

11 June 2015

Mr Wayne Bergmann  
Chair  
Expert Indigenous Working Group  
By email only  
Email: EIWGSecretariat@pmc.gov.au

Dear Mr Bergmann

**Expert Indigenous Working Group – COAG Investigation into Indigenous Land Administration and Use**

Thank you for your letter of 20 April 2015 requesting practical ideas on how Indigenous land administration could be improved to support better Indigenous economic development outcomes.

The TSRA has both an Economic Development program and a Native Title program where important developments are taking place relevant to the work of your group.

The TSRA's Native Title Office implements the TSRA's current role as the native title representative body ("NTRB") for the Torres Strait and some communities at the top of Cape York Peninsula. There is currently a proposal to transition NTRB status from the TSRA to a new entity called Gur A Baradharaw Kod Sea and Land Council ("GBK").

GBK is effectively owned and operated by all of the region's prescribed bodies corporate ("PBCs").

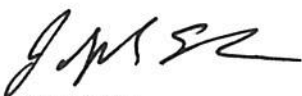
Please find **enclosed** an initial submission from the TSRA with ideas based on the TSRA's experience in this region as the NTRB.

Your letter indicated you would like to hear the views of the PBCs during the investigation. The TSRA may be able to help, as requested, in facilitating arrangements. You may want to liaise with both PBCs and GBK. Please let me know of any needs or proposals you may have in that regard and I will then get back to you.

If you would like further information, please contact the Principal Legal Officer Mr Peter Krebs on 07 4069 0854 or by email [peter.krebs@tsra.gov.au](mailto:peter.krebs@tsra.gov.au)

If you have any queries regarding the enclosed submission, please let me know.

Yours sincerely



Joseph Elu  
Chairperson  
Torres Strait Regional Authority

## Initial Submission

**From:** Torres Strait Regional Authority  
**To:** Expert Indigenous Working Group  
**Re:** COAG Investigation into Indigenous Land Administration and Use  
**Date:** 28 May 2015

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### 1. Torres Strait

As the home of the High Court's *Mabo* decision, the Torres Strait is in many ways synonymous with native title. More recently the High Court's decision in *Akiba* contained the first recognition that native title sea rights can be exercised for commercial and trading purposes.

The Torres Strait is also at the forefront of many post-determination developments in native title:-

- (a) Most of the region's Traditional Owner groups now have successful native title determinations over their traditional land. There are 21 prescribed bodies corporate (PBCs).
- (b) A PBC called Malu Lamar has been established to represent common law holders for sea native title in Part A of the Regional Sea Claim Area with mediation ongoing in Part B of the claim which will hopefully resolve the overlaps opening the way for a consent determination.
- (c) The region's PBCs have formed Gur A Baradharaw Kod Sea and Land Council (GBK) as an umbrella entity for the region. Although GBK itself is not a PBC, it is working towards assuming native title representative body (NTRB) status from the Torres Strait Regional Authority (TSRA). A transition plan is currently being implemented.
- (d) Some PBCs have secured grants of land tenure to compliment native title. Under the *Torres Strait Islander Land Act 1991* (Qld) and the *Aboriginal Land Act 1991* (Qld), a form of inalienable freehold title can be granted to PBCs on trust for common law holders. This form of land tenure replaces the deeds of grant in trust (DOGITs) currently held by local governments as trustees over most Island and many Cape York communities.

PBCs in the region are working with each other and with government agencies on ways to utilise their land and sea rights to address two priority regional issues: Indigenous economic development and home ownership.

The region's NTRB and PBCs are therefore well placed to provide input into the working group's advice to COAG. The TSRA welcomes the opportunity to do so.

The ideas in this submission about improving Indigenous land administration systems to deliver better economic development outcomes are not put forward in any order of

priority. They are the views of the TSRA in its NTRB capacity only. PBCs are likely to have ideas of their own.

## 2. **Idea 1 – Land Tenure Resolution**

**Idea** - The Australian Government and the Queensland Government should resource community-by-community *tenure resolution projects*. Each project should have the goal of, once and for all, implementing contemporary land tenure outcomes for all parcels of land in each community. The outcomes would be geared to optimum economic development and housing outcomes for Traditional Owners.

The tenure resolution would include the specific task in Idea No.2. In conjunction with a clean slate of practical tenure arrangements consistent with native title, economic development and housing outcomes, there should be established a regionally based land tenure management arrangement of the kind referred to in Idea No.3.

**Context** - Economic development and appropriate housing outcomes substantially hinge on a user-friendly and effective land administration system. The group-held nature and other aspects of native title rights, mean that native title is often not conducive to private enterprise initiatives by individual Traditional Owners or even by the group itself.

Nor is native title conducive to the use of land as security for raising capital, facilitating joint ventures and other commercial arrangements with third parties for commercial development needs.

Although a contemporary system of land tenure *in conjunction* with native title is therefore required, the current tenure system in the Torres Strait is excessively complex. As a result little it is understood by, and hence out of reach to, many Traditional Owners.

There are at least five separate pieces of land tenure legislation which, on paper, make a variety of freehold and leasehold tenure options available to Traditional Owners. However the associated complexity, lack of coordination and on-the-ground administration challenges mean that very few tenure grants have been made to Traditional Owners for either economic development or home ownership purposes.

Both the design *and* the administration of the current tenure system are substantial technical barriers to Indigenous economic development.

## 3. **Idea 2 – DOGIT Transfers**

**Idea** - This a more specific aspect of the broader tenure resolution suggestion contained in Idea No.1. In conjunction with broader tenure resolution, the Queensland Government needs to develop much more effective processes and procedures, and address other practical needs, to facilitate DOGIT Transfers to PBCs. Related issues include the need for direct, recurrent resourcing to PBCs so they can carry out these functions.

**Context** – Currently native title in land in almost all communities is held on trust for Traditional Owners by a PBC. On the other hand, tenure over the same land is held as DOGITs by local government in trust for the Traditional Owners.

This immediately creates a disconnect between the native title processes required to address tenure dealings (eg an ILUA to which the PBC must be a party) and the

tenure dealing itself which is granted and largely administered by the local government.

For many years the *Torres Strait Islander Land Act 1991* (Qld) and the *Aboriginal Land Act 1991* (Qld), have involved an obligation on the Queensland Minister to replace DOGITs held by local government with an inalienable form of freehold title held by PBCs on behalf of the relevant Traditional Owner group. To date only two Island communities have had DOGIT transfers successfully completed with both communities struggling to fulfil their new roles due to inadequate resources.

#### **4. Idea No.3 – Land Holding Structures and Entities**

**Idea** - In conjunction with the Ideas above, a review should occur of the structures and entities applying to each Traditional Owner group in the region.

Historical land administration measures by government have, in some cases, meant that a plethora of land trusts and corporations have been established additional to a group's PBC. In some cases land tenure may be held by one entity for a parcel of land and the native title for the same parcel held by another.

The tenure resolution projects in Idea No.1 should include a review of each group's land holding structures. There should be rationalisation and simplification where possible.

Where a Traditional Owner group wishes to develop a group-owned business (as distinct from an individually owned business), the group should be given advice and assistance about an appropriate corporate structure under which both land assets and businesses can be owned and operated by the group. Amongst other things there needs to be structures which ensure that business failure does not jeopardise the group's land assets.

**Context** – As with many aspects of land administration, there has been a silo approach to the management of native title, land tenure and associated business development. A holistic approach has not been taken.

In some cases, the plethora of land holding entities, each with their own boards, business development projects and strategic plans, has created conflict within a group.

These structural inadequacies are a deterrent to effective Indigenous business formation both on behalf of the group and by individuals within the group.

#### **5. Idea No.4 – Economic Development ILUAs**

**Idea** - Industry-based template ILUAs should be developed specific to the region. In particular there should be a template ILUA for tourism projects and a template ILUA for fishing-related activities. These are two industries which present immediate economic development opportunities for the Torres Strait.

The templates would address all native title and cultural heritage requirements for business projects other than compensation formulas which would need to be negotiated on a project by project basis.

The template ILUAs would provide regional consistency, efficiency and cost benefits particularly given that almost all land tenure dealings in the Torres Strait require native title to be addressed.

**Context** – Almost all economic development projects (and for that matter home ownership outcomes), in the region involve land where native title has been determined to exist. There is a strong regional view that native title should always be addressed on an agreement-making basis, most commonly through ILUAs.

PBCs have consistently shown a strong inclination and aptitude to conclude ILUAs for projects. They can point to a number of benchmark ILUA outcomes.

The project to develop template economic development ILUAs should include practical measures, tools and templates to aid the PBCs in meeting the ILUA consultation and consent requirements in Part 2 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

## 6. **Idea No.5 – 100% Ownership of Torres Strait Fisheries**

**Idea** - Traditional Owner based organisations in the Torres Strait, including the TSRA and the PBC for the region's native title sea determination, support an aspiration that 100% of the region's fisheries resources should vest in Traditional Owners.

Fisheries resources provide huge economic development potential for Traditional Owners. Significant progress has already been achieved in delivering statutory fishing entitlements to Traditional Owners.

A close strategic relationship needs to be developed between Traditional Owners, government and fisheries management agencies to achieve this aspiration and put in place commercial structures and other measures through which Traditional Owners can build fishing businesses based on a combination of their native title and statutory fishing entitlements.

**Context** – In *Akiba v Commonwealth*, the High Court of Australia recognised that native title sea rights include a traditional right to fish commercially. In the words of the native title determination, there is a native title right to take the resources of the sea for any purpose.

Statutory fishing entitlements under the *Torres Strait Fisheries Act 1984* (Cth), were established before the native title right to fish commercially was recognised.

An overall effort of all stakeholders is needed to ensure consistency between rights to take resources under fisheries legislation (statutory fishing entitlements) and the newly recognised native title right, is achieved.