

## Chapter Thirteen

# A Regional Approach to Managing Aboriginal Land Title on Cape York<sup>1</sup>

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In 1992 the High Court of Australia for the first time gave legal recognition to the common law native title land rights of the continent's indigenous people.<sup>2</sup> The following year the Commonwealth Government of Australia passed the *Native Title Act 1993 (NTA)*, which introduced a statutory scheme for the recognition of native title in those areas where Aboriginal groups have been able to maintain a traditional connection to land and where the actions of governments have not otherwise extinguished their prior title.

Native title as it is codified in the *NTA* differs from Western forms of title in three significant ways. Firstly, it is premised on the group or communal ownership of land, rather than on private property rights; secondly, it is a recognition and registration of rights and interests in relation to areas of land which pre-date British sovereignty, rather than a formal grant of title by government (QDNRM 2005: 3); thirdly, it may coexist with forms of granted statutory title, such as pastoral leases, over the same tracts of land.

While native title is a formal recognition of indigenous landownership and sets up a process of registration for such interests, it remains a codification within the Western legal framework, and as such is distinct from, though related to, Aboriginal systems of land tenure as perceived by Aboriginal groups themselves. This distinction is exemplified in the sentiment often expressed by Aboriginal people that their connection to country, and the rules and responsibilities attaching to this connection, continue to apply, irrespective of the legal title of the land under 'whitefellow law'. The very fact that Aboriginal systems of land tenure managed to survive without any form of legal recognition for two centuries in the face of legal and political denial, and the actual appropriation of their land — that is, that there are still systems capable of recognition under the *NTA* — alerts us to the fact that Native title is not the same as Aboriginal land tenure. As a codification which draws upon features thought to be characteristic of Aboriginal land tenure, it neither is, nor replaces, the indigenous

<sup>1</sup> This chapter is based upon research undertaken in 2001 for the report *Holding Title and Managing Land in Cape York* (Memmott and McDougall 2004).

<sup>2</sup> *Mabo & Ors v Queensland* (No 2) (1992) 175 CLR 1.

system itself. Indeed, there is considerable room for debate as to whether there may be a unitary system of Aboriginal land tenure over the continent or whether such systems reside at regional or even more local levels of Aboriginal polity (Sutton 2003).

Native title thus 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 Aboriginal landownership. 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 30 years,<sup>3</sup> many Aboriginal groups have acquired land under a variety of titles which 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 one of these other forms of title. What these title forms 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 landownership. 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 landowning corporations.

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 under Queensland's statutory land rights legislation, the *Aboriginal Land Act 1991 (ALA)* (QDNRM 2005: 16).<sup>4</sup> The challenge is to find ways of more effectively and efficiently integrating the ownership and management functions of the multiple Aboriginal landholding entities which result.

<sup>3</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>4</sup> As of 2005, this tenure resolution approach was a matter of State policy (QDNRM 2005: 16). While the authors' experience is mainly in Queensland, we believe similar mechanisms for negotiated land settlements operate in other states.

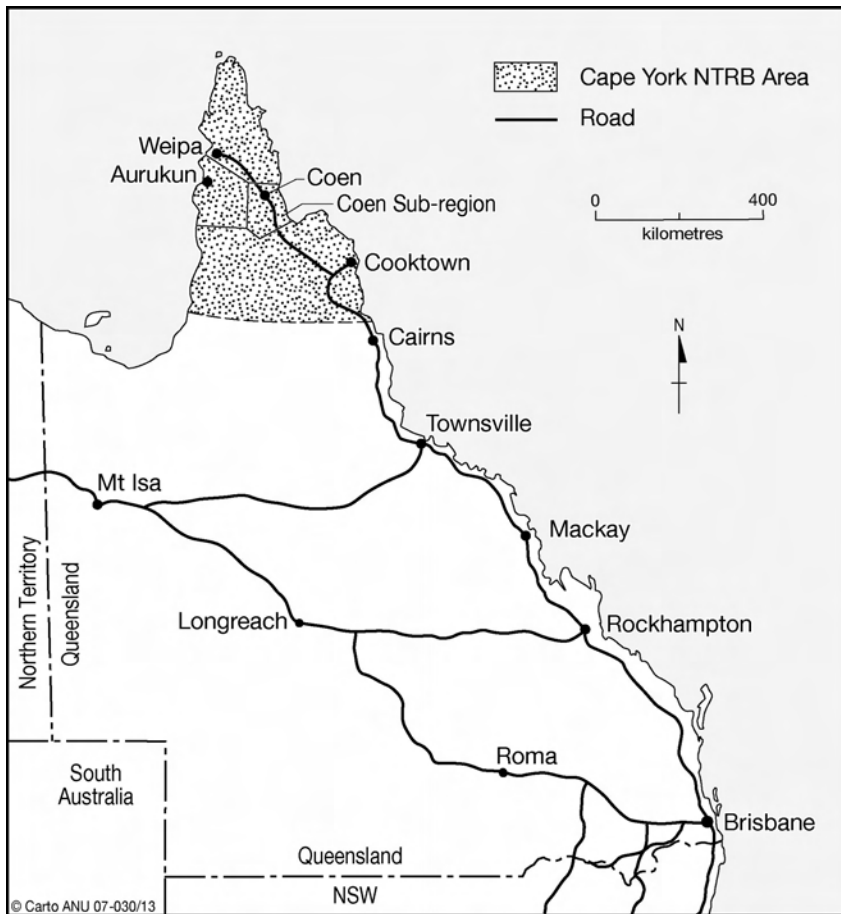
This chapter argues that there is an important role for anthropologists to work with particular Aboriginal or Torres Strait Islander claimant groups, ethnographically document the system of Aboriginal land tenure and customary decision-making processes at the earliest possible opportunity in anthropological claim research, and advise claimants' legal advisers about the implications of this system for the design of Aboriginal landholding corporations. To ignore the opportunity to observe customary decision-making processes is likely to be counter-productive if the sort of corporate structures prescribed by the various land rights legislations are imposed without attention to how things actually happen in an emic political sense on the ground and in the community. The imposition of such legislative requirements are exacerbated further when multiple corporations must be established in a particular region due to multiple overlapping claims that fall under different legal and tenure regimes. Our view is that claimant representative bodies, such as land councils, should allow anthropologists to be proactive in this regard, and that such an approach should result in a closer 'fit' between the membership structures and decision-making processes of Aboriginal landowning corporations and the systems of Aboriginal land tenure as they are understood and practised by claimant groups themselves. While it may be unrealistic to expect that this 'fit' will ever be seamless, incorporating anthropological analysis at an early stage in the planning of corporate structures should minimise the distortion to the emic Aboriginal systems and result in greater consonance between people's experience of rights and responsibilities toward their land under their own system of Aboriginal land tenure and the practice of ownership within corporations set up under native title and other land rights regimes.

This chapter considers some practical aspects of applying such research in two case study areas of Cape York Peninsula in far north Queensland where there are multiple and overlapping Aboriginal entities for the ownership and management of lands and waters. It examines what will be required for the successful operation of the various registered title-holding bodies in these regions, namely native title Prescribed Bodies Corporate (PBCs)<sup>5</sup> and Aboriginal Land Trusts (ALTs) set up to hold title under the *NTA* and *ALA* respectively, as well as Aboriginal corporations holding pastoral leases and other forms of title. It proposes options for rationalising and possibly combining ALTs and PBCs, and models for cost effective coordination of Aboriginal land management at a regional level. Its premise is that this will be best achieved 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,

<sup>5</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. Throughout this chapter 'PBC' will refer to both entities.

rather than allowing these to be subordinated to legal and administrative convenience.

The case study areas are the Coen and Wik subregions of Cape York (CYLC 2001), selected on the basis of variation in the complexity of local land tenure and coexisting land and sea management regimes (see Figure 13-1). Between them, these offer a gradation of scenarios which we believe provide exemplary models for the operation of Aboriginal landholding corporations that are adaptable to other regions and other Aboriginal groups in Australia.<sup>6</sup>



**Figure 13-1: Cape York Native Title Representative Body's area of administration and the subregions of Wik and Coen.**

<sup>6</sup> Unless otherwise indicated, the data presented in this chapter reflects the situation on Cape York up to 2001/02, the time of the original research.

## Cape York Peninsula

The Cape York Peninsula Region covers approximately 150,000 km<sup>2</sup> of remote far north Queensland. The Aboriginal and Torres Strait Islander population comprises at least 60 per cent of the region's total population of 18 000. There are more than 50 named traditional landowning groups in the region. At the time of writing there had been native title determinations over lands of three of these groups — the Guugu Yimithir, the Wik and the Kaurareg — with more than 20 other active claims yet to be determined.

With the exception of parts of the Northern Territory, Cape York has the highest proportion of land in Australia which is, or which has the potential to become, Aboriginal owned and managed. Since much of this land will be held as either Aboriginal freehold or leasehold, and since most groups on Cape York have been able to maintain continuous traditional connection to the land,<sup>7</sup> the incidence of successful native title determinations over much of Cape York can be expected to be high.

## Forms of Aboriginal Land Tenure on Cape York

Native title is but one of several categories of Aboriginal owned land on Cape York, each of which is associated with its own particular corporate landholding entity and each of which may also sustain coexisting native title rights over the same land.

In 1984 Queensland established Deed of Grant in Trust Lands (generally known as DOGITs) 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.<sup>8</sup> Over 11 per cent of Cape York is comprised of DOGITs and there is a large DOGIT area in each of the case study subregions.

In 1991 a form of inalienable Aboriginal freehold title was introduced in Queensland under the *ALA*.<sup>9</sup> This provides for land to be granted usually on the basis of either 'traditional affiliation' or 'historical association', with the land title, once granted, held by an ALT which is usually comprised of a representative group of the beneficiaries of the grant. As of 2005, approximately 5 per cent of

<sup>7</sup> The *NTA* requires that claimants be able to demonstrate that they have maintained an unbroken connection to the land, which is interpreted by the High Court to mean that they have continued to observe traditional law and custom, and to have maintained a 'vital' society based upon this law and custom, in a substantially uninterrupted way since sovereignty.

<sup>8</sup> These councils were originally set up as exclusively Aboriginal local government organisations under specific legislation; they have since been replaced with conventional shire councils, similar to those operating in any town in Queensland. The local communities characteristically comprise a mixture of traditional owners for the area and other Aboriginal residents with historical ties going back several generations.

<sup>9</sup> Readers are referred to Memmott and McDougal (2004) for more detailed explication of the operation of the *ALA*.

Cape York Peninsula was *ALA* Aboriginal freehold held by 19 ALTs (QDNRM 2005, Appendix 2). This freehold may be granted as a result of either a claim process requiring claimants to prove their traditional or historical connection before a judicial tribunal, or by an 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. The DOGITs already discussed are transferable, and the *ALA* requires that in time they must be converted to Aboriginal freehold.

A number of Aboriginal-owned pastoral leases also occur in each subregion. The favoured structure for pastoral lease landholding entities are corporations of traditional owner groups formed under the *Commonwealth Aboriginal Councils and Associations Act 1976 (ACAA)*, the same legislation under which native title PBCs must be incorporated.

Neither DOGIT nor Aboriginal freehold extinguishes native title rights and interests, and the *NTA* provides for any past extinguishment on Aboriginal-owned pastoral leases to be disregarded. Potentially, therefore, traditional owners' full native title may be recognised on all these tenure types, leading to the duplication of landholding entities in ALTs, PBCs, and Aboriginal corporations.

## Native Title — Prescribed Bodies Corporate

Successful native title claimants are required to incorporate as a PBC under the *ACAA*.<sup>10</sup> Claimants may nominate to set up their PBCs to function in one of two ways, either as an agent or as a trust. The essential difference is that under an agency arrangement, decision making rests with the native title group as a whole and the PBC acts only as its agent or representative, while under a trust arrangement, decisions may be made by a small group of trustees without necessarily involving the wider native title group. The choice is of significant consequence as it determines the legal and operational relationships between the native title holders, the PBC as a corporate entity, and the actual native title rights and interests. Traditional owner groups on Cape York have generally expressed a preference for agency PBCs because this structure is perceived to give them greater control over decision making and avoids an additional level of legal complexity interposed by the operation of a trust structure.

<sup>10</sup> This Act has not proved to be altogether suitable for the purposes of PBCs because, in practice, it has not been able to successfully incorporate customary group recruitment mechanisms and decision-making processes (see Fingleton et al. 1996; Mantziaris and Martin 2000: 183–232; Memmott and McDougall 2004: 14–15). In 2005, the Commonwealth Government introduced a *Corporations (Aboriginal and Torres Strait Islander) Bill*, which it claimed would better serve the contemporary requirements of indigenous corporations, including PBCs (RAC 2005).

It is anticipated that eventually the majority of Aboriginal-owned land will have at least two coexisting types of titles and the consequent establishment of two landholding corporations for each area: either (a) Aboriginal freehold and native title, with an ALT and a PBC; or (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. As it is possible to lease land from the trustees on both DOGITs and Aboriginal freehold, there is further potential for three levels of Aboriginal landholding entity on these tenures, all of which may have substantially the same membership of traditional owners — namely the DOGIT trustees or an ALT, a native title PBC and an Aboriginal corporation holding a lease (see Table 13-1).

**Table 13-1: Tenures on Cape York Peninsula showing potential for overlapping Aboriginal ownership.**

Tenure Type	Land area (ha)	Land area (%)	Potential for Ownership by Aboriginal Groups		
			Native title	Aboriginal freehold	Aboriginal-owned lease or freehold
Leases	8 063 000	59.2	Y		Y
National Park	1 647 709	12.1	Y	Y	
DOGIT (Deed of Grant in Trust)	1 551 500	11.4	Y	Y	Y (leasehold)
Aboriginal Freehold	736 600	5.4	Y	Y	Y (leasehold)
Unallocated State Land	475 800	3.5	Y	Y	
Statutory Mining Tenure	597 800	4.4			
Reserve	269 361	2	Y	Y	
Timber Reserve and State Forest	189 613	1.3	Y		
Freehold	90 600	0.7			Y
<b>TOTAL</b>	<b>13 621 983</b>	<b>100</b>			

Source: The figures for each category of tenure are taken from CYLC (2001).

Native title holders may make and register agreements about the use and management of land and waters with other land users, such as miners, governments, pastoralists and developers. These are known as Indigenous Land Use Agreements (ILUAs). ILUAs require the consent of all the native title holders for the area covered, and once made they bind all native title holders (including future generations), as well as the other parties to the agreement. ILUAs provide a mechanism by which governments, native title holders and other land users may come to agreement about the use of land and the recognition of indigenous rights and interests without necessarily requiring a formal determination of native title (Lane 2000). Importantly, where there is a PBC over an ILUA area, it must be a party to the agreement. This enables PBCs to use the ILUA provisions to assist in their function of protecting native title for traditional owners, as well as a range of other land management and economic benefits which might flow from such agreements.

## Active and Passive PBC Structures

Models for PBC design fall along a continuum from 'passive' to 'active'.<sup>11</sup> The passive PBC is a minimalist structure. It is best suited to the agency PBC type since it will not itself hold the native title interests. These will remain with the native title holding group who 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 may therefore have a 'representative' membership structure, rather than a 'participatory' model (which aims to include as many as possible of the native title holders as PBC members). The passive PBC will have limited demands for resources, but is likely to be reliant on the support of regional representative bodies, such as Land Councils or the Land and Sea Management Agencies proposed in the operational models described below.

In contrast to the passive model, the active PBC assumes greater responsibility for the making of decisions within the determination area. The trustee PBC type is better suited to an active role, because it 'holds' the native title and has greater authority to make decisions on behalf of the native title holders. Active PBCs could adopt either 'representative' or 'participatory' membership structures. There is a degree of expert design required here to ensure there is no conflict between the traditional processes and those of the 'active' agency, for which anthropological advice will be essential to minimise such conflict.

The distinction between passive and active relate not only to PBC functions (for example, whether it is an agency or trustee PBC) but also to its membership and its general mode of operation. The decision as to which model is best suited in any particular case will depend upon a variety of factors, including the PBC's responsibilities in relation to other landholding entities owned by the group and the levels and sources of funding.

Importantly, the choice reflects the spectrum of opportunities available in apportioning decision-making responsibilities between the PBC and the native title holders. At one end of the spectrum, a passive/agency/representative structured PBC would have no role other than to 'rubber stamp' decisions (including non-native title decisions) made by the native title holders. At the other end, an active/trustee PBC, even with a minimal representative structure, could make all decisions, including those involving native title rights and interests. A condition for the operation of such a PBC would be that it is possible to replicate traditional decision making within the PBC governance structure itself. The obvious dangers of creating such a representative/active PBC include the lack of accountability to other native title holders, who as non-PBC members

<sup>11</sup> See Memmott and McDougall (2004, Chapter 6) for an in-depth discussion of the design and function of PBCs.



would be forced to rely on their status as beneficiaries to redress any concerns about the management of the PBC.

These decisions may reflect the extent to which the wider membership of the native title group is prepared to cede the day-to-day running of the PBC to an operational and decision-making representative subgroup. As in the case of the Wik PBC described below (in general terms a passive/agent/participatory type of PBC), it is likely that many native title holders will prefer a hybrid of the models to meet their particular requirements.

## Structural Options for PBCs in Relation to Land Trusts and Other Indigenous Landholding Entities

The prospect of ALTs and PBCs operating independently of each other with respect to the same land is a source of concern to traditional owners and is recognised by the Queensland State Government as one of a number of practical matters needing to be addressed in order to improve the articulation of the state and commonwealth legislation (QDNRM 2005).

There is a significant level of frustration about the respective operations of ALTs and PBCs in parts of Cape York, particularly where they have similar memberships and perform functions with respect to the same areas of land. From the perspective of traditional owners, the expectation (and hope) may have been that native title would result in a unitary system within which their customary system of land tenure might be recognised and exercised. In practice, however, it has failed to produce such a simplification of their position, but rather resulted in greater complexity, ambiguity and consequent confusion.

In the Coen subregion for example, there are approximately 10 existing or proposed ALTs, and as of 2004, five native title claims, the membership of whose PBCs will overlap those of the ALTs (see Memmott and McDougall 2004: 93). Given the importance of both the *NTA* 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 landholding and managing entities to reduce not only the confusion and frustration of traditional owners, but also that of external parties trying to engage in negotiations, communications and contracts with the traditional owners. It is to be expected that similar situations occur in other Australian states and territories where there is a form of state land rights legislation.

The integration of PBCs and ALTs into single corporate entities for suitable large-scale socio-geographic units (for example language-based tribes in the case of the Coen subregion) would not only simplify arrangements and reduce confusion but also reduce the administration costs through a more effective (and larger) scale of economy. There are three options for coordinating the operations of ALTs and PBCs. On the face of it, the determination of an ALT as a PBC is the

preferable option since it would limit the resultant structure to a singular corporate entity. However, it is unavailable without amendments to the PBC Regulations by the Commonwealth Government and possibly amendments to the *ALA* by the Queensland State Government.<sup>12</sup> Further, since the criteria for *ALA* land grants and for determination of native title are so very different, combining the two sets of responsibilities into a single entity may not always be the best option because of resultant conflicts of interest for the members.

Given that there are no legislative impediments to appointing a PBC as the sole trustee of an ALT, this constitutes a second option. However, Queensland government policy in the past has discouraged the use of corporate bodies as sole members of an ALT. This option would still entail the formation of two distinct corporate entities, but Table 13-2 sets out how the two entities may be harmonised within a single operational structure.

A third option is that of coordination between the PBC and ALT by agreement only. The PBC and ALT operate as independent entities with respect to the same land, with activities 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 is substantially the same, members of the ALT will have to make agreements with themselves as members of the PBC. This option is the least efficient and provides the greatest scope for fragmentation of indigenous interests. However without the regulatory or policy changes required to implement either of the preferred options, it remains the only practical (and legal) option currently available.

<sup>12</sup> Recognising similarities in the structure and intent of *ACAA* corporations and *ALA* land trusts, the Queensland Government has recently canvassed the option of doing away with ALTs altogether and granting land directly to *ACAA* corporations, which could include PBCs, thereby avoiding the duplication of organisations with almost identical functions. It has 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 (QDNRM 2005: 33-4).

**Table 13-2: Model of harmonised rules for a PBC as trustee of a Land Trust.**

Issue	Land Trust Rules	PBC (as Grantee) Rules
<b>Objects</b>	Objects are for purposes set out in the Aboriginal Land Regulations 1991.	Objects to include acting as grantee of land trust and as a PBC.
<b>Membership</b>	Limited to one grantee — the PBC. Alternatively could include 'historically affiliated' persons as grantees. Historical members to be qualified with no voting powers.	Open to adult native title holders only. Note 'historically affiliated' persons are ineligible for membership.
<b>Committee</b>	Limited to PBC. PBC is Chairperson.	By election at AGM.
<b>Meetings</b>	Annual General Meeting (same day as for PBC). Committee meets quarterly.	AGM (same day as for land trust). Committee meets at least quarterly.
<b>Decision- Making Processes</b>	As set out in rules and in accordance with code of 'permitted dealings' provisions in ALA. Same as PBC.	Prescriptive decision-making processes set out in rules. Same as land trust.
<b>Administration</b>	Separate accounts/audit. Annual statement to Land Claims Registrar.	Separate accounts/audit. Reports to Registrar of Aboriginal Corporations.

## The Wik Subregion

The Wik subregion 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>13</sup> the majority of whom live in Aurukun 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 nationally and internationally through the Wik Native Title High Court Action which established that native title may coexist on pastoral leases.<sup>14</sup>

The Wik people comprise a broad linguistic grouping sharing a range of cultural similarities, within which there are a number of identifiable linguistic subgroups, 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).

The building block of their land tenure system is the clan estate, in which membership is based on the principle of descent. Such estates can be aggregated

<sup>13</sup> See Thomson (1936: 374); McConnel (1939: 62); Sutton (1978); von Sturmer (1978) and Martin (1993, 1997) for an ethnographic history of these peoples.

<sup>14</sup> *The Wik Peoples v Queensland & Ors* (B8 of 1996). While there have since 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 at the time of writing.

into various types and levels of configuration (Sutton 1978: 126–8, 140, 1997: 28), 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 (Sutton 1997: 29–32). Eight of these larger cluster groups comprising the Wik and Wik Way 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 (Memmott and McDougall 2004: 96, 125).

As of 2005, within the native title claim area, there were at least 33 parcels of land of coexisting (but non-extinguishing) tenure. 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*, and further pastoral leases. As well as the PBC for the determined areas of the Wik and Wik Way claims, there were two DOGITs held by the Pormpuraaw and Napranauum Shire Councils, the Aurukun Shire Council which held the Aurukun lease, and at least two proposed ALTs.

Planning authorities in this region included such regional agencies as Aurukun Shire Council, Pormpuraaw Community Aboriginal Council, Napranum Community Aboriginal Council, and the Cook Shire Council. In addition there were a wide range of government and indigenous agencies and departments that had jurisdiction over the wider Cape York region, including Queensland National Parks Service and other government agencies. Forms of planning agreements which were in place included Wik and Wik Way Native Title ILUAs covering pastoral leases under claim and the Western Cape Communities Co-Existence Agreement which brings together native title holders and Aboriginal communities with Comalco, owners of the extensive bauxite leases which have had a significant impact upon Aboriginal communities in the region since the late 1950s.

A mature outstation movement existed with some 24 or more outstations, most of which were serviced from Aurukun, with a smaller number being serviced by an Aboriginal resource agency based in the adjacent Coen subregion. Almost all of these were on the Aurukun Shire lease or on Aboriginal-owned pastoral leases.

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-fishing 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 theft and vandalism at outstations and littering. Their aspirations included: greater control over natural resources and the environment; access controls over non-indigenous land users and the prevention of vandalism of outstations and other property; cultural heritage protection and site mapping; improved infrastructure and access to traditional sites and living areas; and greater economic engagement within the region, including employment and commercial venture opportunities.

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 for the Wik region. These would 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 would also become a hub for the training of a skilled indigenous workforce that would build land management capacity across all Cape York communities (ASC 2001).

## The Coen Subregion

The Coen subregion is located on the east of Cape York 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 rivers and the streams flowing east from the Geikie and McIlwraith ranges. Aboriginal people of the Coen subregion reside in Coen and in some 10 outstations, the largest of which is Port Stewart on the eastern coast. Many of the traditional owners and native title holders live outside the actual Coen subregion at such large Aboriginal communities as Lockhart River, Hopevale and Aurukun, and also in Cooktown.

There are four language groups with native title interests in the Coen region: the Kaanju, Umpila, Lamalama and Ayapathu. While these groups maintain their distinct linguistic identities and are each associated with well-recognised linguistic and tribal territories, they share a system of traditional land tenure, laws and customs which is regional in character (Chase et al. 1998: 37).

Due to historical forces, the Aboriginal system of land tenure in this subregion has shifted from a 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 ownership of land is organised and conceptualised (Chase et al. 1998: 35–9). However, the extent to which these transformations have occurred varies among different groups, so that patterns of land tenure, social organisation and identity are not uniform.

By the end of 2005, while there had been no native title determinations in the region (though there were several outstanding claims), there had been four grants of Aboriginal freehold land. Altogether there were eleven existing or future ALTs. There was one Aboriginal-owned pastoral lease, and several smaller blocks of conventional freehold held by Aboriginal corporations.

The regional planning environment included a central indigenous service agency, the Coen Regional Aboriginal Corporation, which delivered outstation, land and sea management services, as well as various administrative and welfare services. It serviced approximately a dozen residential outstations established on the various areas of Aboriginal land in the region, and assisted the operations of several ALTs in the region. As noted above, it also provides services to some outstations in the Wik subregion, and is likely to have a greater role in this subregion in the future. As well, the Lockhart River Shire Council had a land and sea management program with interests in the northeast corner of the Coen subregion. It oversaw the activities of a ranger service on the DOGIT which had responsibilities for natural and cultural resource management (LRC 2001).

Land and sea management issues of concern to the traditional owners of the Coen subregion included: cultural heritage protection; fire management; the problem of non-indigenous 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. Their aspirations included: the establishment of more outstations, bores, water tanks and other related infrastructure; the development of land management; the protection of sites; joint management of the national parks in the region and greater access to and use of national park lands; and small-scale enterprise operations at their outstations and on Aboriginal land, including for cattle herding, tourism, prawn fishing and pig farming or harvesting.

## **Operational Models for Land Use and Management in the Case Study Subregions**

The models to emerge for each subregion both have, as a core structural element, a centralised Land and Sea Management Agency, providing administrative and other functions to the various Aboriginal landholding entities in its subregion. In other respects, however, the models differ, reflecting the different cultural, demographic and socio-geographic landscape of each subregion.

Whereas the Wik have opted for a single PBC and have not chosen to formally incorporate each of their eight subgroups for local land management purposes, but rather to work through existing organisations (such as the Aurukun Shire Council), the traditional owners in the Coen subregion wish to formalise their four language-named tribal groupings into four corporations to carry out land and sea management contracts, outstation development, and enterprises. In the

interests of rationalising the multiplicity of 18 or more titles in this latter region, a method is proposed to amalgamate these entities for each language group or tribe. This will result in all of a tribe's land and sea areas having a single PBC, which also acts as a trustee of their freehold ALTs.

Administrative and consultative complexities are identified that are likely to be encountered at and near subregional boundaries where groups may choose to seek land and sea management services from centres in adjoining subregions, and where land tenures on ILUAs straddle subregional boundaries.

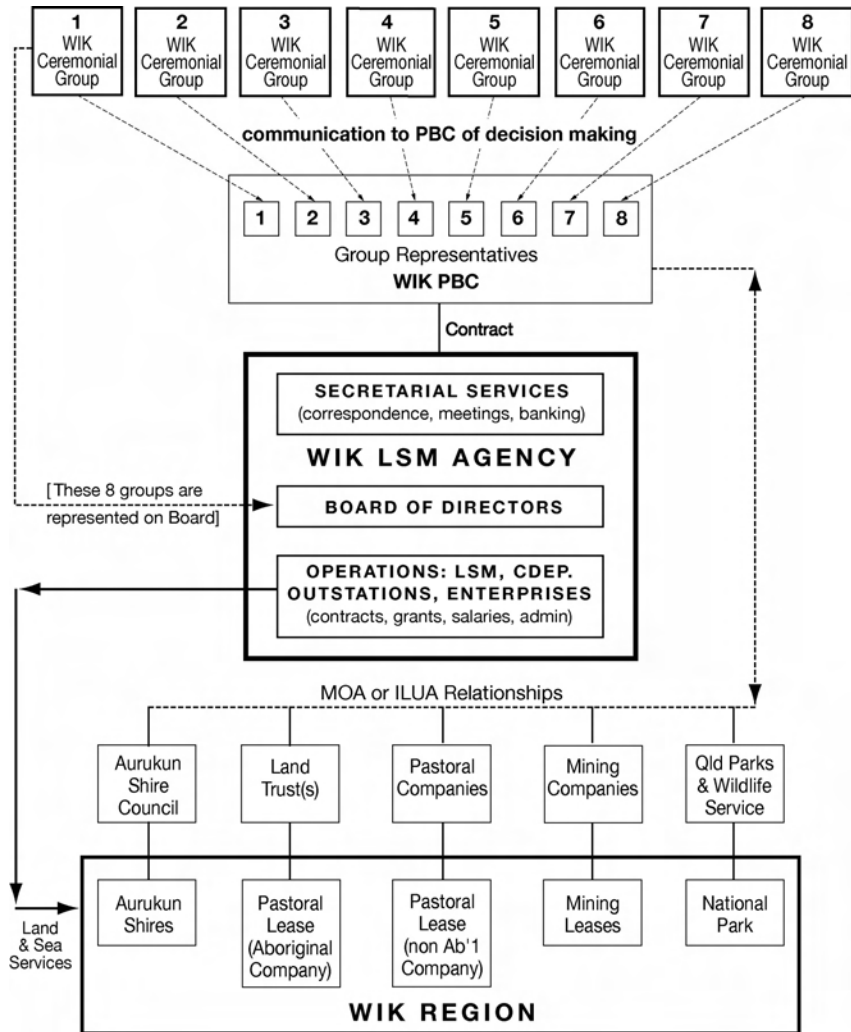
## The Wik Subregion Model

Wik and Wik Way claimants expressed a strong preference for having all Wik people represented on a single PBC ('all Wik people have spoken as one').<sup>15</sup> Their preference was for an agency type PBC with minimal membership based upon representation by regional and ceremonial subgroups from across all Wik and Wik Way country. There was an additional need to ensure that some of the representatives resided in each of the Coen, Napranum and Pormpuraaw communities, and 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 has to take into account those post-contact demographic factors that have taken people away from their country.

The Wik PBC model, as detailed in Figure 13-2, lies somewhere between the passive and active PBC types.<sup>16</sup> It has at its centre a 'passive', agency-type PBC based upon representative subgroups and with limited objects and limited executive powers. But it also has 'active' features, such as participatory representation providing for widespread PBC membership and a representative Governing Committee based upon the eight ceremonial and language groups discussed above. The latter characteristics may support the growth of corporate governance culture within the native title group, possibly causing the PBC to take on a more 'active' role in decision making in the future.

<sup>15</sup> This PBC, named Ngan Aak Kunch, was incorporated in 2002.

<sup>16</sup> This Wik PBC model is very similar to the 'tripartite' statutory model of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Memmott and McDougall, 2004: 89).



**Figure 13-2: Wik subregion model.**

Note: This model shows the proposed structural relationship between the Wik PBC and the Wik Land and Sea Management Agency.

A core feature of this model is that each of the representational groups will need to have a 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 is a most critical aspect of the model, necessary to ensure that Wik and Wik Way law and custom are incorporated into decision making on land and sea issues.

However, this is also a vulnerable aspect of the model, with potential problems including the difficulty of individual groups having a viable meeting when key personnel may be residing in dispersed centres (for example, Aurukun, Coen,



and Pormpuraaw), the need to raise funds to facilitate transport for adequate consultation, and the possibility of apathy amongst members of the representative groups to attend meetings.

It should also be noted that decision making within each of these groups may still have to devolve to the clan or extended family level, before being brought back to the group level, because the ceremonial and regional groups 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 regional associations.<sup>17</sup>

It is not 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 subregion). On the contrary, there is some concern about the likelihood of 'fissioning' or the subdivision of such corporations if they were formed, as it is a commonplace feature of the political dynamics in the Wik universe, both socially and corporately.

The most plausible and efficient method of providing the PBC with an administration facility would be for the PBC to contract the Aurukun Shire Council as a service provider through the council's Land and Sea Management Unit (which in turn could draw on wider council resources by internal arrangements). 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 so on; and raising funds to provide such services. While there are advantages of centrality of location and economies of scale and resources in the council taking on the administration role, there is also potential for conflict of interest in that the civic interests and responsibilities of a Shire Council may not always coincide with those of native title holders. There would therefore need to be protocols in place to deal with such eventualities by separating off the council's local government functions from its PBC-resourcing functions.

In addition to the PBC having a service agreement with the council's Land and Sea Management Unit for administration services, there is traditional owner support for this unit to eventually contract out a range of land and sea management services on behalf of the native title holders, including: land and sea management planning; provision of outstation services; provision of rangers

<sup>17</sup> Personal communication, David Martin, February 2002.

to monitor country and carry out management projects in country; negotiation with developers of various sorts, including mining companies and tourism operators; 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.

## The Coen Subregion Model

Traditional owner groups 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 subregion that will provide the necessary administration functions common to all four groups. Preference was for agency-type PBCs for each group.

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 20 years. The model, as outlined in Figure 13-3, has two key structural dimensions. The first of these is an overarching corporate structure which brings traditional owner and native title groups from the subregion together to form a decision-making committee for common purposes, such as financial administration, subregional land and sea management, resourcing outstations, and liaising with National Park 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 ALT-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 ALTs 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 for having one central agency for the Coen subregion as a point of contact with outside agencies, government departments, industry groups and so forth. 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.



The Coen subregion is economically 'poor' from the indigenous perspective. As of 2002 there were no viable Aboriginal commercial enterprises in active operation, nor were there any prospective mining projects from which cash flows were imminent. Nevertheless, viable prospects for tourism, cattle herding and prawn farming have been identified and form part of traditional owner aspirations.

The Right to Negotiate and the ILUA provisions of the *NTA* also provide a valuable basis for negotiating benefits in return for access to 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, and so on). 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 Papua New Guinea constitutes a project of this type which could provide such opportunities in the Coen subregion.

## Managing Aboriginal Title Holding Entities at the Subregional Level

Three key components common to the land management models for both subregions are centralised Land and Sea Management Agencies providing support to landholding entities; predominantly passive, agency-type PBCs; and a strong desire for the amalgamation of PBCs and ALTs, at least to the extent possible under state and commonwealth regulations. This arrangement is predicated upon an understanding of the traditional social organisation, land tenure and decision-making systems among groups in each subregion, 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 for the registration of Aboriginal interests into various forms of title.

The role of the regional agencies is 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, ALTs and leaseholding corporations. PBCs and ALTs 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 unauthorised use of the land; and cultural, heritage and social functions.

Therefore the most critical external design factor in the regional models is the development of satisfactory consultation and communication among landholding entities (PBCs, ALTs, corporations holding leases and so forth), the native title holders and the regional agencies. 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.

In the case of PBCs, the extent of outsourcing to a regional agency will depend on whether an active or passive PBC model is adopted. However such an arrangement would ideally require that the native title holders agree to consent to the regional agency performing certain acts or classes of activity. This would enable day-to-day transactions to take place within such an agency without its staff having to continually consult with the native title holders — for instance a policy where the agency staff can approve permits for certain scales of tourist activity, camping, fishing and so forth, without having to worry the PBC membership.

The proposed regional agency model also 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 then engage practically in a range of land-based operations, drawing upon any available infrastructure, Community Development Employment Program workers, community rangers, or consultants, on behalf of the native title holders. In all cases there needs to be a close coincidence between the membership, and to some extent the structure, of the landholding entities in the subregion and that of the agency to prevent conflicts of interest, although it would be possible to incorporate spouses, and those with historical interests in land, in the membership of the agency where that is not possible for a PBC.

A key problem for indigenous landholding 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 ALTs, PBCs and leaseholding 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. Neither the commonwealth nor state governments were allocating money for the recurrent administration of PBCs or ALTs. Yet these corporations will be unable to perform their prescribed functions without some base funding, and this is a critical limitation on the ability of Aboriginal landholders to derive real benefits from either native title or statutory land rights legislation in Queensland (QDNRM 2004: 20).

Poor funding already results in low levels of minimal corporate compliance (such as failing to hold annual general meetings, lodge financial reports and hold

elections and so forth) (ibid: 21). But it also results in poor levels of consultation and places limitations on traditional owners' abilities to engage in the interactive social practices that often characterise traditional decision making. This in turn increases the likelihood for dispute amongst native title holders and poorly negotiated outcomes marked by corruption, lack of accountability and legal uncertainty.

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' (such as the recurrent administration) of traditional land management, as well as the 'hardware' (such as 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.

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 ALT income (if any). This is particularly the case where a subgroup of native title holders has an established income stream from an ILUA or other agreement, but the other subgroups in the PBC do not. There is thus a need for an economic plan that allows, on the one hand, Aboriginal income into the region to be equitably spread to groups across the region for basic regional agency functions, but which at the same time recognises local native title rights in compensation outcomes or acknowledges local enterprise initiatives by individual groups.

## **Conclusions**

In this chapter we have discussed the possibilities within the existing Australian planning and legislative framework for rationalising and integrating the operations of PBCs, ALTs, and Aboriginal landowning 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, to the extent possible, to pool resources and to service landholding bodies on this basis. However all such attempts are severely constrained by limitations on funding within the public sector, and by legislative and legal constraints which apply to PBCs, ALTs and the operations of Aboriginal corporations.

These constraints may only be readily overcome with policy and legislative reform of the commonwealth native title and state land rights legislations (and their associated regulations) to harmonise the amalgamation of tenures and landholding entities, to provide adequate levels of base funding for landholding and management entities and to amend them to enable greater flexibility in the types of corporate landholding structures available for native title holders and traditional owners under statutory land rights regimes.

In both the *ALA* land claim and the *NTA* title claim process 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 ALTs. This would shift the initial focus from the frustratingly lengthy and legalistic processes leading to a determination, to consideration of the long-term outcomes people wish to achieve from their native title. It would assist in achieving desired outcomes because, as the claimants pursue their claim, important dynamic aspects of their political processes and social structuring are likely to be revealed, and these may hold valuable clues as to how their title-holding corporations might operate in reality.

Anthropologists can further assist by promoting landholding corporation design and operation as a component of effective community government. A basic design assumption should be that the customary system of Aboriginal land tenure cannot be divorced from the social relations of its 'owners', nor from their systems of internal group authority and governance. At the same time, it is important that PBCs and ALTs are structured to ensure congruency and compatibility with the planning frameworks of state and local government bodies. This may best be done through the sort of regional land and sea management agencies suggested in the case study models. Other specific governance aims would be to minimise unreasonable and unnecessary friction and obstruction with respect to community settlement planning and development processes, through ILUAs between native title holders and DOGIT-owning councils.

In the introduction we drew attention to the distinction between native title as a recent construct of the Australian legal system and Aboriginal land tenure as the emic system of indigenous landownership. A key principle is to inform the PBC design process, and that of ALTs and other landholding corporations, with an understanding of the social structure and decision-making dynamics of the autochthonous Aboriginal land tenure system. This presents a classic opportunity in applied anthropology for the practitioner, based upon his or her research on the emic system, to mediate the transition from the Aboriginal system of land tenure to the holding of title under a corporate, statutory entity, whose objectives include the replication of 'traditional' membership and decision-making processes, into a 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 politicisation and power politics within the native title group.

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