

Submission for the Inquiry into the

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***Aboriginal and Torres Strait Islander Land Holding Bill 2011***



**Chuulangun Aboriginal Corporation**

PMB 30 | Cairns Mail Centre | Qld 4871

E-mail: [chuula@kaanjungaachi.com.au](mailto:chuula@kaanjungaachi.com.au) | Web: [www.kaanjungaachi.com.au](http://www.kaanjungaachi.com.au)

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## **1. Introduction**

The *Aboriginal and Torres Strait Islander Land Holding Bill 2011* which was introduced to the Queensland Parliament on 1 December 2011 repeals the *Aboriginal and Torres Strait Islanders (Land Holding) Bill 1985* and introduces a new Act to finalise leasing arrangements outstanding under the repealed Act. The Bill introduces supporting amendments to the *Aboriginal Land Act 1991* (ALA) and *Torres Strait Islander Land Act 1991* (TSILA), and minor amendments to a number of other Acts. The new Bill aligns the new Act with the ALA and TSILA. The Bill also amends the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* to address separate cultural heritage matters.

This submission discusses the new Bill and related issues from the perspective of Kuuku I'yu Northern Kaanju families living on homelands centred on the upper Wenlock and Pascoe rivers in Cape York Peninsula. As such this submission has a focus on land issues affecting Cape York Peninsula and provides examples and discussion based on the experiences of its authors with land tenure, ownership and management issues affecting their homelands.

## **2. Representation and Governance**

The Chuulangun Aboriginal Corporation (Chuulangun), when implementing its plans for homelands and economic development and cultural heritage protection, has come up against various roadblocks over the years in relation to representation and governance. In 2011 Chuulangun prepared a Discussion Paper "Representation and Governance" which discusses the issues surrounding the tenure resolution process and its outcomes in an effort to encourage the Government to review and ensure that this program is operating efficiently, effectively and ethically in relation to the rights and interests of Traditional Owners. In particular it looks at the areas of concern to Kuuku I'yu Northern Kaanju people, considers the current model of CYTRIG (Cape York Tenure Resolution Implementation Group) and processes, and looks at alternative models or approaches to this process. It is important to make a number of points from this paper and earlier papers by Chuulangun, as they have strong relevance for the purpose and implementation of the new Bill.

### **Legislation and Traditional Owner rights and responsibilities**

Very little legislation, especially regarding land and natural and cultural resource management, is shaped with input from Traditional Owners, and it rarely reflects their rights and interests or their governance, autonomy and Indigenous social structures. There is a need to engage Traditional Owners and their representatives (that have been chosen by them) in a program of review of legislation to better reflect Traditional Owners' rights and interests in social, economic and environmental matters.

However, a history of rights conflicts, paternalism, policy failure, lack of trust and inability to adequately address Indigenous needs have led to seriously damaged relationships between Government and Indigenous peoples. This is only compounded by poor cross-cultural communication between Government and Traditional Owners. There is a need for purpose built engagement structures with highly skilled personnel in the area of policy and program development and legislation reform.

### **Aboriginal Land Act (ALA) reform**

The land holding acts of Government take a regional approach to land tenure systems that is inappropriate and non-Indigenous and thus inherently problematic and goes against the proper recognition of Indigenous title and governance. Land holding groups including many land trusts are

seen as 'categorically defined, bounded and non-negotiable'<sup>1</sup>. The problem with such groups is that what is presented on paper does not necessarily reflect what exists in reality on the ground where the action is taking place in terms of land management and Traditional Owners living and working on country. From our perspective as Traditional Custodians living on homelands a number of land trusts and Indigenous land holding bodies are artificial groups that have been legitimised by government policies and processes.

This serious flaw cannot be properly addressed within the bounds of the land holding Bill, nor is it the intention of this Bill to do this. Rather the Government should be more proactive in its addressing of representation and governance issues in the current state land dealings process and DOGIT transfers and seek to rectify problems with existing land trusts and the ALA.

The land trust model under the ALA is often inappropriate and inadequate to the interests of Traditional Owners. Traditional ownership and clan estates are not inbuilt and these governance structures can deny autonomy for people on country.

The following steps need to be taken which would flow through to the new ATSI Land Holding Bill:

- Reform of the ALA land trust model<sup>2</sup>
- Remove duplication and inconsistency with land trusts and PBCs (prescribed bodies corporate)
- Ensure proper resourcing to enable the development of trusts / PBCs to meet the requirements of traditional and contemporary Indigenous governance.

### **3. Indigenous access and use agreements**

The new Bill also addresses Indigenous access and use agreements (IAUAs) on State Land including on Delbessie leases, the majority of which are within native title claim areas. The Bill explains an IAUA to make it clearer for people using the legislation and to avoid confusion with an Indigenous Land Use Agreement (ILUA) which is made under the *Native Title Act 1993 Cth*. Traditional Owners have the right to choose their own representatives in regard to the development of IAUAs on their homelands. IAUAs should be instigated by the correct Traditional Owners for a particular area and they should have independent legal advice in regard to the making of agreements with Government and other parties. It is a native title right to choose one's own representation and this should be met in all future dealings including those concerning the new Bill.

Facilitation of land dealings is a complex and fraught task for any organisation. In order to have the trust and confidence of Traditional Owners to be able to enter into discussions, the organisation facilitating the deals must be seen as operating with integrity and independence. Unfortunately this has not always been the case in recent dealings on Cape York with one particular facilitator organisation demonstrating obvious bias and an agenda that is against the wishes of a number of Traditional Owners.

It is recommended that the Queensland Government consider alternative options in relation to facilitators where any conflict of interest may exist or there may be a view that the facilitator is not independent. This is the only way to get the most out of land dealings. This could occur with a

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<sup>1</sup> Bauman, T. and Williams, R. 2004 'The business of process research issues in managing Indigenous decision-making and disputes in land', *Research Discussion Paper No. 13*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, page 11.

<sup>2</sup> A proposal for a new land trust model is put forward in "Representation and Governance – A discussion paper" prepared by the Chuulangun Aboriginal Corporation in 2011.

simple addition to the beginning of the land dealings of asking the Traditional Owners whether they wish to have representation and who they wish to represent them.

### **Different governance systems, boundaries, culture and customs**

Traditional governance and customary tenure is very different to the tenure arrangements of the Government. Lines on DERM's maps do not correlate to the Traditional Owners' customary boundaries. This can lead to confusion in relation to who is speaking for what country, incorrect modelling for land trusts and issues of representation on land trusts. This has ramifications for the new Bill in regard to boundaries of leases, contested boundaries and where boundaries of leases are relocated. It is important that the correct Traditional Owners are involved in this process.

One possible solution to this matter would be to change the mapping of tenure in Cape York so to be able to better reflect the traditional governance boundaries. In the event this is not possible, then the models used for land trusts need to be better considered.

Traditional Owner governance varies depending on the Traditional Owner group, language group and their culture and customs. These cultures and customs are not easily transferable and some differ to such a great extent that it would be impossible for them to work together in one entity (or land trust).

In an effort to progress dealings quickly and efficiently, the Government has been pushing for multiple Traditional Owner groups to be placed into single land trusts. The only way this can work is if Traditional Owners want this to happen, the facilitator (undertaking the work) is trusted and truly independent and if the Traditional Owners involved have sufficient trust and confidence in each other and willingness to do the work. Where this is not possible – we recommend that separate land trusts be created and that the appropriate level of funding and resources are expended to ensure this happens.

### **The Cape York Peninsula Representation and Governance Group**

The Cape York Peninsula Representation and Governance Group (CYPRaGG) is a proposal to assist government in negotiating indigenous governance and representation<sup>3</sup>. Governments and lawyers often describe indigenous governance as 'difficult' and 'vexed', but it is neither of those things to us. No 'expert' can help negotiate these issues better than Aboriginal people themselves who have traditional connection through bloodline to particular country on Cape York Peninsula.

The CYPRaGG would facilitate the formation of land trusts and PBCs based on the tribal grouping which is the more appropriate level at which Aboriginal people govern and manage their country. The creation of separate land trusts or PBCs for each Traditional Owner group within a particular area would mean that administrative functions and capacity-building of each entity could then occur at a communal level. In this way governance systems would be enabling the right to self-determination, autonomy and self-government at the Traditional Owner governance level.

A hybrid land trust is one where two or more Indigenous groups are shoved together into a single body corporate, under a different governance model to their own. In the case of the outcomes of the state land dealings, these are ALA land trusts with a constitution, chairperson and board of directors. This is the case with the Mangkuma Land Trust which covers some 241,000 hectares of our homelands, as well as a number of other land trusts on Cape York.

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<sup>3</sup> A brief summary of the CYPRaGG is shown in the Appendix.



While this set up might work very well for the Queensland Government, experience in Cape York has shown that the only thing that these hybrid land trusts are good at is perpetuating disputes and injustices for Indigenous peoples who have already had enough. The problem is that a land trust chair who may have ‘the numbers’ in the community, may make a decision on behalf of the whole land parcel. Not everyone given such a privilege does this but abuses of our Indigenous governance systems have been frequent and serious enough to warrant change. One example is the offering of other people’s lands to a logging company without their knowledge (e.g. Future Corporation Joint Venture with Mangkuma Land Trust in 2003-04).

The implications of this for the new Bill are that a trustee (e.g. a land trust under the ALA) might grant a lease for commercial purposes without obtaining the approval of the particular Traditional Owners for a given area. It is important that the Local Advisory Group established by the Minister to provide advice and work together to resolve issues with lease entitlements and lease boundaries be comprised of the correct people for the land in question and not just any member of the land trust.

#### **4. Indigenous land-holding and leases**

The Summary for the *Aboriginal and Torres Strait Islander Land Bill 2011* suggests that “Indigenous Australians living on their own land cannot access the benefits of the land they own and as a result are the poorest of all Australians”. Further, it is recognised by the Community Affairs Committee that “there are many Indigenous people living on communal land who would like to build their own house or start a business but the current land title system makes this very complicated”. It is the main purpose of the Bill “to make it simpler and easier for Indigenous people living on [Indigenous-held lands] to own their own homes”.

However, to suggest that economic issues alone are at the heart of Indigenous disadvantage is simplifying the issue. Legacy issues and the effects of colonisation and a history of dispossession has resulted in serious inequity between Aboriginal and white Australians. Indeed, some families living in Cape York suffer some of the poorest standards of living in Australia. A moral and ethical impetus exists to ensure that any activities undertaken in Cape York meet the economic, social and cultural needs of its custodians as well as environmental needs.

The proposal that the reforms introduced by the Bill will make owning one’s own home easier and simpler is ignoring far more factors that are at play in home ownership including having secure long-term employment to pay off a mortgage and maintain a house.

In addition, much of the Indigenous-held land the subject of the new Bill is in Queensland’s remote north including Cape York where the cost of building housing infrastructure is exorbitant. Also the fact that basic services such as health and education are based in towns and Aboriginal communities, means that support for Indigenous people to own their own homes on their homelands, would need to be matched with support for access to essential services and communication, as well as supporting infrastructure such as roads and airstrips.

The publishing of lease entitlements lawfully approved by the former councils is an important amendment in the new Bill as it introduces greater transparency to lease arrangements which might previously have been unknown to the Traditional Owners. Many Traditional Owners would be unaware of lease arrangements on their own homelands which would contribute to feelings of powerlessness that their land is being managed by someone else. So this amendment provides greater autonomy for Traditional Owners and the opportunity to speak up about lease arrangements that they feel might have been approved without their knowledge or consent.

## **5. Environmental protection, homelands development, and the conservation economy**

Some legislation supports Traditional Custodians to take opportunities to develop their preferred sustainable livelihoods on homelands, engage in employment, and participate in the conservation economy and sustainable development. However, there is a lack of coordinated strategies and investment in remote area development – e.g. tourism, the carbon market, natural resource management, and alternatives to mining – and this is holding back the ability for economic potentials to develop in remote homelands and communities. There is a direct role for government to facilitate an investment strategy in a remote area ‘conservation economy’ and in capacity-building for Indigenous landholders and entrepreneurs which would further support Indigenous people to access the benefits of their land which the new Bill aims to do.

There is also an issue of equity. Historically, Indigenous people have been denied the benefits of economic development taking place on their homelands, and this continues in many forms today. A social justice approach to the issue would result in a range of compensatory and advancement measures, as of right. Traditional Custodians need more funds at the grass roots level, and better structural arrangements and investment strategies, to enable them to benefit economically from their rights and interests in land.

Contemporary environmental approaches are integrating Traditional Custodian rights and responsibilities to look after country. Unfortunately, centralisation of effort under land and sea centres controlled by local councils and regional city-based bodies is diverting resources, frustrating or limiting efforts on homelands, and failing to deliver and secure conservation and economic outcomes. While programs such as the Wild River Rangers are working in new and better directions, there is still a need for government agencies to recognise, support and work with locally originated, owned, operated and controlled Indigenous organisations on country.

Studies show that people living and working on their homelands benefit from a range of social, cultural, economic and health outcomes, as well as improved employment, training and capacity-building opportunities. Despite this, there is inadequate recognition and limited support of (and even hostility towards) the value of a homelands approach to development in remote areas. Support for Indigenous people to own their own homes and start businesses needs to be matched with support for homelands as this is where this sort of development and entrepreneurship would take place.

The proposal of Government that Indigenous people need to be able to benefit from their own land and that the new Bill takes steps towards facilitating this through improved lease arrangements, needs to be matched with further reform of the ALA to better reflect Indigenous governance structures. Further, Government needs to steer away from restrictive and collectivised approach to Indigenous development issues under the narrow frameworks of welfare reform and dependency and move away from the assimilationist mentality which concentrates programs and service delivery into centralised communities and ‘growth’ towns.

## **6. Indigenous cultural heritage**

The new Bill also amends the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Act 2003* to implement recommendations of a review of those acts. The changes aim to recognise, protect and preserve Indigenous culture in Queensland. The new Bill gives the power to make the final decision about cultural heritage management plans (CHMPs) and cultural heritage studies to the Land Court of Queensland. It is important that when assessing CHMPs and studies the Land Court properly consider the Indigenous governance and representation of an area by ensuring that the

correct Traditional Owners are party to the agreement. Further the Land Court should practice proper cultural sensitivity for both tangible and intangible cultural heritage. In regard to disputes that the Land Court is called upon to mediate it is essential that Traditional Owners have proper independent representation and advice.

## **7. Conclusion**

We urge the government to support an agenda of reform of the land tenure system that will see recognition of proper Indigenous governance, law, kinship and bloodline, as well as the unity of Indigenous customary intellectual property and the land, waters and resources. If the government is serious about this there needs to be reform of the ALA as well as serious overhaul of the state land dealings processes. This will have implications for the *Aboriginal and Torres Strait Islander Land Holding Bill 2011*. Further, Government needs to match land tenure reform aimed to facilitate home ownership and entrepreneurship with programs to support homelands development. New legislation and reform of existing legislation should be formulated 'from the inside-out' and appropriately recognise the legitimacy of Indigenous customary law, governance, kinship, bloodline and intellectual property. At the same time, Indigenous law needs to be recognised in all Acts of government.



## Appendix

### Proposed Cape York Peninsula Representative and Governance Group

It is proposed that the CYPRaGG:

- Mandates proper geographical representation by being constituted of 12 people, four from the eastern Paakichi lands, four from Kaanichi lands, and four from western Paakichi lands (as shown on the map below).
- Is constituted by members chosen by Elder Groups from each of the 12 areas.
- Advises on correct Traditional Owners who speak for the country being discussed by government.
- Caters for government programs by directing funds to the correct Traditional owners via a public trust.
- Operates by rules of consensus.
- Works to their own time lines.
- Acts as a representative if needed.



Map showing proposed CYPRaGG membership locations on Cape York