

Submission – Indigenous Land Administration and Use

To: Expert Indigenous Working Group

COAG Investigation into Indigenous Land Administration and Use

From: Torres Strait Region PBCs

Date: 5 June 2015

Note: References in this submission to Traditional Owners is a reference to the Aboriginal and Torres Strait Islander land and sea owners of the Torres Strait region.

1. Introduction

- 1.1 This submission is made jointly by all PBCs in the Torres Strait.
- 1.2 A map showing Torres Strait native title determination areas is contained in **Annexure 1**. A list of the PBCs is contained in **Annexure 2**.
- 1.3 The Torres Strait operates largely in a post-determination environment. However this does not mean that there is a reduction in the extent of native title-related assistance required; the contrary is the case.
- 1.4 The nature and extent of post-determination issues, the variety of assistance needs and the sheer number of PBCs, requires innovation in the way support services are provided. Although that aspect may not fall strictly within the scope of the Terms of Reference (“ToR”), it is a vital issue. Some key points are therefore addressed briefly in paragraph 4 of the submission.
- 1.5 The Torres Strait region involves the full gambit of opportunities and challenges confronting PBCs. A key distinguishing regional feature is the extent of sea resources, the nature of Indigenous rights (including native title) to sea resources and the extent of sea-related opportunities. Although only land is referred to in the ToR, it is very important that Indigenous sea administration and use is considered in the COAG investigation.
- 1.6 Paragraph 2 of this submission addresses a PBC proposal regarding the main opportunity and challenge for Torres Strait PBCs in relation to sea administration and use.
- 1.7 In relation to land administration and use, perhaps the largest Torres Strait challenge for Traditional Owners, PBCs, public sector agencies and private proponents is the gross complexity and lack of coordination in the current land tenure system. The current system has truly reached gridlock. Other than through the application of excessive time and resources, most tenure dealings are unachievable.
- 1.8 Perhaps more than any other region in Australia, the Torres Strait has vast experience in native title. The post-determination initiatives that PBCs are currently pursuing and the unique combination of land and sea issues, the unique combination of both Aboriginal and Torres Strait Islander communities

and the direct involvement in the region of all three levels of government, mean that the region is well placed to pilot outcomes from the COAG investigation.

- 1.9 Specific ideas in relation to each element in the scope of investigation are contained in paragraph 3. Where possible, suggested actions for each idea have also been included. Because of the large number of ideas put forward, this submission contains only a brief overview of each one. More information on the ideas can be provided upon request.
- 1.10 Some of the ideas do not strictly relate to land administration and use. However Indigenous economic development and home ownership outcomes can not be achieved by improved land administration alone. Accordingly this submission contains a range of ideas, many Torres Strait specific, which together could deliver the region's Traditional Owners economic independence and real social advancement. Proper implementation of the ideas will also place the region's PBCs on a fully functional and financially sustainable footing for the long term.

2. Torres Strait Fisheries Reform Proposal

- 2.1 Torres Strait PBCs endorse the initial Ideas Paper provided to the EIWG by Mr Maluwap Nona on 15 April 2015.
- 2.2 As indicated in the paper, Malu Lamar (Torres Strait Islander) Corporation RNTBC is the PBC for the current Torres Strait sea determination area. All of the region's PBCs join with Malu Lamar in reiterating the request for EIWG endorsement of the need for comprehensive Torres Strait fisheries reform.
- 2.3 By way of background to this vital aspect of seas administration and use, **Annexure 3** replicates the schedule from the Ideas Paper about the Torres Strait seas situation. It has however been updated with latest developments.
- 2.4 The EIWG report to COAG should specifically incorporate or otherwise support the following points:-
 - (a) For those Traditional Owners whose traditional country includes both land and seas, improvements to current laws and systems regulating native title and other sea rights must be improved to enable them to derive economic benefits, fully enable Indigenous economic and commercial advancement and jobs creation. The Torres Strait is a key example.
 - (b) In the case of the Torres Strait, the *Akiba v Commonwealth* decision of the High Court of Australia on 7 August 2013 found that the native title sea rights include a right for Traditional Owners to take the resources of the sea for all commercial and non-commercial purposes. That is to say the native title sea right includes the right to fish commercially.
 - (c) The *Torres Strait Fisheries Act 1984* (Cth) regulates commercial fishing in the Torres Strait. As the native title sea rights include a right to commercially fish and as the native title rights are subject to Commonwealth and State laws, the *Torres Strait Fisheries Act 1984* regulates native title. However the legislation was enacted *before* it was known that Traditional Owners already had a native title right to

commercially fish. This alone necessitates review and reform of the legislation.

- (d) The *Torres Strait Fisheries Act 1984* itself enables the creation of statutory fishing entitlements capable of being held only by Traditional Owners (so-called “TIB licences”). However it also enables the creation of statutory fishing entitlements for non-Traditional Owners (so-called “TVH licences”). The peak regulator under the *Torres Strait Fisheries Act 1984*, is the Protected Zone Joint Authority (“PZJA”). It resolved on 9 April 2014 to support the aspiration for 100% of Torres Strait fisheries resources (statutory entitlements to fish commercially as well as the native title right to fish commercially), to be held by Traditional Owners.
- (e) Given the sea rights held by Traditional Owners in the Torres Strait and the extent to which the fisheries and other sea resources can achieve Indigenous economic development outcomes, all levels of government should actively support development of the Torres Strait fisheries reform proposal advocated by Malu Lamar as the PBC for the Torres Strait sea determination area.
- (f) The *Fisheries Act 1994* (Qld) regulates recreational fishing in the Torres Strait. Recreational fishing, particularly fishing charters, also has great potential for Indigenous economic development in the region. There are opportunities for commercial cross-over between recreational fishing and the region’s vast untapped tourism potential. The Queensland Government is currently reviewing the *Fisheries Act 1994*. As with commercial fishing, detailed reform proposals to enhance Traditional Owner opportunities in the recreational fishing space must be developed.
- (g) Professional independent fisheries expertise is needed to help Malu Lamar develop the technical detail of all the necessary reforms.
- (h) In addition to regulatory reform, achieving actual economic development outcomes requires commercial reform. The long history of non-Traditional Owner exploitation of fisheries resources means that Traditional Owners themselves don’t have the capital or sometimes the commercial expertise required for Indigenous fishing business start-ups. Some of the ideas in paragraph 3 reflect the kinds of new commercial arrangements that are needed.

3. Scope of Investigation – Ideas

3.1 ***Enable Traditional Owners to derive economic benefits from their rights***

Idea 1 - Torres Strait Fisheries Reform Proposal – Commercial fishing presents perhaps the largest single economic opportunity for Traditional Owners in the Torres Strait. Traditional Owners currently have modest involvement in commercial fishing and very little involvement in fish processing, export and retail of fish products. There is also very little Traditional Owner involvement in the business of recreational fishing.

This is incongruous given the recently recognised native title right to fish commercially, other Indigenous sea rights and the extent of fisheries resources in Traditional Owner’s sea country.

Malu Lamar has provided a synopsis to the Australian Government about the development of a detailed fisheries reform proposal. Regulatory and commercial reform outcomes may broadly reflect the type of fisheries reform outcomes achieved by Māori in New Zealand over the last two decades.

Suggested Actions -

- (a) The Australian Government should properly resource development of the fisheries reform proposal.
- (b) The Australian Fisheries Management Authority (“AFMA”) proposes to develop a Tropical Rock Lobster Management Plan in advance of the fisheries reform proposal. The draft management plan needs to incorporate reform concepts and other changes of the kind proposed by Malu Lamar in a submission to AFMA in January 2015. AFMA needs to resource Malu Lamar to engage independent fisheries experts to help develop the technical changes required to the draft plan.
- (c) The potential for Indigenous fishing businesses to take best advantage of domestic and particularly export markets, is often dependant on their ability to regularly supply large quantities of product. A mechanism should be developed to enable Traditional Owners for fisheries in neighbouring regions to explore joint venture, fishing cooperative and other commercial supply models to ensure volume and regularity of supply.

Idea 2 - Land tenure resolution – Over the course of decades a land tenure system has evolved in the Torres Strait and other Queensland Indigenous communities, of astounding complexity. Land tenures and their administration are variously derived from the following legislation and regulations:-

- *Aboriginal and Torres Strait Islander Land Holding Act 2013 (Qld)*
- *Aboriginal and Torres Strait Islander (Providing Freehold) Amendment Act 2014 (Qld)*
- *Aboriginal Land Act 1991 (Qld)*
- *Aboriginal Land Regulation 1991 (Qld)*
- *Land Act 1994 (Qld)*
- *Land Regulation 2009 (Qld)*
- *Torres Strait Islander Land Act 1991 (Qld).*
- *Torres Strait Islander Land Regulation 2011 (Qld).*

A plethora of State policies and procedures have been separately made in relation to the different legislation. In the Torres Strait, this legislation, regulation and policy operates in the context of “DOGIT transfers”. That is to say, the cancellation of existing deeds of grant in trust for which a local government is usually the trustee and their replacement with grants of an alienable form of freehold title, usually to the PBC.

The process of DOGIT transfers is itself immensely complex. There are a large number of DOGIT transfers still to be undertaken in the Torres Strait.

The *Aboriginal and Torres Strait Islander Land Holding Act 2013* replaces similar legislation that was enacted in 1985. Its main purpose is to provide for private and mostly perpetual leases to be granted to Indigenous occupants of homes. In the Torres Strait, some 294 “validly” and “invalidly” made applications were lodged with government, most of them over 25 years ago. Despite almost two decades having passed, few of the applications have been processed to the grant stage. The 2013 legislation seeks to establish a process for the processing of outstanding applications.

Unfortunately, the new process is of itself extraordinary complex. There is very little knowledge about it on the part of applicants, native title holders and the community at large. Interface with applicants and others is mostly through a government website. The rights of applicants under the legislation are deemed to expire after certain timeframes elapse.

More concerning still, the Queensland Government proposes to utilise Part 2 Division 3 Subdivision I of the *Native Title Act 1993* to validate the grant of new leases pursuant to old applications. Under section 241D(1)(b), the grant of the lease will automatically extinguish native title over the lease area.

More recently the Queensland Government has enacted the *Aboriginal and Torres Strait Islander (Providing Freehold) Amendment Act 2014* which contains complex processes which may ultimately enable the grant of ordinary (alienable) freehold to Traditional Owners. However the process effectively gives priority to persons who already hold a non-native title interest in a parcel of land. That person may be different to the traditional land owner. This creates considerable scope for disputation.

The system for other types of leasing (for up to 99 years) is provided for by the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*. Such leases are often beyond the capacity and capability of Traditional Owners to secure. This is evidenced by the fact that, although leasing options have been available under the legislation for nearly 25 years, very few such leases have actually been granted to Traditional Owners.

Over and above all of this, each individual tenure grant of whatever kind needs to be undertaken in a manner compliant with Part 2 Division 3 of the *Native Title Act 1993*.

All of this together means that the current tenure system is largely unworkable from a Traditional Owner perspective. There are two possible solutions. Firstly, a massive land tenure law reform project primarily aimed at simplifying the whole tenure system. Secondly, the current system remains but government dedicates the resources to undertake comprehensive land tenure resolution projects on a community by community basis.

The tenure resolution projects would address all DOGIT transfers and other land dealings necessary to create an up to date “clean slate” compliment of tenures in each community. Some of the other ideas for land administration contained in this submission would then enable future tenure dealings for residential and business purposes to be undertaken efficiently and effectively.

Suggested Actions -

- (a) The design of a comprehensive land tenure resolution system needs detailed consideration. The object should be to create a blueprint capable of practical implementation at the community level.
- (b) Preparation of the blueprint is likely to be best facilitated by appropriate property experts outside of government. There is currently little effective coordination between the multiple government departments, units and agencies that administer the existing tenure system. An external, independent expert working with government would help cut through vested interest and bureaucratic resistance to change.
- (c) Tenure resolution outcomes should be consistent with the traditional laws and customs which, under section 223(1) of the *Native Title Act 1993*, comprise native title. For example, wherever possible land tenure boundaries should be consistent with traditional land boundaries (refer also to Idea 18).

Idea 3 - Torres Strait fisheries ILUA – Over the last 12 months, Malu Lamar has received over 115 separate future act notifications in relation to proposed future acts in its determination area. It is impossible for an un-resourced PBC to effectively manage the procedural rights under the *Native Title Act 1993* associated with these numbers.

More importantly, procedural rights in relation to many of the future acts are not commensurate with the affect they have on native title rights (see also Idea 4 below). There is also inconsistency in how government fisheries and other agencies are interpreting and applying the future act provisions in relation to sea rights.

To address these issues, a Torres Strait regional fisheries ILUA should be developed. In addition to providing future act consents on a class basis (some classes being subject to conditions), the ILUA could incorporate outcomes from the Torres Strait fisheries reform proposal referred to in Idea 1.

Suggested Actions –

- (a) The National Native Title Tribunal (“NNTT”) should facilitate an initial meeting of all fisheries-related agencies to consider this idea. Malu Lamar has already received an indication from the NNTT that it will assist.
- (b) In broad conceptual terms, a template Torres Strait Infrastructure and Housing ILUA has already been developed and provides a starting point for the kind of fisheries-related ILUA outcomes that could be achieved.
- (c) A lead Australian Government department is needed to coordinate and engender cooperation from other Commonwealth and State agencies. Given its role in relation to the *Native Title Act 1993* and its capabilities in complex law reform, the Attorney-General’s Department of the Australian Government could be best placed to perform this role.

Idea 4 – Reforming the application of s24HA to fishing-related future acts – Section 24HA of the *Native Title Act 1993* enables future acts consisting of

the grant of leases, licences, permits or authorities to be done validly simply where the grants are made under legislation that relates to the management or regulation of, amongst other things, living aquatic resources (which would include fisheries resources). The only procedural rights afforded to native title holders under section 24HA are a right to be notified and an opportunity to comment.

This provision was enacted before it was understood or accepted at law that native title sea rights can include a right to take living aquatic resources for commercial (as well as non-commercial) purposes. The grant of any lease, licence, permit or authority which affects a native title right of that kind, has considerable consequences for the native title holders.

Those consequences include economic loss. Where such leases, licences, permits or authorities are granted to non-native title holders, they undercut the economic development opportunities of native title holders.

Section 24HA needs to be reformed so that it does not apply to the grant of leases, licences, permits or authorities which afford commercial rights or entitlements to non-native title holders in respect of living aquatic resources to which native title holders themselves already have a native title right to take the same resources for commercial purposes.

Suggested Actions -

- (a) The Australian Government, through the Attorney-General's department, should discuss this issue with Malu Lamar and devise appropriate law reform.
- (b) The idea for a Torres Strait fisheries ILUA (refer to Idea 3), is an appropriate means of addressing future act compliance which authorise leases, licences, permits or authorities to non-native title holders for the commercial taking of living aquatic resources to which native title holders already have relevant native title rights.

Idea 5 - Regional tenure management – In the past the Queensland Government has investigated the possibility of establishing a “hub” which would assist external parties manage and administer land tenure and town planning systems in Indigenous communities. It is not know what, if anything, came of the investigation.

The concept does however have some merit. Importantly though there needs to be a separate services hub for each region. Each hub needs to be mostly focused on tenure administration. It needs to be free of conflicts of interest so as to enable the service provider to primarily assist PBCs and Traditional Owners with their tenure applications.

Assistance could be provided to others on a secondary basis.

Such a services hub for the Torres Strait region might, for example, sit within Gur A Baradharaw Kod Sea and Land Council (“GBK”).

Suggested Actions -

- (a) Senior policy makers within the Queensland Government should liaise with GBK and the TSRA about this concept.
- (b) Buy-in from local government will be important. Initial exploration of the idea should include the Local Government Association of Queensland.

Idea 6 – Streamlining processes for ILUA negotiations and registration –
In the Torres Strait, ILUAs are the preferred method of addressing the requirements of Part 2 Division 3 of the *Native Title Act 1993* in relation to all future acts.

The Torres Strait region has already been at the forefront of many ILUA innovations. The latest is the Template Regional Infrastructure and Housing ILUA. Unfortunately, completion of the template ILUA project has long been delayed by poor coordination between Departments and agencies within the Queensland Government.

A number of other ideas in this submission relate to the development of industry based template ILUAs utilising the existing regional template as a model. However where further templates are developed, there needs to be a commitment by government parties to proactive and innovative involvement and proper resourcing.

There are a range of technical improvements which can be made to the negotiation, authorisation and registration of ILUAs and ideas have previously been put forward by the National Native Title Council. Government now needs to expedite streamlining of the processes.

Most ILUAs in the Torres Strait region are now body corporate ILUAs under Part 2 Division 3 Subdivision B of the *Native Title Act 1993*. There are substantial and highly technical “consultation and consent” requirements on PBCs under Part 2 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999*. They often intersect with procedural requirements in PBC Rule Books and substantive traditional decision-making requirements under traditional laws and customs.

The Torres Strait experience is that the technical requirements for body corporate ILUA consultation and consent are poorly understood by most government agencies. This often impedes the completion of ILUAs. There is substantial scope for streamlining and simplifying the procedures.

Suggested Actions –

- (a) The organisations and agencies considering this issue should consult with the Torres Strait native title representative body about the particular process and procedural challenges in the region regarding PBC consultation and consent requirements for body corporate ILUAs.
- (b) There are a number of pending body corporate ILUAs in the Torres Strait where ideas for streamlined processes could be simulated for road testing purposes.

3.2 ***Enable jobs and economic advancement for Indigenous peoples***

Idea 7 - Regional enterprise divestment – The Torres Strait Island Regional Council is currently in the process of divesting numerous community enterprises. Community based organisations, such as PBCs, have been invited to express interest in assuming the enterprises.

For PBCs, there are both risks and opportunities with enterprise divestment. It is vital that where the ownership and/or operation of an enterprise is assumed by a PBC, it is done on the basis that the enterprise is viable from a financial and management perspective. Appropriate due diligence assessments are necessary.

Unfortunately resources to undertake due diligence are not available. Most PBCs and native title representative bodies do not possess the necessary commercial, financial and legal capabilities.

All levels of government, native title representative bodies and PBCs need to work together to create a proper enterprise divestment system. The system should incorporate appropriate processes for due diligence and business planning and help PBCs and their related corporate entities develop the capacity and capability to assume operation of the enterprises.

When properly divested, existing local enterprises do have real possibilities to generate revenue streams which, over time, may enable PBCs to become independent of government resourcing.

Suggested Actions -

- (a) A taskforce should be established to create a system for facilitating government divestment of relevant enterprises to PBCs at the regional and local level.
- (b) The immediately pending local government enterprise divestments to PBCs in the Torres Strait should be used to road test the system.

Idea 8 - PBC corporate structures for commercial enterprises – Where a Traditional Owner group, through its PBC, wishes to undertake commercial enterprises, it will generally be prudent for the enterprises to operate through separate corporate/commercial structures. It is important that the commercial failure of an enterprise does not threaten the PBC which holds native title and other land and sea assets.

Many PBCS in Australia are separately developing corporate structure models. Traditional Owner groups in other countries, such as Canada and New Zealand, are even more advanced.

A series of tools and templates relating to corporate structures for commercial enterprises should be developed for use by PBCs nationally. It shouldn't be necessary for each PBC to re-design the wheel. The tools and templates need to be developed by experts with appropriate accounting and legal qualifications.

Suggested Actions –

- (a) The taskforce suggested in Idea 1, could also take on the role of developing the tools and templates.
- (b) Given the pending enterprise divestment in the Torres Strait, this region is well placed to trial the development and use of the tools and templates.

Idea 9 – PBC ownership/equity participation in IBIS stores – The largest single generators of what is effectively commercial revenue in most Torres Strait communities are the local IBIS stores. The IBIS store in each community often provides the sole retail outlet. It is anachronistic that, in this day and age, retail operations in communities are still government owned and operated.

IBIS is the Islander Board of Industry and Service, a Queensland Government owned and operated corporation under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld).

The revenues of IBIS stores are almost entirely derived from the retail spend of Traditional Owners. Although the operation is intended to be not-for-profit, the IBIS stores could be fully or partially owned by PBCs or their related entities and they could be conducted on a profit-making basis. There are many other potential economic advancement and job creation benefits.

For example, much more of the management of the stores could be locally or regionally based (at the moment most of the management is operated out of Cairns). Although some management functions would continue to be centralised on a regional basis (for example through an entity like GBK), there is scope for greater involvement at the local community level.

Local ownership and involvement would also encourage the IBIS stores to become platforms for other individually owned commercial enterprises. For example coffee shops, hairdressers and even competing retail outlets could be integrated into the existing IBIS retail platform in each community.

Suggested Actions –

- (a) The taskforce suggested in relation to Ideas 7 and 8 could also investigate this idea. It would be appropriate for a specific committee to be appointed within the taskforce and the committee should include independent professional experts and representatives from Torres Strait PBCs.
- (b) If the committee recommends the idea, a business model for full or partial divestment of IBIS stores to PBCs or their related entities should be developed.

Idea 10 – Indigenous economic advancement outcomes from Queensland's reforms to agricultural land tenures and tenures within conservation areas and off-shore Islands – The *Land and Other Amendments Act 2014* (Qld) recently enacted the Queensland Government's reforms facilitating easier tenure upgrades of pastoral leases and other agricultural land tenures. Related reforms also enable leases to be granted within conservation areas and allow upgrades to leasehold tenures for off-shore Islands.

Most tenure dealings facilitated by these reforms will need to address native title. An ILUA is the appropriate means by which native title is addressed. The ILUAs should provide native title parties with the opportunity for direct commercial involvement in the associated business enterprises. This could involve everything from equity participation to ownership and/or the establishment and operation of spin-off businesses.

A suite of ILUA-related tools and templates could be developed. The tools and templates could contain detailed ideas, models and draft documents both in relation to ILUAs themselves and the commercial outcomes. Parties to any particular proposed ILUA would of course be free to vary the models in any way.

Suggested Actions –

- (a) The taskforce for Ideas 7, 8 and 9 could also develop this idea further.
- (b) The tools and templates should be trialled as soon as proposals for relevant tenure dealings/business enterprises emerge. The tools and templates should be regularly updated to reflect learnings from practical experience.

Idea 11 – PBC involvement in regional whole-of-government technical working group – In Queensland the Remote Indigenous Land and Infrastructure Program Office in the Department of Aboriginal and Torres Strait Islander Partnerships has established technical working groups (“TWG”) to oversee management and roll-out of government infrastructure and housing projects in Indigenous communities.

The Torres Strait experience is that PBCs have little, if any, involvement in the TWGs. This is an impediment to direct PBC/Traditional Owner involvement in the formation of nuts and bolts arrangements about how projects are undertaken.

There would be considerable value-adding to the work of TWGs if PBCs were embedded. Where possible, there should be one TWG for each region, certainly in the Torres Strait.

Suggested Actions –

- (a) The appropriate Queensland Minister should meet with Torres Strait PBC representatives to discuss their involvement in a single TWG for the Torres Strait region.
- (b) Information about the TWG model in Queensland should be provided to other States and Territories.

3.3 *Enable Indigenous home ownership and commercial enterprise*

Idea 12- DOGIT transfers – The central role of DOGIT transfers in the Torres Strait land tenure system, and hence in relation to Indigenous home ownership and commercial enterprises, is referred to in Idea 2.

Because of the way the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* work, it is important that DOGIT transfers only take place *after* a PBC has been established pursuant to a native title determination. This is the only way in which they can qualify as the grantee for grants of inalienable

freehold. It is very important that wherever possible the native title and the inalienable freehold are held by the same corporate entity (i.e. the PBC), on behalf of the Traditional Owner group.

Although PBCs have been in place for most Torres Strait communities for many years, there have only been two DOGIT transfers completed in the region so far. Several other transfer processes have been flagged. In some cases however there are major problems around deficiencies in the statutory consultation requirement and with the transparency of the processes generally.

The grants of inalienable freehold to PBCs pursuant to DOGIT transfers are, under the current land tenure system, a vital component for better enabling home ownership and commercial enterprises. However the way in which DOGIT transfer processes are conducted by the Queensland Government needs substantial improvement, including as to their effectiveness, efficiency and speed.

The Queensland Government should commit to immediate dialogue with Torres Strait PBCs on a regional basis about all current and proposed DOGIT transfers and discuss detailed reforms to the way in which DOGIT transfers are conducted.

DOGIT transfers should be implemented as part of the comprehensive tenure resolution projects for each community referred to in Idea 2.

Suggested Actions –

- (a) The Queensland Minister for Natural Resources and Mines should immediately meet with the Kaurareg Native Title Aboriginal Corporation RNTBC (as it has repeatedly requested), regarding the proposed DOGIT transfer at Kirri (Hammond Island).
- (b) The Queensland Minister for Natural Resources and Mines should immediately meet with the Mualgal (Torres Strait Islander) Corporation RNTBC in relation to any proposed DOGIT transfer at St Pauls on Moa Island.
- (c) Any pending steps in relation to the proposed DOGIT transfers referred to in paragraphs (a) and (b) should stop until the Minister has provided a detailed briefing to the PBCs concerned and given them direct opportunity for input into any proposed Ministerial decisions.
- (d) The Queensland Government should appoint an independent external expert to review the current DOGIT transfer processes and recommend changes.

Idea 13 - Community land tenure education - The problem of tenure complexity has been previously referred to. It is incongruous that such a complex system (quite possibly one of the most complex land tenure systems in the world), should apply in Indigenous communities where there has been no effort by government to inform Traditional Owners about how the land tenure system works.

Affording the essential base-line knowledge required by Traditional Owners to ensure their effective participation in the land tenure system, is not met by one-off, fly-in and fly-out presentations by government officers about a particular aspect of the system. The distribution of information sheets and powerpoint

slides at hastily arranged “community meetings” is not sufficient. A comprehensive program of community education about the land tenure system and how it works with native title is essential.

In the Torres Strait, English is often the second language for many Traditional Owners. Translation of community education programs into traditional language is necessary.

Only with appropriate knowledge of how land tenures work, can individual Traditional Owners utilise the system to achieve their own home ownership and business enterprise outcomes.

Suggested Actions -

- (a) Collaboration is required between appropriately skilled education providers and property/land specialists in the development of a community land tenure education program specifically for Traditional Owners.
- (b) The fundamentals of land tenure should be taught to new Traditional Owner generations at relevant educational institutions.

Idea 14 – Removing technical barriers to Indigenous business start-ups –

The complexity of the land tenure system is a fundamental technical barrier to Indigenous business start-ups. Most Indigenous business proposals involve land tenure dealings of one kind or another. Without access to specialist professional expertise and resources, the complexity of the system presently renders Indigenous business-related tenure outcomes impossible in many cases.

However there are other technical barriers as well. For example, in order for a business or residential lease to be registered it must be accompanied by a plan of the lease area which meets numerous technical specifications. Generally such plans need to be prepared by surveyors. The cost of engaging a surveyor to prepare the plan is expensive in the easiest of circumstances. In the case of remote Torres Strait Islands, the expense is completely prohibitive.

Recently the TSRA has written to the Remote Indigenous Land and Infrastructure Program Office in Queensland with practical suggestions for addressing this particular aspect. However there are many other technical barriers both in relation to land tenure grants and other business start-up requirements.

Suggested Actions -

- (a) An audit should be conducted by an agency or organisation with appropriate skills and experience to identify the full range of technical barriers to Indigenous business start-ups. Given that many red-tape barriers arise from State and local government regulation, separate audits may be required in each State and Territory.
- (b) The auditors should develop comprehensive practical suggestions for removing or diminishing the technical barriers identified.

Idea 15 – Pilot Indigenous business support program – Absent any government or other external assistance, one practical way of enabling Indigenous commercial enterprises is by supporting key entrepreneurial trail

blazers. A trail blazing business can create a practical start-up path which other Indigenous entrepreneurs can follow. They also provide great inspiration to others.

A trail blazing business could be used to create blueprints, tools and templates (including for land tenure outcomes), that other business start-ups can then follow.

Although there may be some role for government involvement in a pilot Indigenous business support program, it should be spearheaded by Indigenous business organisations and supported by large mainstream businesses and business peak bodies.

Suggested Actions -

- (a) An Indigenous business organisation (such as the South East Queensland Indigenous Chamber of Commerce), could perhaps partner with a national business peak body to develop the program.
- (b) Major Australian mainstream businesses should be approached to resource development of the program.

Idea 16 - Facilitate budget outcomes for Indigenous businesses – The Australian Government's 2015/16 federal budget contained a package of assistance measures for small businesses. Apart from the lower small business corporate tax rate, they include provisions for instant asset write-offs and simplified depreciations and initiatives for encouraging small business start-ups.

The program referred to in Idea 15 should expressly incorporate ways of maximising the budget outcomes for Indigenous small businesses.

The Australian Government should produce an information service targeted to Traditional Owners about how the small business budget outcomes and other government policies can particularly assist Indigenous business start-ups and those Indigenous businesses already operating.

Suggested Actions -

- (a) A relevant Australian Government department or agency should be given the task of implementing this idea.
- (b) All levels of government should give coordinated consideration to new policies and initiatives specifically geared to assisting Indigenous small businesses with a special emphasis on red-tape reduction and approvals processes that are user friendly to Traditional Owners.

Idea 17 - Regional Indigenous business incubator - Indigenous entrepreneurs, particularly in remote and regional locations, would be greatly assisted if they had practical access to a business incubator service specifically geared to their needs.

Suggested Actions –

- (a) Consideration should be given to what organisation or agency is best placed to investigate the means by which this idea can be realised.

- (b) In some regions the architecture for an Indigenous business incubator might already exist. For example, the Torres Strait Regional Authority has an existing economic development arm.

Idea 18 - Traditional boundary resolution and Indigenous home construction on traditional land - The traditional laws and customs of many Traditional Owner groups in the Torres Strait provide for clans and families to possess distinct parcels of traditional land of their own. Given that these traditional laws and customs comprise native title, why should home construction by the Traditional Owners first require a tenure grant to be made at all?

The one aspect where tenure grants can assist is in ensuring certain land boundaries. However, a program to formally resolve traditional boundaries in the Torres Strait context could address this aspect.

Suggested Actions -

- (a) Ugar Ged Kem Le Zeuber Er Kep Le (Torres Strait Islander) Corporation RNTBC is currently working with the local government and the National Native Title Tribunal on an innovative program for traditional boundary resolution at Ugar (Stephen Island). All government agencies should give this initiative maximum support.
- (b) Outcomes from that project should be extended to include consideration of ways and means by which native title can be sufficient to enable private home construction by Traditional Owners on their traditional land without any additional land tenure requirement. It is acknowledged that this investigation may need to be specific to the Torres Strait given the particular nature of traditional laws and customs about traditional land ownership in the region.

3.4 Attract private sector investment and finance

Idea 19 - Private business development ILUAs – there are a number of instances in the Torres Strait where individual Traditional Owners are in the start-up phase for their own small businesses. To the extent possible with the very limited resources available, they are being established in ways that pick up some of the aspects of Idea 15.

Most of the business start-ups require tenure grants, typically for small scale fish processing plants. The private investment in those plants requires that a lease be granted over the plant site. In turn, the valid grant of the lease requires an ILUA.

There is substantial scope for easing the means and reducing the cost, involved in addressing the ILUA requirement. For example, standard tools and templates for such ILUAs could be created. Different model ILUAs could be prepared for different types of businesses.

Particular consideration needs to be given to the compensation models which PBCs (in the case of body corporate ILUAs) and business proponents could consider. Given that most Indigenous business start-ups are capital poor, profit sharing models should be considered. There may also be opportunities for equity participation in the business by the PBC or its related entities.

Suggested Actions -

- (a) The taskforce and special committee referred to in Idea 9 could also develop this idea further.
- (b) The tools and templates should be trailed on the Indigenous business enterprises already emerging in the Torres Strait. The tools and templates should be regularly updated to reflect learnings from practical experience.

Idea 20 - Tax based incentives for Indigenous businesses – it is beyond the scope of this submission to consider this issue in detail. However the position of inherent disadvantage facing many Indigenous small businesses, particularly at the start-up stage, means that innovative tax based incentives should be adopted by government.

This could include advantageous tax treatment for non-Indigenous investors in Indigenous majority owned businesses.

Attracting capital is a major challenge. Given the remoteness, associated high business costs and other risk factors associated with many indigenous business start-ups, tax based incentives for external investment are an important part of the policy settings that need to be considered.

Suggested Actions -

- (a) The Indigenous business organisation/national business peak body proposed to action Idea 15 should also examine this proposal. It should have direct access to relevant treasury officials and independent tax/accounting advice.
- (b) A package of tax based incentives should ideally be developed as part of the Australian Governments 2016/17 budget.

Idea 21- Native title payment provisions in Income Tax Assessment Act – The *Income Tax Assessment Act 1997* (Cth), already contains provisions for the favourable tax treatment of “native title payments” (being payments made in respect of compensation under ILUAs and other native title agreements).

Tax/accounting experts should give consideration to how innovative use of the provisions might be adopted by Indigenous businesses where business revenue is derived from a direct exercise of native title rights (i.e. the revenue could be the compensation under an ILUA).

Consideration should be given to how the existing provisions could be modified or expanded to provide the type of tax based incentives for Indigenous businesses referred to in Idea 20.

Suggested Actions –

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 22 - Private sector joint ventures – Indigenous business start-ups face two particular challenges. Firstly inadequate access to start-up/expansion capital and secondly the need for technical business start-up and management expertise.

Private sector joint ventures between Indigenous entrepreneurs and established non-Indigenous businesses is a primary means of addressing these issues. The extent of start-up capital required may mean that a substantial equity holding is initially taken by the non-Indigenous business where capital is provided by way of an equity stake.

Innovative consideration needs to be given to equity and debt means by which capital can be raised to support Indigenous business start-ups. This might, for example include shareholding arrangements under which the Indigenous partner could buy down or buy out the non-Indigenous partner over time. Tools, templates and models for such joint ventures could also be prepared.

Suggested Actions –

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 23 - Native title compensation resolution for past acts – The *Native Title Act 1993* provides native title holders with statutory compensation entitlements in relation to affects on their native title from a range of past acts, previous exclusive possession acts and previous non-exclusive possession acts.

There are also statutory entitlements to compensation in relation to already undertaken future acts covered by provisions in Part 2 Division 3 of the *Native Title Act 1993* other than ILUAs.

In the Torres Strait, the determination of native title claims is now nearly complete. The extent of native title and the associated rights and interests is now clear. There is a very substantial reservoir of existing native title compensation entitlements which PBCs can now pursue.

The compensation entitlements may themselves provide a source of capital for Indigenous economic development purposes. Beyond that, the compensation entitlements need, in their own right, to be realised efficiently, effectively and expeditiously.

The statutory compensation claim process in the *Native Title Act 1993* will not achieve those ends. The Australian Government and the Queensland Government should commence dialogue with Torres Strait PBCs about an alternative means of achieving agreed settlements of government compensation liabilities on a regional basis.

Suggested Actions -

- (a) A special project should be initiated involving the Australian Government, the Queensland Government and Torres Strait PBCs to examine this issue.

- (b) Assistance from the National Native Title Tribunal should be sought to help facilitate the project.

Idea 24 - Native title compensation innovations for future acts – New future acts are constantly occurring throughout Torres Strait land and seas. Where the future acts are covered by ILUAs, the ILUAs themselves need to provide for appropriate compensation outcomes. Future acts covered by non-ILUA provisions in Part 2 Division 3 of the *Native Title Act 1993* require statutory compensation claims.

In the ILUA context, some Torres Strait PBCs are already investigating innovative compensation mechanisms. For example, long term participation in revenue streams generated by local government enterprises and the concept of levies applicable to non-Traditional Owner activities.

These ideas however are generated on a piece meal basis. There is a risk of duplication and redesigning of the wheel. Again ideas, models, tools and templates should be developed in the interests of effectiveness, efficiency and expediency.

Suggested Actions -

- (a) A special project should be initiated involving the Australian Government, the Queensland Government and Torres Strait PBCs to examine this issue.
- (b) Assistance from the National Native Title Tribunal should be sought to help facilitate the project.

Idea 25 - Facilitate Indigenous access to international and domestic philanthropy – Australia is poor at philanthropy (see newspaper article in **Annexure 4**). Internationally philanthropists, particularly in the United States, are doing great things in funding work in a range of worthy fields.

Given the growing resourcing limitations on government, Indigenous communities may have to look more closely at how private philanthropy can be accessed.

Governments at all levels in Australia should do more to encourage private philanthropy. The newspaper article notes, for example, that the greater philanthropy in the United States may be attributable to the more advantageous tax treatment given to it in that jurisdiction.

Suggested Actions -

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 26 – Harness Significant Investor Visa investment in Indigenous businesses – The Significant Investor Visa (“SIV”) program may be another source of equity funds for Indigenous business start-ups. A recent newspaper article about the opportunity in a broader context is contained in **Annexure 5**.

Experience so far unfortunately seems to suggest that Australian investors have a low appetite for investing in Indigenous businesses. In part that is because there is no incentive for them to do so.

The SIV program is of itself a potential encouragement to international investment in Australia's Indigenous small business space.

Suggested Actions –

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 27 – Relationship building with trade and investment agencies – In addition to Ideas 24 and 25, there are other ways in which foreign investment in Australia's Indigenous small-businesses can be encouraged.

The native title and statutory Indigenous land and sea rights of Traditional Owners create a basis for commercial relationships of many kinds between foreign investors and Traditional Owners.

Australia's trade and investment agencies have a vital facilitation role in that regard.

Recent achievements by the Australian Government in relation to ChAFTA¹, JAEPA² and KAFTA³ mean that international trade and investment opportunities for Traditional Owner and Indigenous businesses is likely to grow.

Much of the trade and investment interest generated by those bilateral trade and investment agreements will relate to agricultural, fisheries, tourism and mineral and energy opportunities where Indigenous land and sea rights will need to be addressed.

Suggested Actions –

- (a) In Queensland, dialogue should begin between Trade and Investment Queensland and a specifically formed Indigenous working group on how the emerging opportunities in foreign trade and investment can be realised.
- (b) Indigenous businesses, PBCs and Traditional Owners generally need to be adequately equipped to take advantage of the opportunities. Some specific ideas follow. Trade and investment agencies should feed into those ideas.

3.5 Develop industries and businesses

Idea 28 - Indigenous business development plans – Any business initiative needs to be viable on its own terms. Whether Indigenous or non-Indigenous, a

¹ China Australia Free Trade Agreement

² Japan-Australia Economic Partnership Agreement

³ Korea-Australia Free Trade Agreement

proposed business start up needs to be wholly underpinned by a commercially feasible business idea.

It is beyond the scope of this submission to detail the specifics of how Indigenous business ideas can be tested at an early stage against standard feasibility criteria. An accessible business planning service geared to Traditional Owners should be developed.

Suggested Actions –

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 29 – Island Owned/City Operated Businesses – In the Torres Strait, some Indigenous businesses will need to operate wholly on a remote Island. For example, an Island based tourism business.

However there are other Indigenous owned businesses that could be owned by Traditional Owners in the region but operate wholly or partially in other locations. For example, Torres Strait Islander art has a growing following amongst art collectors worldwide. It is also a popular art form for foreign and domestic tourists visiting galleries and other art outlets in city locations.

Given the remoteness and associated cost of business in the Torres Strait, there may be other advantages in having Torres Strait based ownership, but with all or part of the business operations located elsewhere.

Although this is an appropriate model for privately-owned Indigenous businesses, it is not a model which should be adopted by government agencies and public service providers.

Suggested Actions -

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 30 – Fisheries and Other Industry Cooperatives – Cooperatives are a business structure governed by the *Cooperatives Act 1997* (Qld) and the *Cooperatives Regulation 1997* (Qld). Cooperatives have a legal status of their own (much like a corporation) and operational cooperatives must have share capital.

Cooperatives can perform commercial and business functions. They can generate profits for their members and there is no upper limit on membership. Members can operate their own individual businesses, for example individually owned fishing businesses might combine to become members of a fishing cooperative.

The establishment of Indigenous industry-based cooperatives, particularly on a regional basis, could have many advantages. In a fishing context for example, a cooperative would be able to marshal the catch of all of the individual members to create the volume and reliability of supply that is so important in realising export opportunities.

A cooperative model can also help individual business members cope with common management issues, buy business inputs in bulk (such as fuel) and hence lessen the operating costs of individual business members. There are many other potential commercial advantages as well.

Suggested Actions -

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 31 - Technical barriers to international trade and investment for Indigenous businesses – Indigenous businesses are particularly susceptible to a whole range of technical barriers to participation in international trade and investment.

Any Indigenous business looking to export, is subject to all of the same rules and regulations applicable to large, established, non-Indigenous businesses. This market advantage may even be used to block market entry by Indigenous business start-ups.

More significant is the nature and extent of the technical barriers themselves. For example in the export of fisheries products from the Torres Strait there are extraordinary regulatory hurdles (often in addition to development approval hurdles at the local government level).

Export regulatory requirements administered by the Australian Department of Agriculture, Forestry and Fisheries, present an enormous technical barrier to the Indigenous establishment of fish processing facilities out of which direct export of processed fish products can be made.

Another example relates to direct export routes out of the Torres Strait. Although the Torres Strait region is closer than any other part of Australia to East Asia (and hence should present competitive advantages in relation to things like transportation costs), advice from the Australian Government suggests there may be barriers to direct transportation from the region to East Asian markets.

Suggested Actions -

- (a) The Indigenous business organisation/national business peak body referred to in Idea 15 should further investigate this idea.
- (b) It should have direct access to relevant treasury officials and independent tax/accounting experts.

Idea 32 - Facilitate international friendship agreements and Indigenous local government “sister-city” arrangements with Asia - ChAFTA, JAEPA

and KAFTA present major potential opportunities for Indigenous businesses in remote and regional Australia in the way referred to in Idea 27.

Taking best advantage of those opportunities requires a holistic approach to relationship building between Indigenous (and non-Indigenous) communities in rural and remote Australia and communities in Asia. It is well known that relationships are a key part of Asian business cultures – something very consistent with Indigenous cultures in Australia.

The establishment of things like International Friendship Agreements and Sister-City/Sister-Town arrangements between Australia's Indigenous local governments and appropriate counterparts in Asia is a practical way of facilitating relationship building.

Suggested Action –

- (a) The Torres Strait would be a good region in which to pioneer this idea, particularly with the People's Republic of China ("PRC"). PRC is a huge potential market in the two areas of great economic opportunity for the Torres Strait – fisheries and tourism. The PRC art market, now the largest in the world, could also be an important market for the distinctive arts of the Torres Strait.
- (b) The Local Government Association of Queensland may be able to help facilitate an investigation into this idea. The idea should be jointly supported by the Torres Strait Island Regional Council and the Torres Shire Council.

3.6 Support service delivery and infrastructure investment

Idea 33 – Streamline Indigenous land holding structures and entities – There are obvious challenges in addressing and coordinating resourcing, communication and other needs across all of the Torres Strait Regions 21 PBCs.

It is important for government to note that the PBCs try to take a regional approach to most of the issues they have in common. That of itself is advantageous to government in ensuring consistency in communication and in delivering efficient operational outcomes.

The number of PBCs and their geographic location on Islands spanning over 100,000 square kilometres of seas does however mean that there are special PBC resourcing requirements in the Torres Strait.

At a micro level, a small number of Traditional Owner groups have multiple land holding entities performing different structures. One group in the Torres Strait has a PBC and four separate land trusts each with its own corporate identity and administration. Practical measures for streamlining should be discussed between the Australian Government and affected PBCs.

Suggested Actions –

- (a) This issue involves a number of specifics. Efforts by the relevant PBC to engage with the Queensland Department of Natural Resources and Mines have not resulted in appropriate dialogue.

- (b) The Queensland Minister for Natural Resources and Mines should urgently address the issue directly with relevant PBCs.

Idea 34 - Government service and infrastructure development ILUAs – The Torres Strait has pioneered a template Public Infrastructure and Housing ILUA. Over the last 12 months or so resolution with the Queensland Government has proved difficult.

The template ILUA could provide a useful model for other government service and infrastructure development ILUAs.

Suggested Actions –

- (a) The Queensland Government should expedite resolution of the currently proposed template ILUA.
- (b) Concepts involved in the template ILUA could apply to the other ILUA-related proposals in this submission.

Idea 35 - Torres Strait Maritime Safety ILUA – The Kaurareg Native Title Aboriginal Corporation RNTBC has previously put forward ideas to the Australian Maritime Safety Authority (“AMSA”) about the development of a Maritime Safety ILUA for the Torres Strait.

AMSA itself undertakes future acts throughout the region. There are a range of other maritime safety and sea traffic issues that such an agreement could address.

Not only is the Torres Strait a primary sea route for Australia’s sea borne trade and commerce, it is also the only part of Australia with a common border with another country. Given these factors and its very close proximity to South East Asia, the region is vital to Australia’s immigration, quarantine and defence interests.

The Torres Strait region also possess a vast and strategically unique opportunity in relation to a sustainable energy source of the future. The oceanic tidal flows through the Strait between the Coral Sea and the Arafura Sea are located entirely within Australian maritime jurisdiction and are technically accessible to tidal energy infrastructure because of the region’s particular configuration of Islands.

Whether in the context of the Maritime Safety ILUA or in a broader context, it is important that the Australian Government and its agencies have a comprehensive relationship with the regions PBCs and Traditional Owner communities.

Suggested Actions –

- (a) The Australian Government is invited to contact the Kaurareg Native Title Aboriginal Corporation RNTBC to further discuss the idea of the Maritime Safety ILUA.
- (b) Torres Strait PBCs welcome the opportunity for broader dialogue with the Australian Government about a holistic relationship within which broader strategic issues can be addressed.

Idea 36 - Public sector joint ventures – It is important government understands that individual PBCs often have to deal on an almost daily basis with all three levels of government.

PBC functions are not limited just to native title. In many cases PBCs hold statutory land interests, in Queensland they have responsibilities under cultural heritage legislation and they are subject to innumerable policy and legislative initiatives by all levels of government.

The consultation requests made by government agencies to individual PBCs alone in relation to the development of policies, procedures, land and sea management issues, land use planning, environmental management and a vast array of other matters, are important. However they also require considerable time and resources on the part of PBCs.

Voluntary PBC directors give of themselves, often to breaking point, in trying to meet the challenges involved in establishing and fostering the vital PBC/government relationship.

Many of the other ideas referred to in this submission are linked to this issue.

A means of establishing more effective relationships between PBCs and whole-of-Commonwealth/State/local government is needed. Although it is beyond the scope of this submission to go into detail, the concept of PBC/public sector “joint ventures” should be explored.

Suggested Actions –

- (a) This is quintessentially a COAG issue. Ideas and suggestions on how to build more effective PBC/whole-of-government relationships need input from COAG itself.
- (b) Torres Strait PBCs stand ready to engage in further dialogue with COAG about this issue.

4. PBC and NTRB Administrative Arrangements

- 4.1 There are many administrative and management arrangements currently being considered as part of the transition of NTRB status and functions from the Torres Strait Regional Authority (“TSRA”) to GBK. As they are the subject of a specific transition plan which is currently being implemented.
- 4.2 It is however important to note the vital role played by NTRB in assisting PBCs and Traditional Owners directly exercise native title for commercial and non-commercial purposes, to exercise other non-native title Indigenous rights to land and sea and to leverage economic, social and cultural outcomes from native title and non-native title land and sea rights.
- 4.3 NTRBs are a vital source of professional, legal and management assistance for PBCs in those respects and need to be adequately resourced to do so. However the resourcing of NTRBs should not be of the expense of the direct resourcing requirements of PBCs.
- 4.4 In the Torres Strait, some PBCs have been in existence for nearly 20 years and yet the limited recurrent resourcing directly available to them have left their

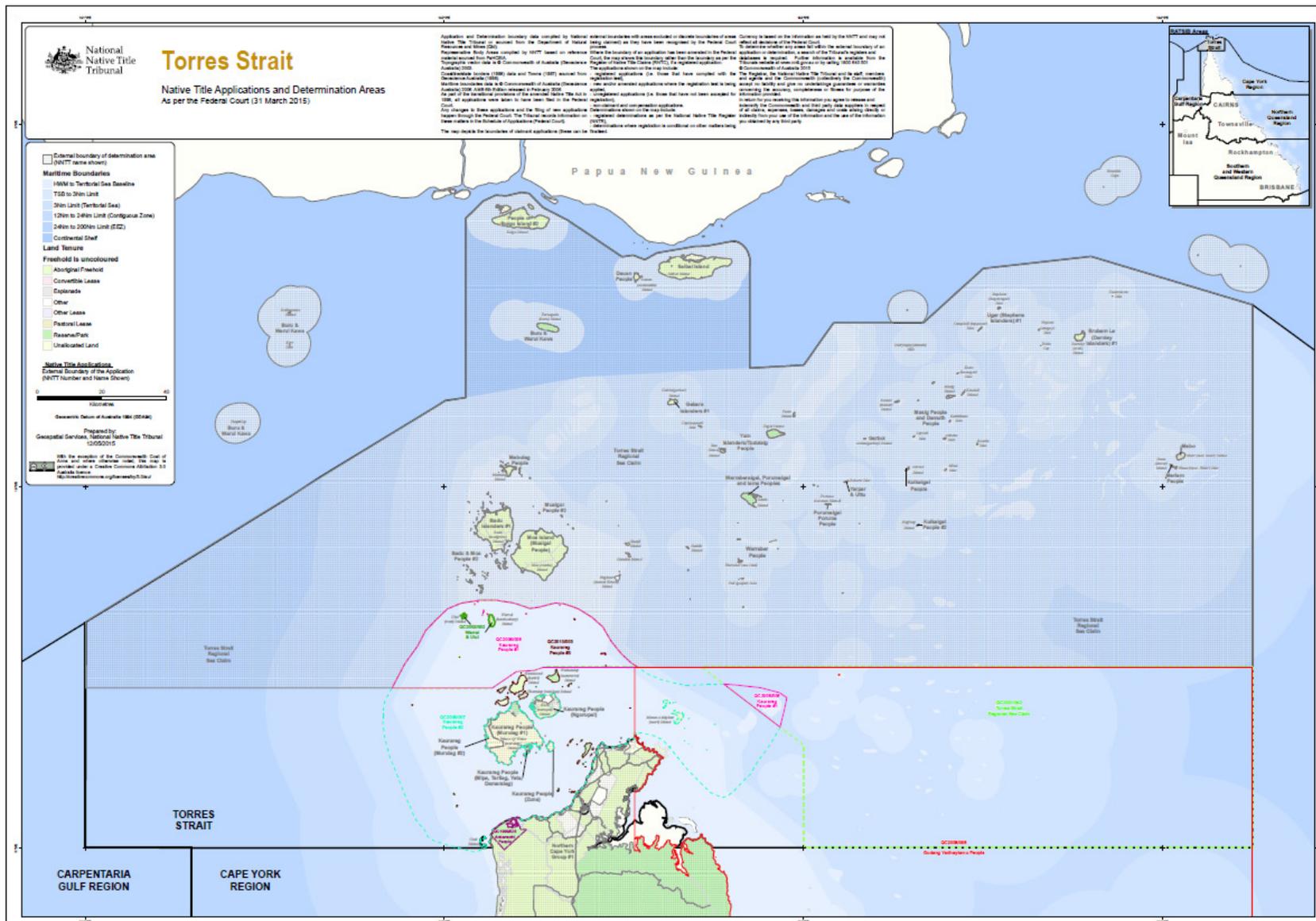
capabilities threadbare. As indicated through the ideas in paragraph 3, PBCs are ideally placed and in some respects solely placed, to assist Traditional Owners achieve their aspirations. Although it had been hoped that outcomes from the Deloitte Access Economics' report to the Australian Government into NTRBs and PBCs would help find solutions to the problems of PBC resourcing, capacity and capability, it is regrettable that very little advance has been made so far.

4.5 The following suggestions are made in relation to PBC and NTRB arrangements:-

- (a) *Australian Government response to the Deloitte report* – The Australian Government should write to each PBC and NTRB explaining its current position in relation to the recommendations in the Deloitte report and the practical steps it is taking, or proposes to take, in relation to the recommendations.
- (b) *PBC Resourcing* – Direct recurrent resourcing to PBCs is essential. Some of the ideas in paragraph 3 relate to PBC financing but this does not negate the need for a core amount of government resourcing, at least until PBCs reasonable establishment and operating expenses can be met from other sources.
- (c) *PBC Fee for Service* – Given the lack of other sources of recurrent funding to cover their operational costs, Torres Strait PBCs are currently developing a comprehensive cost-recovery system utilising the fee for service provisions in section 60AB of the *Native Title Act 1993* (Cth) and Part 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). It is currently considered that those provisions enable recovery of NTRB costs in providing professional services to PBCs where there is a third party proponent of a future act. The Australian Government and the Queensland Government should proactively support Torres Strait PBCs in the regional PBC/NTRB cost recovery system and also assist PBCs with the practicalities of implementation (e.g invoicing, bookkeeping, accounting and recoveries). Absent other sources of revenue, all levels of government should note that PBC fees for service are likely to be high and they should make appropriate provision in their own budgets.
- (d) *Regional PBC Back-Office Support* – As individual corporate entities for discrete Traditional Owner group, each PBC needs to have its own operations. However there are some aspects of back-office management and administration which could be shared on a regional basis. Given that GBK is to be owned and operated by PBCs, all levels of government should help facilitate and support means by which some PBC back-office functions can be performed on a regional basis by it.
- (e) *PBC Skills Development* – The directors for all Torres Strait PBCs are voluntary and only a couple have adequate resourcing to maintain their own in-house executive management. Skills-sharing and skills development at director and executive management levels is impeded by the constant resourcing constraints exacerbated by things like the very high transport, travel and communication costs associated with the region's Island configuration and remoteness. Programs for annual training, secondment opportunities, formal induction and base-level

communication equipment, telephone, computers and video conferencing, are ideas for addressing these challenges.

Annexure 1



Annexure 2

1. Badu Ar Mua Migi Lagal (TSI) Corporation RNTBC [ICN: 4583]
2. Dauanalgaw (TSI) Corporation RNTBC [ICN: 3510]
3. Erubam Le Traditional Land and Sea Owners (TSI) Corporation RNTBC [ICN:3860]
4. Garboi (TSI) Corporation RNTBC [ICN:4548]
5. Geberalgaw (TSI) Corporation RNTBC [ICN: 3861]
6. Goemulgaw (TSI) Corporation RNTBC [ICN: 3508]
7. Kaurareg Native Title (Aboriginal) Corporation RNTBC [ICN: 3712]
8. Kulkalgaw (TSI) Corporation RNTBC [ICN: 3915]
9. Magani Lagaugal(TSI) Corporation RNTBC [ICN: 4017]
10. Maluilgal (TSI) Corporation RNTBC [ICN: 4549]
11. Malu Lamar (TSI) Corporation RNTBC [ICN: 8051]
12. Malu Ki'ai (TSI) Corporation RNTBC [ICN: 3934]
13. Masigalgaw (TSI) Corporation RNTBC [ICN: 3568]
14. Mer Gedkem Le (TSI) Corporation RNTBC [ICN: 3282]
15. Mualgal (TSI) Corporation RNTBC [ICN: 3369]
16. Mura Badulgal (TSI) Corporation RNTBC [ICN: 3720]
17. Porumalgaw (TSI) Corporation RNTBC [ICN: 3612]
18. Saibai Mura Buway (TSI) Corporation RNTBC [ICN: 2993]
19. Ugar Ged Kem Le Zeuber Er Kep (TSI) Corporation RNTBC [ICN: 3935]
20. Wakeyama (TSI) Corporation RNTBC [ICN: 4550]
21. Warrabergalgaw (TSI) Corporation RNTBC [ICN: 3613]

Annexure 3

The Torres Strait Seas Situation

1. Native Title and the Torres Strait

- 1.1 Along with the High Court's *Mabo* decision, the Torres Strait is home to a landmark native title judgment in relation to the sea: *Akiba v Commonwealth* (the Torres Strait Regional Seas Claim Part A). The High Court decision was handed down on 7 August 2013.
- 1.2 Torres Strait Islanders lodged the claim in 2001. The Australian and Queensland Governments opposed some aspects. Amongst other things, they argued that the making by government of fishing legislation in the Torres Strait, had substantially extinguished some native title rights; particularly the right under traditional laws for Torres Strait Islanders to fish commercially and to trade in the resources of the sea.
- 1.3 The case was initially decided in favour of Torres Strait Islanders by Justice Finn on 2 July 2010. He found that the native title to the sea did include the right to take resources for any purpose (including commercial and trading purposes) and that this right had not been extinguished.
- 1.4 Key findings by Justice Finn included the following:-

"The evidence establishes beyond question that the Islanders sold marine resources for money – the sea provided their "income" – and after the advent of the marine industries, for some number of the Islanders, this was done regularly and systematically... the Islanders were, and are, trading fish".

The Judge said that "the point to be emphasised is that the fundamental resource- related right of use was the right to take (fish). Use of what was taken was unconstrained, save by considerations of respect, conservation and the avoidance of waste".

- 1.5 Government appealed that decision to the Full Federal Court. The Full Federal Court upheld the appeal.
- 1.6 However on 7 August 2013, the High Court overturned that decision and found that Torres Strait Islanders do have a native title right to take the resources of the sea for all purposes, including personal, domestic, commercial and trading purposes.
- 1.7 On 30 June 2014, Malu Lamar was appointed by the Federal Court as the RNTBC.

2. Post Determination Opportunities

- 2.1 Economic development opportunities arising from the sea determination are affected by two features of the determination:-
 - (a) Native title must by law co-exist with other existing rights in the same area, such as non-Traditional Owner fishing licences.

- (b) Generally speaking, native title is still subject to other legislation, such as the *Torres Strait Fisheries Act 1984* (Cth).
- 2.2 The *Torres Strait Fisheries Act 1984* established the Torres Strait Protected Zone, over the Torres Strait. It also established the Protected Zone Joint Authority (“PZJA”), which is responsible for the management of commercial and traditional fishing in the zone and designated adjacent seas.
- 2.3 The *Torres Strait Fisheries Act 1984* also gives effect to fisheries aspects in the Torres Strait Treaty.
- 2.4 Currently the commercial fisheries are dominated by what is called the “TVH sector”. These are non-Traditional Owner fishers who, through access to “TVH licences” under the *Torres Strait Fisheries Act 1984* and use of their private capital resources, have set up successful fishing businesses. Torres Strait Islanders may work for them as employees but, generally speaking, do not receive any economic benefit from the TVH sector.
- 2.5 Some Torres Strait Islanders fish commercially as individuals on a small scale. However they generally do not have the capital resources, sophisticated fishing equipment, sophisticated business structures and connections which enable them to compete effectively with the large, established TVH fishers.
- 2.6 Even where they do fish on their own account, Traditional Owner fishers (together called the “TIB sector”), are often obliged to sell their catch in an unprocessed state to “middle men”. Unprocessed fish sells at the very lowest end of the value chain.
- 2.7 Because there are currently very few fish processing facilities in the Torres Strait and no direct export routes out of the Torres Strait, a common practice is for middle men to buy a Traditional Owner’s catch cheaply and then ship it to southern ports where the value-adding is done and high value export transactions are made. Very little benefit comes back to the Indigenous TIB fishers themselves.
- 2.8 Malu Lamar is seeking holistic and comprehensive Torres Strait fisheries reform. Malu Lamar has made contact with Iwi officials in New Zealand and has mapped out a model for fisheries reform based on the Iwi experience.
- 2.9 There has been some early success. After lobbying by Malu Lamar in 2014, the PZJA resolved to support the aspiration of “100% ownership” of all Torres Strait fisheries by the Torres Strait’s Indigenous people.
- 2.10 Work is now needed to develop a detailed fisheries reform proposal to turn this resolve into reality. Malu Lamar wants the reform proposal to entail both regulatory reform (delivering the 100% ownership aspiration) and commercial reform (perhaps involving the establishment of things like a Torres Strait Islander fishing cooperative).

3. Economic Opportunities from Fisheries Reform

- 3.1 Torres Strait Islanders have inherent fishing skills. The skills have been passed on from generation to generation and give Islanders the capability to very efficiently and effectively catch fish on a sustainable basis.

- 3.2 The Torres Strait has some of the richest and most diverse fisheries in Australia.
- 3.3 The marine environments in the Torres Strait include:-
- (a) vast, unspoilt coral reefs;
 - (b) deep waters where fast flowing currents offer pristine ocean flows between the Coral Sea and the Arafura Sea; and
 - (c) mangrove and estuarine habitats adjacent to the vast coastline of PNG's Western Province and around many low-lying mangrove islands in the north of the Torres Strait.
- 3.4 These diverse marine ecosystems sustain the following fisheries:-
- (a) Tropical rock lobsters.
 - (b) Multiple species of prawns.
 - (c) Finfish including premium species such as coral trout, Spanish mackerel, barramundi and numerous types of excellent eating reef fish.
 - (d) "Hand collectable" fishery including trochus and Beche-de-Mer (sea cucumbers).
 - (e) Mud crabs.
 - (f) Pearl shell for which the Torres Strait was particularly famous in the nineteenth century.
- 3.5 Since undertaking its native title function, Malu Lamar has begun grappling with the limitations of native title. However it has also started to think innovatively about how the mix of legal rights coming out of the decision can be used to achieve real, practical economic development outcomes.
- 3.6 This includes consideration of how native title and associated procedural rights and compensation rights can be used as leverage to achieve fisheries reform.
- 3.7 In the commercial space, Malu Lamar has started to consider how Torres Strait Islanders can build their own fishing businesses based on their native title right to take sea resources. Preliminary work has been done on associated fish processing ideas, export ideas and the potential for favourable tax treatment under the native title payments provisions in the *Income Tax Assessment Act 1997* (Cth).

4. Torres Strait Fisheries Reform Proposal

- 4.1 Malu Lamar's board is comprised of the Chairs of all of the Torres Strait Islander RNTBCs for each Island.
- 4.2 Malu Lamar has no management, administration or office facilities of its own. Its board members perform their role voluntarily. Malu Lamar receives support on legal issues from the Native Title Office of the TSRA (the rep body), but is otherwise devoid of resourcing.

- 4.3 Development of the fisheries reform proposal requires further more detailed study of the New Zealand experience. It also requires high-level independent fisheries expertise to help develop detailed and sophisticated reform proposals. All of that requires resourcing.
- 4.4 In 2014 Malu Lamar applied to the Australian Government for a grant under its "Indigenous Advancement Strategy". On 4 March 2015, Malu Lamar received advice from the IAS that funding for only a fraction of the cost of developing the proposal has been approved. A solution to the resourcing deficiency needs to be urgently found.

Australia poor at giving away riches

Philanthropy

John Kehoe

Bill Gross, the famous American bond king who became rich betting on interest rate shifts, revealed this week that he intended to give away his \$US2 billion (\$2.5 billion) fortune.

Soon after the verbose Gross declared the idea was "staggering, even to me", Wall Street private equity boss Stephen Schwarzman of Blackstone Group revealed his latest donation: \$US150 million to build a performing arts centre at Yale University.

America's rich are showering cash on education, healthcare, scientific research, the environment, arts, religion, racial relations and third-world poverty.

The United States, the wealthiest and most capitalist economy in the world, is the most generous.

Enormous wealth built on finance and technology, generous tax deductions, fear of ruining their children and a smaller government safety net are undoubtedly catalysts to take up the

American psychology ... is that we were supposed to do something and step in to change some of the culture.

Billy Starr

"giving pledge" challenge issued by Bill Gates and Warren Buffett.

Yet there is something else in the American psyche that makes philanthropy appear almost obligatory.

Billy Starr, the founder of the Massachusetts Pan-Mass Challenge bike-a-thon cancer fundraiser that is on track to raise a cumulative \$US500 million in its 36th year, says people feel a "sense of ownership in the causes they support".

"American psychology, as best I can read it, is that we were supposed to do something and step in to change some of the culture," Starr says.

In comparison, Australia ranks sixth in the Charities Aid Foundation's world giving index, behind the US, Myanmar, Canada, Ireland and New Zealand. The index incorporates donations of money, helping strangers and volun-

teering time. Analysis of tax data by Koda Capital, a Sydney wealth management firm with a philanthropy service, shows \$2.29 billion worth of donations were claimed in 2012-13, with an average donation claim of \$504.

In the US, philanthropy has a proud history dating back to 1638, when deceased minister John Harvard bequeathed his library and half of his estate to an undergraduate school in Massachusetts that became known as Harvard College.

More recently, Facebook founder Mark Zuckerberg started channelling the company's stock and his own cash to fund public education, while hedge-fund manager Kenneth Griffin donated \$US150 million to his alma mater, Harvard University. They are not alone.

Buffett, 84, affirmed this month that he is progressively giving away 99 per cent of his estimated \$US70 billion fortune, saying he wants to "leave his children enough to do anything, but not enough to do nothing".

David Rubenstein, co-founder of Washington-based private equity group The Carlyle Group, intends to donate most of his reputed \$US3 billion wealth before he dies. He typically donates more than \$US100 million a year to causes such as the John F. Kennedy Centre for the Performing Arts, Columbia University's Medical Centre, the National Gallery of Art and the Thomas Jefferson Foundation.

"The federal government doesn't have the money that it used to have, and therefore if we want to keep some of the great symbols ... I do think people - all citizens, not just me - need to consider patriotic philanthropy," Rubenstein said at a conference attended by *AFR Weekend* last year.

Lauren Shenfield, principal at Philanthropy Advisors in New York, says many wealthy people have more money than they need, so they want to leave a legacy or "don't want to leave so much to their children that it might get in the way of [them] leading happy or productive lives". She encourages wealthy people to give while they're alive so "they can have fun and enjoy it". "A lot of people just leave money in their will and never experience helping other people," she says.

Beyond pure altruism, US taxes are more favourable than Australia's for philanthropy. Estate and inheritance taxes lure the rich to become philanthropists while they are living, instead of incurring dreaded "death taxes".

Visa changes won't scare rich migrants

Foreign investment

Su-Lin Tan

Changes to the \$5 million Significant Investor Visa program were met with mixed reactions on Friday.

There were cheers from venture capital groups, while most fund managers and migration agents were unperturbed by the government's new requirement for migrants bringing \$5 million into Australia to invest at least \$500,000 in eligible Australian venture capital, or growth private equity funds investing in start-up and small private companies.

"There has been negative self-interest reactions to the changes, but

we support the objectives of the government to get capital into the economy and attract talent," Moelis Australia Visa Fund chief executive Andrew Martin said.

"At \$500,000, the balance is sensible. It might impact some prospective SIV applicants in the short term but there will be those who will still apply because they trust the stable regulatory environment of Australia."

Migrants who qualify for the significant investor visa are currently required to invest \$5 million into complying investments with a restriction on investment in direct property.

On July 1, they have to invest in venture capital funds and be required to deposit \$1.5 million in managed funds,

which invest in emerging companies listed on the Australian Securities Exchange.

"For some time, the Australian Private Equity & Venture Capital Association has advocated for these changes to the SIV program in order to help better align the flow of capital from high net worth individuals offshore into those parts of our economy that can really drive our nation's innovative potential," chief executive Yasser El-Ansary said.

Those who opposed the changes were concerned that wealthy investors looking for safe havens to invest their money, such as migrants from China, would be turned off by the mandatory investment in riskier assets.

"Typically, Chinese investors, who have formed the majority of SIV investors so far, prefer safer asset classes, and VC investment may be an issue," said Suren Pather, director of another SIV fund, Sumo.

The director of property and migration group Ausin Group, Mark Morcos, feared the changes have the potential to "shut the program down".

"Under the proposed rules Ausin's immigration consultants expect investors to shun the SIV program and start looking for more viable alternatives, such as business visas or the Investor Stream Visa," he said.

"Interest in Canada and the USA's comparable visa programs could increase as they are more affordable."

Mr Morcos said Chinese, who make up 91 per cent of the SIV applications, were mostly comfortable with bonds and residential property because they understand them.

"Eliminating the small cap requirement and allowing clients to balance their remaining portfolio with assets of their choice would ensure SIVs remain a viable foreign investment alternative in this country."

Jeffrey Lee of Comasters legal firm disagreed, saying \$500,000 would not be an issue.

"\$1 million is still OK. True, they like to keep their money so it won't disappear, but they also understand that with high risks such as VCs come high returns," he said.