



Cape York Land Council Aboriginal Corporation
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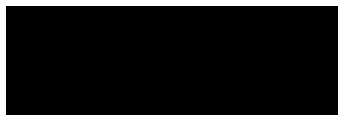
Joint Standing Committee on Northern Australia
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Dear Committee Members

Please find attached a submission from the Cape York Land Council regarding the *Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia*.

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

Yours sincerely,



Richie Ah Mat
Chair
Cape York Land Council

Cape York Land Council submission regarding the Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

Terms of Reference

The Joint Standing Committee on Northern Australia will inquire into and report on the opportunities and challenges associated with land rights, native title and other land-related agreements (together with payments, benefits and access arrangements under these agreements) for the purpose of engaging Traditional Owners in the economic development of Northern Australia, including, but not limited to:

1. The current engagement, structure and funding of representative bodies, including land councils and native title bodies such as prescribed body corporates;
2. The role, structure, performance and resourcing of Government entities (such as Supply Nation and Indigenous Business Australia);
3. Legislative, administrative and funding constraints, and capacity for improving economic development engagement;
4. Strategies for the enhancement of economic development opportunities and capacity building for Traditional Owners of land and sea owner entities.
5. The principle of free, prior, and informed consent.
6. Opportunities that are being accessed and that can be derived from Native Title and statutory titles such as the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Introduction

CYLC notes that previous inquiries and policy development processes have enquired into similar matters as the *Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia*. Many parties, including CYLC, have made submissions to these previous inquiries, and many previous findings will be relevant to the objectives of this current inquiry. CYLC refers the Committee to outcomes of previous processes such as the Commonwealth Government's *Developing Northern Australia Green and White Papers*, the Queensland Government's *Inquiry into Service Delivery in Queensland's remote and discrete Aboriginal and Torres Strait Islander communities*, and COAG's *Investigation into Indigenous Land Administration and Use* as having relevance to the current inquiry.

CYLC's comments in this submission are relevant to our extensive experience with seeking to facilitate the participation of Traditional Owners in economic activities in Queensland's Cape York where Queensland and Commonwealth statutory regimes apply. Comments about our experience on Cape York are relevant to the rest of northern Queensland because the same regimes apply. Broadly speaking the same generic issues exist across northern Australia, and the remedies suggested for Cape York will also be broadly applicable elsewhere.

Engagement of Traditional Owners in the economic development of northern Australia, particularly Cape York, has been an objective of the Cape York Land Council and our sister organisations Balkanu Cape York Aboriginal Development Corporation and Cape York Partnerships, collectively known as the Cape York Regional Organisations (CYROs), for over twenty five years. Over this time we have built considerable understanding of the elements necessary to achieve economic development on Cape York and have built substantial capacity, networks and knowledge about the people, the land, and the opportunities and challenges to using land for modern, mainstream economic purposes. It is true that significant opportunities exist and that Cape York Aboriginal people have development aspirations, but it is also true that substantial challenges and obstacles remain to realising these opportunities.

From the perspective of twenty five years' experience CYLC has observed the comings and goings of many policies, programs, agencies and service providers seeking to promote economic development. However, the ephemeral nature of programs and capricious nature of policies has meant that the

consolidated and sustained effort required to enable a suitable level of economic activity on Cape York has not eventuated. Some enabling circumstances have improved, but some challenges are greater than ever.

Fundamentally, what is required is a politically bipartisan commitment across all levels of government to resource and implement a suite of development arrangements in partnership with Cape York and other northern Australia Indigenous people over a sustained period of time. A generational commitment must be made so that sufficient time and resources are made available to implement change and solidify the new arrangements and ensuing economic activities. All stakeholders – the Commonwealth Government, State / Territory Governments, local governments, Indigenous people and organisations, industry groups, markets, consumers and others – must have commitment to and confidence in the agreed arrangements and work towards achieving them in a coordinated and cooperative way.

Without such a vision and commitment, attempts to engage Traditional Owners in economic development will continue to suffer from the ad hoc, inconsistent, stop start and splintered approach that has resulted in the poor outcomes we have witnessed over the last twenty five years. The unfair and unreasonable conclusion by some politicians that Native Title is a barrier to development in northern Australia rather than a natural source of strength and wealth will also remain. Northern Australia's Indigenous people, and the northern Australia economy, will continue to suffer as a result. A sustained, resourced, bilateral, whole of government partnership with Indigenous people that addresses the issues raised in this submission must be a recommendation coming from this Joint Standing Committee Inquiry if the Inquiry is to be of real value and service to Australia.

Key Points

- A politically bipartisan commitment is essential across all levels of government to resource and implement a suite of arrangements to facilitate development in partnership with northern Australia Indigenous people over a sustained period of time.
 - Arrangements must build on existing strengths and utilise organisations with an established track record, knowledge, networks and skills.
 - A three level governance structure (regional, sub regional and local) is required to provide development enabling services, to support and implement Traditional Owner decisions about land use and development, and to support Traditional Owner development of their own businesses based on their land.
 - Commonwealth and State / Territory regimes regarding Aboriginal rights and interests in land, and land use, must be reconciled so that they work compatibly together.
 - Processes for native title consent should be simplified without eroding Traditional Owner rights.
 - More research is necessary to build knowledge about land use capability, and agreement through statutory plans about land uses.
 - Land use for environmental conservation should be structured as economic development via the purchase of public-good environmental services and outcomes off private Aboriginal land.
 - Transport, communications and other types of infrastructure, and municipal service delivery, require improvement to facilitate economic activity.
 - The Land Administration System on Aboriginal land must be upgraded, including tenure transfers and land title registrations, so that leases may be more easily granted.
 - Capital must be able to be attracted for investment in Aboriginal land, enabled by a mechanism such as a trust fund to underwrite investment.
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1. The current engagement, structure and funding of representative bodies, including land councils and native title bodies such as prescribed body corporates;

Representative bodies and prescribed bodies corporate - Native title representative bodies and service providers (NTRB / SPs), including CYLC, have been implementing the *Native Title Act 1993* (Cth) (NTA) for 26 years. Over this period significant progress has been made with native title claims, determinations and the establishment of Registered Native Title Bodies Corporate (RNTBCs). On Cape York for example approximately 45% of the land area has been the subject of a native title determination, almost all remaining claimable land is under claim, and thirteen RNTBCs have been established to hold and manage native title rights. Sea claims will also be lodged soon. In the foreseeable future all land on Cape York will have been the subject of a native title determination and RNTBCs will exist for all determined land. Other regions in northern Australia are progressing towards similar outcomes.

Northern Australia therefore is progressing towards a near-future situation where native title determinations have been completed and ensuing rights and interests are held by prescribed bodies corporate. This is a very important stage in the restoration of Traditional Owner rights and the creation of structures that potentially enable Traditional Owners to engage with mainstream economic activities. However, the experience on Cape York and elsewhere has been that RNTBCs require ongoing assistance to manage native title rights and subsequent Traditional Owner benefits. The support RNTBCs require includes legal, financial, operational, corporate governance and distribution of benefits advice and assistance. If this support is not provided most RNTBCs will be unable to effectively perform these functions and the benefits of native title rights will not be achieved. If it comes to this then much of the investment and effort made to determine native title and establish RNTBCs will largely have been wasted.

To avoid this undesirable situation the functions of Native Title Representative Bodies / Service Providers (NTRB / SPs) need to expand and transition to support the exercise of native title rights in a post-determination environment. NTRB / SPs should be funded to provide the necessary legal, financial, operational, corporate governance, benefits distribution, and other advice and assistance to RNTBCs. These services need to be delivered at no or very low cost because most RNTBCs currently have limited incomes and this is likely to continue to be the situation for many groups for the foreseeable future. A key objective of support from NTRB / SPs to RNTBCs must be to make use of native title rights to generate an income for RNTBCs and the Traditional Owners they represent.

An expansion in the functions of RNTBCs should be to also represent and support Traditional Owners in the exercise of their statutory land rights and cultural heritage rights under State based legislation such as the *Aboriginal Land Act 1991* (Qld) and *Aboriginal Cultural Heritage Act 2003* (Qld), and the multitude of land and resource management legislation that regulate land use such as the *Planning Act 2016*, *Vegetation Management Act 1999*, *Nature Conservation Act 1992* (Qld), *Mineral Resources Act 1989* (Qld) etc. This expansion of RNTBC functions is so Traditional Owners, and external entities that wish to engage with Traditional Owners, have a corporation that provides a "one stop shop" for all native title, statutory land rights, cultural heritage and other land related matters.

The corollary of the expansion of RNTBC functions to also address relevant State legislation is that NTRB / SPs roles and functions should also expand to include legal, financial, operational, corporate governance, distribution of benefits, and other advice and assistance relevant to State legislation. However, unlike the support that the Commonwealth Government provides for implementation of the NTA and the operations of RNTBCs, the Queensland Government provides only limited support to Aboriginal corporations in relation to State legislation, and often does not address critical needs and issues. The Queensland Government must review and increase the level of support it provides so that its legislation is competently administered. This review must be undertaken in consultation with

Aboriginal land holding corporations and other parties with an interest in this matter to identify the critical needs of corporations and how support may be effectively provided.

Within each RNTBC area of responsibility there are usually several Traditional Owner groups with interests in separate parts of the area. These separate areas are the land, or “country” traditionally owned by separate Traditional Owner groups. On Cape York RNTBCs recognise the principle that only the Traditional Owners may make decisions about, or “speak for”, what happens on that land. RNTBCs simply implement decisions that the Traditional Owner group makes. Traditional Owner groups therefore also require capacity to undertake collective decision making processes, and speak for their country.

Corporate coordination - Aboriginal land interests on Cape York would be best represented and managed by a three level structure to competently satisfy the responsibilities of Commonwealth and State regimes and to make the most of economic development opportunities.

The broadest level structure is the regional level where professional services and support are provided to assist the functions of sub regional structures. CYLC currently operates at the Cape York regional level. The functions of NTRB / SPs, such as CYLC, should be expanded to take on the delivery of legal, financial, operational, corporate governance, distribution of benefits, and other advice and assistance relevant to the requirements of Commonwealth and State legislation to sub regional organisations such as RNTBCs. The regional level body would also provide services, such as business planning, book keeping and payroll services, to local level Aboriginal businesses if required. This service is important because some Aboriginal businesses have the ability to deliver a good or service, but struggle with the “paperwork” that is also a necessary part of business operations.

In addition, the regional level structure should also be involved in identifying and attracting regional economic opportunities such as cattle, tourism and mining and linking them with opportunities on Aboriginal land. An essential part of this function would be to conduct due diligence research and provide advice to sub regional organisations and Traditional Owners, and government or other investors, about the merits and prospects of proposed developments. A regional level structure such as the CYROs could perform such a function because of our extensive experience with project proposals and knowledge about what is viable where on Cape York.

An economic opportunity is emerging on Cape York in relation to water whereby it is proposed that RNTBCs and Aboriginal freehold trustees are provided with water allocations that they can use or trade with other parties. CYLC has previously proposed that if an RNTBC has not yet been established, but a native title claim lodged, then CYLC could hold the water allocation for that area and trade the water on behalf of Traditional Owners until such time as the claim is determined and the RNTBC established. This is another example of an important function that a regional level structure could perform.

The mid-level structure is at the sub regional level, such as an RNTBC, which holds and manages Traditional Owner rights and interests in land, including native title, statutory land rights (such as Aboriginal freehold), and cultural heritage. In a region such as Cape York there could be approximately fifteen or more sub regional structures. The sub regional structure should be positioned with responsibility as the portal between Traditional Owners and the rest of the world. As such, one of its main roles would be to identify the Traditional Owner group (and in some cases other Aboriginal people with interests) relevant to native title, land rights and cultural heritage issues. To assist its functioning the sub regional structure would receive professional services from the regional structure. In addition, the sub regional structure could proactively engage with sub regional specific economic activities, such as timber, fishing and road building, depending upon the sub region’s resources. A separate business arm of the sub regional structure could be established to deliver certain goods or services if this approach was supported by Traditional Owners.

The grass roots structure exists at the local level and is typically the Traditional Owner group for an area of land. Several Traditional Owner groups are likely to exist within a sub-regional area. Traditional Owner groups require their own structure which functions to make decisions about how their native title, land rights and cultural heritage rights and interests are exercised, such as whether to provide native title consent for a proposed future act, use of Aboriginal freehold rights, and how cultural heritage should be managed.

Benefits from the use of land, such as native title compensation, lease rent from Aboriginal freehold and cultural heritage monitoring, should be collectively received by the Traditional Owner group and then distributed to individuals according to the rules of the group. The sub regional structure assists the Traditional Owner group to engage in processes associated with their land, assist their decision making processes and implements administrative procedures required to enact Traditional Owner decisions.

The local level will also generate small Aboriginal businesses to participate in economic activities, employ local people and provide land based goods and services, such as tourism operators, cattle and crop farmers, fishers, land managers, shop owners, tradespeople, etc. These businesses will have a relationship with the sub regional structure to secure tenure to land through a lease. Businesses will also have a relationship with the regional structure, if desired, to obtain subsidised business support services such as business planning, book keeping and payroll services.

2. The role, structure, performance and resourcing of Government entities (such as Supply Nation and Indigenous Business Australia);

All Commonwealth entities, including Supply Nation, the ILC and IBA, operate across Commonwealth and State jurisdictions, usually with a poor understanding of the different opportunities inherent in native title and statutory land rights, and with limited support from other Commonwealth agencies. Therefore, at the regional level, NTRB / SPs have a critical role to play in supporting the work of these entities if there is Commonwealth-led reform to the strategic function and operation of the regional arrangements.

The IBA model fails to give the necessary support to indigenous businesses, particularly small business. The IBA model focusses on business planning and financing and not the broader support that is often required to keep a business afloat in remote areas such as Cape York. IBA does not have the experience in tenure resolution, community engagement, agreement-making and other functions critical to building and maintaining a successful business on indigenous land.

Indigenous business support is too often seen as business planning and financing rather than the more holistic approach. Organisations such as Balkanu recognise that a broad range of support is often necessary to achieve successful indigenous businesses. The Cape York Regional Organisations seek to ensure that the range of support required by indigenous businesses are provided from the one group with a deep understanding of Cape York. Organisations such as My Pathways, Many Rivers Microfinance, IBA and the ILC cannot provide that holistic service.

3. Legislative, administrative and funding constraints, and capacity for improving economic development engagement

Economic development in northern Australia is, and will continue to be, predominantly based on land use activities such as agriculture, mining, tourism, infrastructure construction, and environmental conservation. Indigenous land rights and / or native title rights exist in the majority

of land in northern Australia so development must occur in the context of an Indigenous domain. For example, on Cape York native title has been determined to exist in 45 percent of the land area and is anticipated to be determined in approximately 98 percent of the land area within two years, often coexisting with a form of tenure such as pastoral lease. Sea claims will likely determine native title to exist in most surrounding sea country. Statutory land rights, in the form of Aboriginal freehold tenure, exists over approximately one third of the area of Cape York, often coexisting with native title, and this area is growing. Much of the rest of northern Queensland is similar, although not quite as strong an Indigenous domain as Cape York. Development proposal and assessment processes therefore must take this reality into account.

The fact that northern Australia is an Indigenous domain where statutory land rights and native title rights have significant influence over development decisions presents opportunities and challenges for engaging traditional owners in economic development. The opportunities are inherent mainly in Indigenous peoples' desires for greater engagement in the mainstream economy, and less engagement in the welfare economy. The challenges and constraints are inherent mainly in legislative settings, administrative arrangements and information availability.

Some of the constraints to economic development include:

- a. *Commonwealth vs State legislative and administrative regimes*: Native title rights pursuant to the NTA and land rights pursuant to Queensland's *Aboriginal Land Act 1991* (ALA) are not entirely compatible or complementary. The ALA and NTA need to be rationalised to ensure land rights and native title rights complement each other so that in areas where they coexist these rights enable development rather than complicate and constrain land use and development.

One necessary reform is to better align the structure and functions of corporate bodies to hold and manage native title and statutory land rights. Currently it is possible for one Aboriginal corporation to hold native title rights and another Aboriginal corporation to hold Aboriginal freehold land rights for the same area of land. There are several examples of this situation on Cape York. Development based on the Aboriginal freehold tenure usually requires native title consent, but this becomes problematic where two Aboriginal corporations are competing to determine outcomes and derive benefits from the same area of land.

A regular outcome is that development doesn't proceed on this land because of conflict between the corporations, and native title consent and / or the grant of a lease is not forthcoming. Stronger linkages must be developed between the ALA and NTA to ensure that only one Aboriginal corporation exists to hold native title and land rights for an area of land, and that the rules of this corporation accommodate management of the land to provide benefits to all Aboriginal parties with an interest in that area of land.

Another disjuncture between Commonwealth and State systems is that native title rights and interests based on the Commonwealth's NTA are not acknowledged or recorded in State / Territory government land title systems, such as Queensland's Land Title Register. Furthermore, statutory land use plans, such as local government planning schemes in Queensland, do not show the native title status of land. This lack of consolidated information means that developers do not have a single point of reference to identify the ownership, planning controls, native title status and contacts, and other relevant information.

Without this information developers may be reluctant to propose development for uncertain areas, or they may proceed with development without addressing native title issues until issues come to a head, and then development may cease. The

Commonwealth and States / Territory need to identify ways in which native title can be recorded in land title systems so that information is available to prospective land users, and native title issues proactively addressed prior to the proposed development significantly progressing.

- b. *Native title consent*: Native title exists or may exist in most of northern Australia so the consent of Traditional Owners, in the form of an Indigenous Land Use Agreement (ILUA), is usually required before development may proceed. This applies to most land except fee simple freehold land, so Aboriginal freehold, pastoral lease and other land under a State tenure generally require an ILUA consenting to the development. Consent provided through an ILUA is usually reliant upon some benefit, such as employment or other form of compensation, being provided to the Traditional Owners, and the negotiation of an ILUA can be very successful in facilitating Traditional Owner engagement in development.

However, ILUA negotiations are typically time consuming and expensive and this alone can discourage proponents from pursuing development in areas where native title exists or may exist, even though development potential exists. For example, pastoral lease holders on Cape York who wish to diversify their land use activities usually require an ILUA to permit the desired lease amendments. However, despite indicating their desire to make such lease amendments no pastoralist has proceeded because of the obstacle presented by the need for an ILUA. If land use diversification was to occur this could provide benefits to the pastoralist and Traditional Owners.

To address the ILUA obstacle CYLC has been assisting Traditional Owners to negotiate “process ILUAs” in Cape York Aboriginal towns where development is anticipated. These process ILUAs do not consent to a particular development, but instead they provide consent to a simplified process for consent for when future development is proposed. Process ILUAs have potential to integrate with town planning processes that identify land use aspirations and future land use.

Process ILUAs can also include formulas for the calculation of native title compensation, and protocols for the protection and management of Aboriginal cultural heritage. Process ILUAs retain and sometimes enhance the rights of Traditional Owners to consent to and condition development, whilst also making the overall native title consent process faster, cheaper and easier for all parties. Similar process ILUAs should be negotiated across northern Australia, especially on land where Indigenous people also hold tenured land rights such as Aboriginal freehold, so that ILUA negotiations are not a significant deterrent to development. A template process ILUA could be developed as a starting point for negotiations.

- c. *Conservation vs development*: Development in northern Australia is significantly and increasingly constrained by environmental conservation legislation and statutory land use plans which aim to protect environmental values. Statutory Aboriginal land rights are severely affected by these constraints because Aboriginal freehold land frequently has high conservation values because it has not been developed. Despite Aboriginal freehold land being a privately owned tenure providing for unrestricted land use, Aboriginal private property rights and development options are being progressively constrained by legislation such as Queensland’s *Planning Act 2016* and its development assessment processes, which require compliance, amongst other things, with the *Vegetation Management Act 1999*.
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Aboriginal private property rights and land use options are being constrained without consent from, or compensation to, the land owners. The *Vegetation Management Act 1999* alone has effectively stymied much land use development in northern Queensland, and especially on Aboriginal freehold land, because it prohibits the clearing of remnant vegetation, and almost all Aboriginal freehold land is covered in remnant vegetation. The *Vegetation Management Act 1999* does provide theoretical exemptions for some Aboriginal freehold land but qualifying for the exemptions entails a process that is beyond the capacity of the Aboriginal land owning corporations. Queensland's *Vegetation Management Act 1999* is just one example of many regulatory constraints on development on Aboriginal land.

Cape York Aboriginal people insist that their right to use their private property as a vehicle for their economic development must not be suppressed as a way of offsetting environmental damage that has been or will be caused by development in other parts of Queensland and Australia. If Aboriginal peoples' property rights are proposed to be restricted then this should occur only with their consent through an ILUA, and they should be compensated for any loss of opportunity to use their land. They must also be supported to pursue other forms of economic activity that do not involve prohibited land uses.

If private landowners, including the owners of Aboriginal freehold land, are constrained by law and statutory plans from using their land for mainstream economic activities (such as agriculture) because government policy requires that this land should instead provide public good environmental outcomes, then the public must pay private landholders for their loss of development options by paying for the environmental / ecosystem goods and services provided by their land. Environmental services include carbon sequestration, biodiversity and threatened species protection, landscape protection, erosion management, water quality improvement, and control of pests and weeds. All Australians enjoy the benefits of these outcomes. Achieving these outcomes however requires proactive management of land – unmanaged wilderness does not deliver the same services – so landowners must be paid to manage their land to deliver these public services.

Environmental conservation therefore must be considered a form of economic development in northern Australia, and Traditional Owners must be heavily involved in this economic activity on Aboriginal freehold land and other land they traditionally own. For example, carbon abatement and sequestration is a growing area of the conservation economy and has potential to more significantly involve Traditional Owners.

Carbon abatement and sequestration through savannah burning provides an important opportunity for Traditional Owners on Cape York. CYLC is supporting Traditional Owners to have their rights recognised so that they achieve the benefits from this industry to which they are entitled. This is a modern economic activity based on traditional knowledge and practice. The experience on Cape York has been that there has been a rush by outside aggregators to monopolise this opportunity without respecting the rights of Traditional Owners.

More broadly, the Commonwealth and State / Territory Governments should review legislation and statutory plans that restrict land use in northern Australia to achieve environmental outcomes. The regulatory mechanisms in these laws and plans should be amended so that they do not achieve their objectives by simply preventing certain land uses, because this form of land management will not achieve desired environmental outcomes and robs land owners of rights and opportunity. Instead, laws and plans

should take a proactive approach where governments purchase or lease services from land owners to manage their land to achieve environmental outcomes.

Partnerships could be formed between government and environmental / philanthropic / business organisations to fund these initiatives. Traditional Owners would enthusiastically and competently take up opportunities to manage their traditional land to deliver environmental services to the Australian public, such as climate change mitigation, biodiversity protection and water quality improvements if suitable investments were made to purchase desired services and outcomes. Economic and environmental outcomes will not be achieved if land is simply locked up by regulation, unused and unmanaged. Further, the economic development prospects for Traditional Owners will only decline further if full use is not made of the opportunity for public good conservation on private indigenous land.

- d. *Land use capability information*: Economic development in northern Australia is also heavily constrained by a lack of information about land use capability. In Cape York for example, information about land that is most suited for different uses is limited, so there is limited knowledge about where economic developments could be targeted. Previous information gathering exercises have been useful, but not comprehensive, and the information has not been further assessed to indicate where, for example, different types of agricultural activities would be most suited based on the coincidence of suitable soil type and fertility, water availability, terrain, necessary infrastructure, environmental constraints, etc. Instead, the onus is placed on proponents to do this research to assess potential locations to conduct their business.

To encourage land based economic development governments should proactively research and assess land use capability in northern Australia to identify development potentials and their locations. Aboriginal freehold land should be a target of this process and the process should result in a "Prospectus" being prepared for each Aboriginal freehold land owning corporation which identifies economic potentials in their land such as agricultural options, sand, gravel and timber resources, tourist attractions, and conservation economy opportunities. With such a Prospectus the Aboriginal freehold land owners could promote that Traditional Owners take up the opportunities identified either directly or in partnership with another party, or the land could be leased to another party to conduct the business and engage Traditional Owners through employment or contract.

- e. *Infrastructure*: Infrastructure provision and economic development operate as complementary and iterative processes whereby transport, communication and other infrastructure assets enable economic development activities, and as economic activities increase additional infrastructure is required. Economic development in northern Australia, including in remote Aboriginal communities, is already supported to an extent by existing infrastructure. In remote Aboriginal towns, the substantial investment in urban infrastructure, such as electricity, water, sewerage, roads, airstrips, phone and internet, education, health and police facilities, office buildings and houses, etc provide opportunities for economic development based on small and medium scale enterprises and home ownership. These economic activities should exist in addition to activities based on land use for primary production.

A workforce, including skilled workers, also exists with this urban infrastructure so research is required to identify the types of enterprise that could make use of these existing assets. Home ownership could be a key plank in this urban economy because if the majority of people in Aboriginal towns were home owners this would support a

service industry to maintain these private properties. The land administration system reforms that are discussed in point 4 below are also necessary to enable urban enterprise and home ownership.

To increase certainty and opportunity for urban development and land based primary production the reliability and extent of infrastructure networks should be improved. Improvements to transport infrastructure, such as all-weather roads, and better rail, air and sea transport facilities will all enable and enhance economic activity.

For example, all weather roads on Cape York and a live cattle export facility at Weipa would provide substantial support and certainty for the beef industry, and there is significant potential for Traditional Owners to be more involved in cattle by making use of their Aboriginal freehold land rights and employment on pastoral leases. Similarly, communications infrastructure, such as phone and internet networks, need to be improved to provide more reliable connectivity in northern Australia so that business may be conducted with more certainty. It is a frequent experience on Cape York for phone and internet services to be disrupted, and this in turn disrupts the conduct of business.

- f. *Tax mechanisms:* Local economies in Cape York Aboriginal communities are almost entirely based around the transfer of government welfare and service delivery, but there is substantially less product or tax revenue generated from these places that feeds back into the Australian economy. Reforms must aim to facilitate the use of Aboriginal land and infrastructure assets to generate a real and diversified economy and accelerate the move away from the welfare economy.

Tax exemptions for Indigenous businesses in remote locations have merit and would help to stimulate and sustain economic activities. A new tax regime should be developed and applied to this class of economic activity. However, an amended tax regime would only benefit profitable companies. Additional incentives for Indigenous business should also be provided such as start-up funding and higher rebates against operating losses, such as Indigenous employment costs, so that businesses successfully establish and become profitable and tax paying operations. In this way Aboriginal communities could become financial contributors to Australian society where their outputs become greater than welfare inputs.

- g. *Service Delivery Reform:* Currently, the Commonwealth and State governments play the role of funder, purchaser and direct provider of services into Aboriginal communities, and there is little influence by the community over the services that are delivered to it. Economic development would be supported by governments reforming their role to being funder and co-purchaser of agreed outcomes in cooperation with communities.

This arrangement would allow Aboriginal people to be more directly involved in determining the services that would be most beneficial to their community and could be more involved in being the service providers. This would also support procurement policies that have been introduced by the Commonwealth and Queensland Government whereby governments purchase a portion of their goods and services from Indigenous providers. This is consistent with current ideas and advice provided by Empowered Communities, Pama Futures and also the Queensland Productivity Inquiry into Service Delivery in Queensland's remote and discrete Aboriginal and Torres Strait Islander Communities, and compatible with the three level (regional, sub regional and local) governance structure discussed under point 1.

- h. *Capital attraction*: Economic development on Aboriginal land, like development on any land, must be able to attract capital for investment, but because Aboriginal freehold land is inalienable it cannot be used as collateral for investment security. A lease of Aboriginal freehold land is alienable and can be used as collateral, but finance providers are reluctant to accept a lease as collateral because of the limited market for lease trading in remote Aboriginal land.

To address this critical issue a method must be established to enable the attraction of capital investment in Aboriginal land. Mainstream finance providers would willingly provide loans for investment in Aboriginal land if there was a clear and certain process to recoup finances in the event of default by the borrower. One such method could be a trust that acts as guarantor for capital investments. A trust fund could operate through a combination of funds deposited by Aboriginal corporations from lease payments and underwriting by Commonwealth and State governments.

- i. *Business incubation* - There are limited examples of small businesses operating on land owned by Aboriginal corporations. However there are some activities delivered by local governments and other service providers, often employing local Aboriginal people, which have potential to transition to small businesses where locally based Aboriginal providers take up these service delivery roles. Aboriginal people are currently employed in ranger, fishing, retail and other roles where they gain skills that could be utilised in a private business.

However, there are limited supported pathways for local Aboriginal people to take the step up from employment to small business operator. Additional support needs to be provided to Aboriginal people with skills and aspirations to be small business operators by a regional service provider with a deep understanding of Cape York, such as Balkanu. In addition, governments and other employers should be incentivised to manage their service delivery program as an incubator for their Aboriginal employees and assist them to transition to self-employed business operators if this is their aspiration.

- j. *Build on existing strengths* – Enhancing opportunities and building the capacity of Aboriginal land owning corporations to engage in economic development is a role that is taken on by numerous entities in Cape York, such as State and Commonwealth agencies, IBA, ILC, church groups, CYLC, Balkanu Cape York Aboriginal Development Corporation and various others. It has become a crowded space with multiple players with multiple agendas with variable abilities and experiences providing multiple points of view. The result is that the message to Aboriginal corporations is mixed and creates too many variables and options to consider, and often the messages are naive because of the lack of understanding of the messenger about the local situation.

To improve this situation, programs to enhance opportunities and build the capacity of Aboriginal corporations should be rationalised and strengthened by concentrating program delivery through entities with experience, knowledge of and networks within a region. In Cape York for example, the most experienced, committed and knowledgeable entities with deep links into the region and understanding of the land and people are the Cape York Regional Organisations (CYROs) consisting of CYLC, Balkanu and Cape York Partnerships. Government should recognise the value in the CYROs and work in partnership with them to build Aboriginal corporations' capacities to realise the economic development opportunities in their land.

- k. *Implementation Plan*: To implement the reform strategy proposed above an All Parties Implementation Plan, identifying actions, roles and responsibilities, timelines and

resourcing should be developed and implemented by Commonwealth and State governments and other stakeholders. Required actions include statutory reform, policy reform and administrative actions.

The Queensland Government will have major responsibility for the implementation of actions because its legislation and policies regulate most elements of land use. However, implementation of these actions will also require collaboration and cooperation between the Queensland Government and other parties. For example, CYLC has responsibility in relation to native title claims and ILUAs negotiations; the Commonwealth Government should provide resources for ILUA negotiations, the assessment of land capabilities and appropriate uses, and Aboriginal corporation capacity building; and Local Governments must be involved in improved land use planning and municipal service delivery.

4. Strategies for the enhancement of economic development opportunities and capacity building for Traditional Owners of land and sea owner entities.

Economic development potential for Traditional Owners exists to its greatest extent in land owned by Traditional Owner entities. On Cape York, statutory land rights, in the form of Aboriginal freehold tenure held by Aboriginal trustees, offer significant potential for economic development. Aboriginal freehold land provides Traditional Owners with opportunities to freely engage in mainstream economic activities, and this contrasts with the often limited economic development potential of native title. Traditional Owner engagement in the economic development of northern Australia therefore can be maximised by facilitating the use of statutory land rights such as Aboriginal freehold.

However, as discussed above under point 3, in Cape York and elsewhere, the economic development potential of Aboriginal freehold land is yet to be fully realised because of significant constraints on utilising the rights inherent in this tenure. A multi-faceted and long term reform strategy must be implemented to lift constraints and develop the capacity of Aboriginal owners to manage, utilise and realise the potential of Aboriginal freehold land.

The reform strategy to enhance the use of Aboriginal freehold land must maintain the communal and inalienable character of Aboriginal land ownership, whilst addressing constraints to the creation of secure individual rights on this communal tenure. In practical terms this means that an Aboriginal trustee corporation should continue to be the Aboriginal freehold land owner on behalf of the relevant Traditional Owners (and Aboriginal people with historical affiliation), and grant leases to individuals to undertake activities on the land. The lease rent (and native title compensation for Aboriginal freehold land where native title continues to exist) will provide benefit to the land owners, whilst the land use activity that the lease permits will provide benefit to the individual. The lease of Aboriginal freehold therefore is the mechanism that facilitates economic development and realisation of the potential of Aboriginal freehold land. A key priority of a reform strategy therefore must be to ensure that leasing mechanisms for Aboriginal freehold land function efficiently and effectively. If Aboriginal freehold leasing is sufficiently enabled, economic development in which Traditional Owners are involved will follow.

In Queensland, the reform strategy to achieve effective and efficient leasing mechanisms must focus on extending the quality of the land administration system to Aboriginal freehold land that applies to and provides the platform for economic development on non-Aboriginal land. Queensland's land administration system is world class, except for its application to Aboriginal land. Dealings in non-Aboriginal land in Queensland are effective at facilitating economic development because of the certainty, security of tenure and procedural efficiency that the State's

land administration system provides. The land administration system is a key piece of governance infrastructure that must be reformed for Aboriginal land. In addition, the capacity of the holders of Aboriginal freehold land must be improved so that they understand and can effectively utilise the system to facilitate development.

Some of the land administration system reform actions that are necessary to enhance the leasing of Aboriginal land in Queensland include:

- a. *Tenure reform*: Accelerate the program of land transfers under the *Aboriginal Land Act 1991*. Transfer transferable land from current tenures to Aboriginal freehold tenure held by a trustee corporation consisting predominantly of Traditional Owners. This must include transferable land within Aboriginal towns so that Traditional Owners own the land that is currently used, or has strong potential to be used, for economic development.

For example, most of the land used for social housing in Cape York Aboriginal towns is transferable land held by local governments under Deed of Grant in Trust tenure, and the local government has leased this land to the State Government for social housing. The local government receives all benefits from lease of the land, and the State Government is taking very limited actions to transfer this transferable land to Traditional Owners despite this being a requirement of the ALA since 1991.

When land transfers do occur, Aboriginal freehold land property rights must include rights to resources such as timber, gravel, carbon, water, vegetation, etc so that these resources may also be used for economic purposes.

If all transferrable land was transferred with full resource rights to Traditional Owner corporations then the income from existing social housing and other leases would be sufficient to enable the Traditional Owner corporations to operate effectively and attract other parties to take up leases over remaining areas for economic purposes.

- b. *Holding of Interests in Land*: A single Aboriginal Corporation should perform the functions of:
 - i. a Registered Native Title Body Corporate (RNTBC) to hold and manage native title rights and interests,
 - ii. a Land Trust to hold and manage Aboriginal freehold and other tenure rights and interests in land, and
 - iii. a Cultural Heritage Body to manage cultural heritage protection.

The Corporation's constitution must identify how it will integrate native title and land rights processes during development processes, and how it will operate in the interests of native title holders and Aboriginal people with historical interests in the land;

- c. *Land Title Registration*: Each parcel of Aboriginal land used for (or planned to be used for) a discrete purpose (such as home ownership, social housing, business or service delivery) must be surveyed and registered as a lot on Queensland's Land Title Register. Existing land users, such as local government and service deliverers, must have registered leases over the lot they use and their interest recorded.
- d. *Native Title Consent*: See point 3b above.
- e. *Land Use Planning and Management*: An assessment of Aboriginal land values, capabilities and appropriate uses must be performed and used to prepare a statutorily-

compliant planning scheme that provides for appropriate development. The native title status of land should also be reflected in planning schemes. Also see point 3d above.

- f. *Municipal Service Delivery:* Development relies on the delivery of adequate municipal services such as water, waste collection and local roads. The resources to provide these services come mainly from rates levied by local governments on land owners. However, in Queensland's Indigenous local government areas there is no rates base because the State Government has not extended the land administration system that provides annual land valuations, which provide the basis for rates calculations, to these areas.

Instead, a conflicted situation exists where Aboriginal local governments use their role as DOGIT trustee to lease land, mainly to the State for social housing, and use lease incomes to subsidise their delivery of municipal services. Indigenous local government arrangements must be reformed so that transferrable land is transferred and Councils cease to be land trustees and focus solely on their local government responsibilities. Land valuations and rates charging systems must be put in place so Councils can raise sufficient revenue to deliver adequate municipal services.

5. The principle of free, prior, and informed consent.

The involvement of Traditional Owners in economic development would be significantly enhanced if governments and developers consistently upheld the principle of free, prior and informed consent (FPIC). This is because the process to negotiate FPIC fundamentally involves the negotiation of a deal between the Traditional Owners and the land use proponent whereby land use consent is provided by Traditional Owners in exchange for benefits such as partnership, employment and compensation.

Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) articulates FPIC as *"States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources"*. Australia endorsed UNDRIP on 3 April 2009, but land users in Australia are not obliged to deal with Aboriginal and Torres Strait Islander peoples to receive their FPIC except in a limited range of circumstances.

Even when there is no legal obligation to negotiate it is not necessarily to the advantage of a prospective land user to not negotiate FPIC because the development may still encounter resistance from Traditional Owners and result in commercial risk for the developers, cause delays, increase costs, cause reputational risks and limit the social licence of the development to proceed. Conversely, if FPIC is negotiated it facilitates the development proceeding smoothly, provides benefits to Traditional Owners, avoids impacts on traditional cultures, avoids divisions in communities and provides economic opportunity. FPIC may require more upfront effort before a project commences but in the long run it is beneficial to the developer to make the effort to obtain FPIC.

The mechanism used in the NTA to demonstrate FPIC is an Indigenous Land Use Agreement (ILUA). ILUAs are an effective mechanism to demonstrate FPIC because the NTA lays out a process and minimum requirements that must be satisfied before the ILUA may be registered. Traditional Owners are also entitled to legal support to assist their participation in ILUA negotiations. CYLC supports that ILUAs are more widely utilised beyond the legal obligations of the NTA and more in line with UNDRIP principle of *"prior to the approval of any project affecting their (Traditional Owner) lands or territories and other resources"*.

An important interpretation of FPIC prior to the approval of any project affecting Traditional Owner land and resources is that this includes statutory, planning and administrative actions that seek to constrain the use of land. This is also discussed above where environmental conservation legislation and statutory land use plans may be imposed with the objective of limiting land uses. FPIC should also be received prior to such constraints being introduced because of the impact they may have on Traditional Owner aspirations for economic use of their land.

For example, Queensland's *Nature Conservation Act 1992* provides powers to declare Nature Refuges without FPIC, and if declared over an area this constrains the uses that may occur. By constraining land uses it limits opportunities for economic development and Traditional Owner engagement and benefit from potential projects. Similarly the *Vegetation Management Act 1999* imposes restrictions over clearing Aboriginal land so development options are severely limited, but no consent was received for this limiting of previously existing opportunity. So FPIC should be necessary not only when actions are proposed to use and develop land, but also when actions are proposed to limit the use and development of land.

CYLC maintains that FPIC should be obtained for all proposals to use, or limit the use of, land where Traditional Owners have an interest. Traditional Owner interest in land should be defined as being where an Aboriginal corporation holds land rights such as Aboriginal freehold, or where native title has been determined or claimed.

6. Opportunities that are being accessed and that can be derived from Native Title and statutory titles such as the *Aboriginal Land Rights (Northern Territory) Act 1976*.

By far the greatest economic development potential and opportunities for Traditional Owners exist in land rights created by statutory title, such as under the *Aboriginal Land Rights (Northern Territory) Act 1976*, and Queensland's *Aboriginal Land Act 1991*. Land rights are far more prospective for economic development than native title and have the advantage that Traditional Owners, as registered land owners, can proactively decide about uses that land may be put to and initiate economic development projects themselves or enter into joint ventures with others. Native title opportunities are dependent upon a third party making use of land and Traditional Owners negotiating their engagement in, or benefits from, the third party land use.

Despite the economic development potential of Aboriginal freehold, on Cape York there has been limited realisation of this potential because of issues including:

- the failings of the substandard land administration system that applies to this land, such as the lack of surveyed lots and restrictions imposed by statutory land use plans and environmental conservation legislation;
 - the limited capacity of Aboriginal land holding corporations to administer the land and also to align and integrate future land use with Native Title rights and interests; and
 - the difficulty in attracting finance for development because the land cannot be used as alienable collateral in its base form, and too little support is provided to trustees and Traditional Owners to understand the power and fungibility of leasing and the broad scope for leasing available to trustees under the ALA .
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