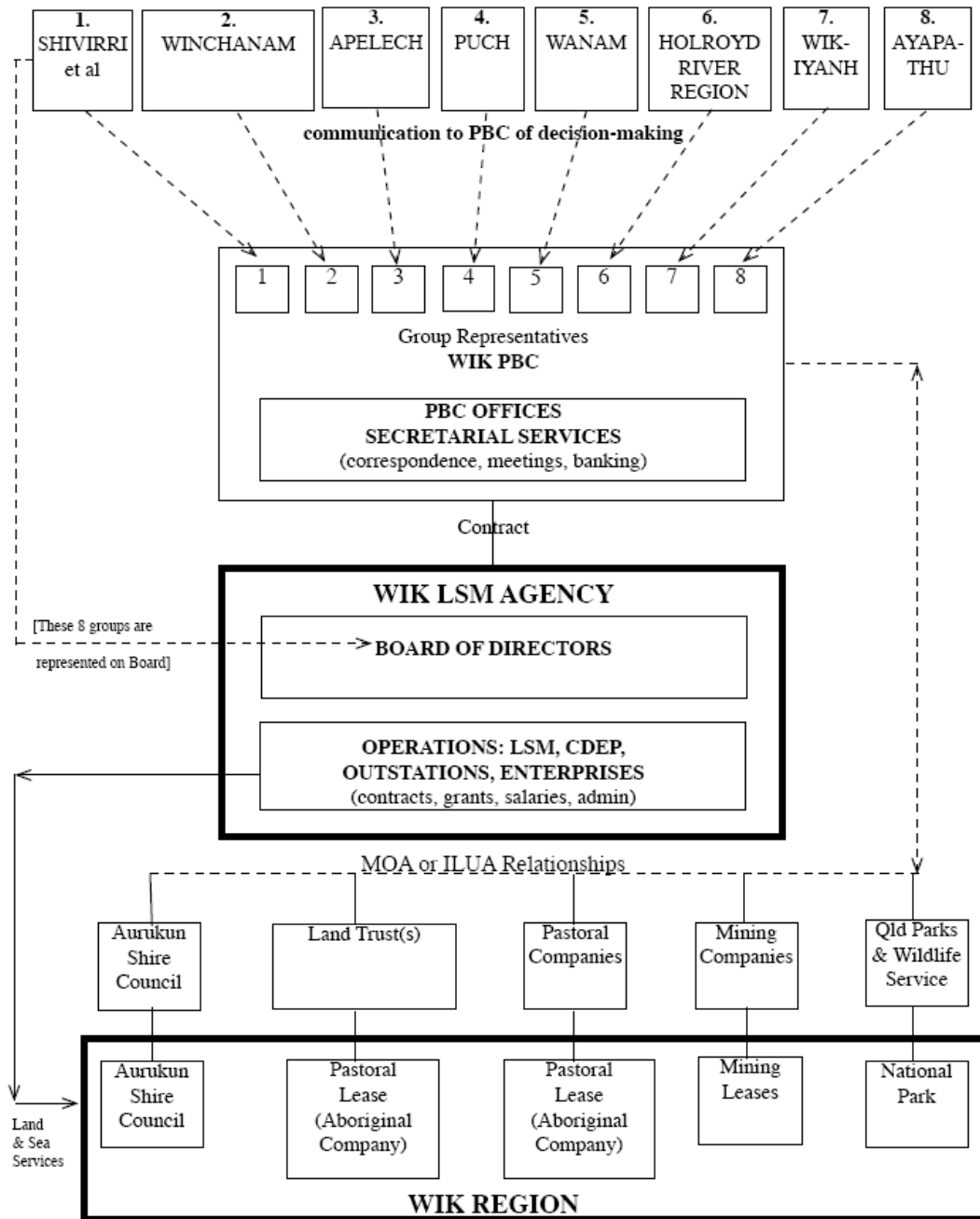


Figure 4: Wik Subregion Model, showing the proposed structural relationship between the Wik PBC and the Wik Land and Sea Management (LSM) Agency after the Chalco royalty flow allows a permanent PBC Office to be established.

### The Coen Region Model

In contrast to the Wik peoples, traditional owner groups in the Coen region expressed a preference for a structure which retains independent corporate vehicles for each of the four language-named tribes while at the same time recognising the need for a central agency for the region that will provide the necessary administration functions common to all four groups. While some land trusts and existing native title claims comprise coalitions of language groups, within these structures there is a preference for each group retaining autonomy in relation to its territorial area and the

management of that area, including appropriate representative structures within any land-owning entities, whether PBCs or land trusts.

This model is structurally analogous to the relationship which has been established between the Coen Regional Aboriginal Corporation and the outlying outstation communities which it has serviced for the past fifteen years. The model has two key structural dimensions. The first of these is an overarching corporate structure which brings traditional owner and native title groups from the region together to form a decision making committee for common purposes, such as financial administration, regional land and sea management, resourcing outstations, and liaising with National Parks Boards of Management.

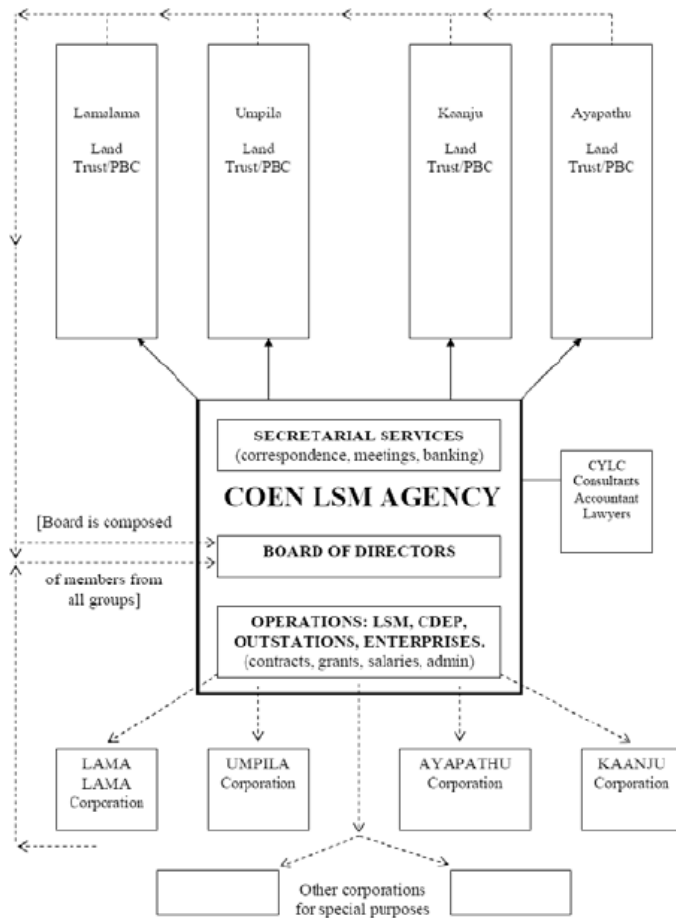
Within this wider structure, separate traditional owner decision-making committees for each of the four tribal native title groups will act as trustees for their respective local areas of land. These committees will have responsibility for making decisions about budget allocations for their own groups, use of local assets, businesses and so on, as well as PBC and land trust relevant matters, and overseeing land and sea management contracts on the group's traditional land. Eventually, this model should lead to the structural amalgamation of PBCs and land trusts for each tribal group, though this may still be some way off since it will depend upon the resolution of the political and legal impediments discussed above.

There are persuasive arguments as to why there should be one central Agency for the Coen 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 most State and Federal government funding agencies that funding goes through a regional organisation rather than to individuals, family or outstation groups. Further, while CRAC has historically acted as a de facto land and sea management agency, there is a perceived need for the more formal recognition and funding of a dedicated unit, mandated separately from the four constituent language groups as they establish their PBC/land trusts, whether as a part of CRAC or as a separate entity. The administration services required from a central Agency are likely to be similar to those described above for the Wik Agency.

The Coen region is economically 'poor' from the Indigenous perspective. While CRAC has had some success in spinning off enterprises and in using these to fund its wider operations, it continues to rely upon government grants for the major portion of its budget. Likewise, while there is small scale cattle business carried out on some outstations, these currently barely cover operating costs and outstations, too, continue to rely upon external funding for housing, basic infrastructure and members' personal incomes. While viable prospects for tourism, cattle herding, prawn farming and the like have been identified and form part of Traditional Owner aspirations, it is difficult to see these developing into a sustainable economic base without intensive external support, both financial and administrative; and there are no prospective mining or other development projects which might generate significant cash flows for land owners.

The Right to Negotiate and the ILUA provisions of the NTA provide a potential basis for negotiating benefits in return for access and use of native title lands, and in compensation for any extinguished or impaired native title resulting from land and sea

developments (for example, loss of resource collection area, damage to a sacred site etc). Mining and other development companies may also be legislatively obliged to carry out a social and environmental impact assessment in relation to their projects. Through such studies a range of economic activities can often be designed in which local Aboriginal groups can engage and which can ‘piggy-back’ on the main project. The proposed gas pipeline from PNG constitutes a project of this type which could provide such opportunities to the Kaanju and Ayapathu groups in the Coen region, who in 2006 signed a pipeline ILUA; however, by 2007 the project had been mothballed with no definite prospects of being resuscitated.



**Figure 5:** Coen Subregion Model, illustrating the proposed Coen Land and Sea Management (LSM) Agency, a set of tribal PBCs which also serve as Land Trusts, and a set of four tribal corporations for day-to-day business in the Coen subregion. This would result from an amalgamation and rationalisation of all existing PBCs and land trusts.

### *Managing Aboriginal land holding entities at the regional level*

Two key components common to the land management models for both regions are centralised Land and Sea Management Agencies providing support to land-holding entities and a strong desire for the amalgamation of PBCs and land trusts. This arrangement is predicated upon a desire to retain the traditional social organisation, land tenure and decision-making systems among groups in each region, but constrained by the necessity of incorporating traditional decision-making practices into organisations which will be economically sustainable and will comply with the legal and regulatory environment imposed by State and Commonwealth legislation.

Regional Agencies should be able to provide sufficient economies of scale for their affiliated title-holding bodies to be able to accommodate a more traditional mode of operation. They would provide contracted secretarial services to PBCs, land trusts and lease-holding corporations. PBCs and land trusts might also outsource some of their functions, for example, the management of certain areas of native title land, issuing of entry permits onto Aboriginal freehold land, and so on. The Agencies' activities will intermesh with a range of the native title rights and interests being claimed in the region with respect to the general use of country, occupation and erection of residences, hunting, fishing and collecting resources, management, conservation and care for the land, the right to prohibit unauthorized use of the land, and cultural, heritage and social functions.

In order to respond to consent requests for planning and development activities from other parties under the NTA, properly resourced consultation of native title-holders needs to be ensured. Therefore a critical design factor in the regional models is the development of satisfactory consultation and communication among land-holding entities (PBCs, land trusts, corporations holding leases, etc.), the native title-holders and the regional agencies.

A key problem for Indigenous land-holding groups is to develop a capacity to independently fund their operational as well as infrastructure costs. At the very least, a minimum income is required for a base secretarial and administration service to fulfil the legislative duties of land trusts, PBCs and lease-holding corporations (including meeting organisation and travel costs). Therefore the ability to use ILUA agreements to finance not only title-holding bodies but also their regional service Agencies will be vital because ongoing grant funding is likely to become increasingly limited.

The regional Agency model allows income derived from compensation or other benefits, such as those negotiated under ILUAs, to be channelled through the PBC to the Agency which can engage practically in a range of land-based operations, drawing upon any available infrastructure, CDEP or 'Work for the Dole' employees, community Rangers, or consultants, on behalf of the native title-holders.

The case of CRAC demonstrates the potential for an agency to develop associated income generating enterprises and to integrate these with its core functions in such a way that it continues to benefit from the advantages of being a funded service organisation while at the same time loosening its dependence upon public funding. In remote areas such as Coen and Aurukun there is significant scope for filling niche services which are not generally attractive to the private sector because of their small scale and remote location, but are feasible for local organisations whose basic overheads are publicly funded. The new NTRB/PBC funding guidelines likewise encourage PBCs to seek financial support from non-government sources. However, the reality is that for the foreseeable future, unless there are highly lucrative development projects in a region (for example, Chalco), Indigenous landholders and their service agencies will continue to require significant levels of public funding to cover their base operations and ensure their regulatory compliance. Funding will continue to be a critical limitation on the ability of Aboriginal land holders to derive real benefits from either native title or statutory land rights legislation in Queensland.

Clear rules of agreement will have to be established amongst traditional owners (including native title-holders) as to how monies coming into the regional Agency will be distributed, to complement those set down for PBC and land trust 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 (for example, as in the case of the Merapah EPAs). 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 regional Agency functions but which at the same time recognizes local native title rights in compensation outcomes or acknowledges local enterprise initiatives by individual groups.

There is a substantial dollar investment required to maintain Aboriginal traditional connection to country through customary land tenure systems incorporated into contemporary corporate entities. Traditional land management does not equate necessarily to a cheaper alternative; indeed, because of its communal nature and a general tendency toward consensus decision-making through intra-community consultation, resources are required to run what might be termed the 'software' (i.e. the recurrent administration) of traditional land management, as well as the 'hardware' (i.e. the management operations). Funding bodies all too often fail to get this balance right, so that while there may be resources available for 'doing' things (often termed project, implementation or program funding), there is little provision for maintaining the capacities of the organisation to function effectively over the longer term. The Commonwealth's belated decision to financially support PBCs through the NTRB network is a welcome step forward; one that is yet to be matched by the Queensland government in relation to the land trust set up under its ALA legislation.

## Conclusions – the sustainability of Aboriginal land holding entities under Native Title

This paper is based on ongoing research into the operations of PBCs and other Indigenous land-holding entities on Cape York Peninsula. One object of the research has been to assess the possibilities within the existing Australian planning and legislative framework for rationalising and integrating the operations of PBCs, land trusts and Aboriginal land-owning corporations so as to improve the outcomes possible from land acquired by Aboriginal groups on Cape York and elsewhere under a variety of tenures. A key to the models proposed has been to take a regional approach and so far as possible, to pool resources and service land-holding bodies on this basis.

In this paper we have reviewed developments in each of the Aurukun and Coen regions since the research was begun in 2001. Significant hurdles to the development of effective land-holding bodies identified then were funding constraints and the differing legislative requirements upon incorporation of land-owning bodies under the *State Aboriginal Land Act* and the *Commonwealth Native Title Act*. As the case of the Wik PBC shows, funding remains a constraint on the organisation's ability to fulfil even its basic legal responsibilities, let alone taking on land management functions. Without short-term prospects of funding, the Wik PBC (probably like many others in Australia) has been difficult to sustain. Fortunately it has been aided by a 'trusted outsider' professional who has acted as a broker in the inter-ethnic field,

‘straddling the gap between administrative demands and local capacity’<sup>77</sup>, and representing the PBC in Future Act and mining exploration negotiations.

While Queensland’s legislative amendment enabling the amalgamation of PBCs into land trusts is a positive initiative, there is still no movement in the Native Title regulations at the Commonwealth level which would allow the alternative possibility of land trusts incorporated in Queensland to function as PBCs. On the other hand, the new CATSI Act addresses some of the legal contradictions which previously impeded the incorporation of traditional decision-making processes into Aboriginal corporations, so that land owners now may be better able to apply their own decision-making practices to matters of native title administration. Together with the changes to Commonwealth government native title funding policy to allow NTRBs to provide ongoing assistance to PBCs, these are all positive, though limited, initiatives.

There have been further developments in the case study regions which give cause for optimism. Most notable is the Chalco project mining agreement in Aurukun, which offers the potential for the long-term prospect of the Wik PBC to become relatively secure, at least financially. A transition period is required until a royalty flow can support an administration service, secure premises and establish relevant Land and Sea Management services.

However most PBCs do not have the advantage of a multi-billion dollar mining project on their land. Such is the case in the Coen region where, other than domestic-scale cattle operations on the outstations, the opportunities for raising significant income remain limited. Though an ILUA has been signed for the proposed PNG gas pipeline, the project is yet to materialise and, in any case, will benefit only two of the Coen tribal groups.

While focus is on PBCs, the reality on Cape York is that PBCs are only one of a number of types of Aboriginal land-holding bodies, and whilst in the Aurukun region the PBC is poised to take a dominant role in land management, in Coen the scene is far more heterogeneous, with a variety of land-holding and outstation organisations networked through a central non-government auspicing agency (CRAC) for the delivery of services, infrastructure, project funding, and land management functions.

CRAC has grown to be a resilient and longitudinally stable organisation; less dependent upon especially effective individuals or ‘trusted outsiders’, than is often the case, Smith argues that it owes its success to effective decision making by its board, facilitated by a strong and positive relationship between its non-Indigenous project managers and the board.<sup>78</sup> However, its position in the regional constellation of land-owning and residential groups in Coen is analogous to that of such a person in the Wik PBC. The success of CRAC as an organisation, and in particular its administration of CDEP and development initiatives over the course of the past 15 years, has been a predominant factor in establishing residential groups in outstations on their own land, and at the same time providing the means for their engagement with wider economies.<sup>79</sup> The sustainability of these outstations depends greatly upon the strength of a centralised resource agency. In particular, CRAC demonstrates the

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<sup>77</sup> Moran 2006, p.277.

<sup>78</sup> Smith 2003, p. 104-105.

<sup>79</sup> Smith 2002.

long-term viability of a regional resource agency and the potential for such organisations to not only harness multiple pools of public project funding on behalf of their land-holding clients, but also to develop local enterprises which fulfil a need in the region, and have the potential to generate income and to provide training and employment.

Another key premise of our argument is that the cultural integrity of the native title holder community may be supported in the design of the PBC by giving primary consideration to using elements of the local Aboriginal system of land tenure and its associated decision-making processes as the building blocks in the construction of corporate landholding entities and land management structures, rather than allowing these to be subordinated to legal and administrative convenience. However in both the ALA and the native title claim processes, the structure of the title-holding corporation is often the last aspect to be considered.

In our view the preferred approach is to work with claimants from the outset on designing and establishing their PBCs and land trusts. This would shift the initial focus from the frustratingly lengthy and legalistic processes leading to a determination, to consideration of what are the optimal corporate structures that will meet the long-term outcomes which Aboriginal communities wish to achieve from their native title. As the claimants pursue their claim, important dynamic aspects of their political processes and social structuring are likely to be revealed and may hold valuable clues as to how their title-holding corporations might and should operate in reality.

A key principle is to inform the PBC design process, and that of land trusts and other land-holding corporations, with an understanding of the social structure and decision-making dynamics of the autochthonous Aboriginal land tenure system. A successful PBC or land trust must operate to mediate the transition from the Aboriginal system of land tenure to the holding of title under a corporate, statutory entity, whose governing structures permit the replication of 'traditional' membership and decision-making processes, into a corporate structure capable of articulating with a variety of non-Indigenous planning and land management entities. Major design challenges include maintaining the integrity of traditional decision-making processes whilst responding to the legal and administrative requirements of the various statutory regimes for Aboriginal land rights; structuring the membership to reflect traditional social organisational arrangements; and having a capacity to subsume any politicization and power politics within the native title group.

The preferred models to emerge for each region (and as reflected in our research reports) have as a core structural element a centralised Land and Sea Management Agency, providing administrative and other functions to the various Aboriginal land-holding entities in its region. In other respects, however, the models differ, reflecting the different cultural, demographic and socio-geographic landscapes of each region. This can be clearly seen in the case studies which present almost two extremes from, on the one hand, a relatively homogenous tribal/cultural native title group, a limited number of overlapping tenures and good prospects for the generation of independent income, to on the other hand, a region in which there are several distinct and strongly independent tribal groupings, a variety of overlapping and interweaving tenures, and ongoing land tenure negotiations without (as yet) successful native title



determinations. Yet in both regions, there is an awareness of the need to support and work through regional institutions in order for localised land-holding groups to achieve their cultural and economic objectives, and to retain a desirable level of autonomy and control over land to which they have particular traditional connections.

But the present reality is that while the models presented in this paper are an ideal toward which arrangements in each region are moving, and while there have been encouraging movements forward at local, state and Commonwealth levels, the existing PBCs and land trusts in both regions are under-resourced, under-supported and are functionally dormant. They rely upon minimal external support, in the Wik case from a lawyer in Brisbane and the Aurukun Council, and in the Coen case from an auspicing NGO (CRAC), to manage their traditional title, including responding to important economic opportunities such as Chalco and the PNG gas pipeline. Based on these two case studies, it is not possible to say that PBCs and land trusts are currently effectively managing their own affairs through the exercise of traditional decision-making.

Furthermore, while there have been local developments which have the potential to bring significant benefits to native title-holders, to date their engagement with third parties has likewise relied heavily upon the external support and expertise of trusted outsiders and established organisations such as CRAC, the Aurukun Council, Cape York Land Council and Balkanu. It is unrealistic to expect that small, poorly resourced PBCs will ever be able to manage external relations involving ILUAs and commercially complex negotiations; however, a well resourced regional land and sea management agency could provide the management framework through which PBCs and land trusts could either engage directly with third parties and/or with NTRBs and other sources of expertise to assist them. While the recent change to native title funding policy holds out the promise of placing PBCs on a more sustainable footing, the next logical step of establishing regional land and sea management agencies to assist them to maximise economic opportunities is yet to be taken.

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