



CAPE YORK SUSTAINABLE FUTURES

ABN 25 307 084 879

3 August 2012

Kathy Munro
The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
George Street
BRISBANE QLD 4000

By email SDIIC@parliament.qld.gov.au

Re: Inquiry into the future and continued relevance of Government land tenure across Queensland

Dear Kathy,

Please accept this letter and the accompanying report as the submission by Cape York Sustainable Futures to the Inquiry into the future and continued relevance of Government land tenure across Queensland.

Cape York Sustainable Futures has a 25 year history of working with communities for the sustainable development of Cape York and creating livelihoods the Cape's remote communities. Land tenure is a major impediment to this.

Overall Recommendations

The attached submission sets out many detailed recommendations which we would ask are considered. Our overall recommendations are

- There is an urgent and ongoing need to resolve land tenure issues to encourage private investment across Cape York.
- Existing pastoral leases need greater security of tenure, the Delbessie and Cape York Heritage Act arrangements include onerous constraints and complex processes to achieve the requirements for longer terms and renewals, 99 year leases or freehold are recommended.
- The diversity policy for pastoral leases needs to be relaxed and more economic opportunities (tourism, conservation and others) permitted for existing lessees.
- There needs to be an accessible mechanism for entrepreneurs (indigenous and non-indigenous, family, private and corporate entities) to excise or create small leases for specific purposes (or indeed small freehold parcels) to facilitate economic opportunities in tourism, retail, services etc. across Cape York. The timeframe and costs of this needs to recognise and be commensurate with the value of such lands in a remote area with often only seasonal business potential.



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- There is an urgent need cut the red tape and expense of ILUA's, for pastoralists and entrepreneurs. A Government facilitation service is recommended to realise Cape York economic opportunities.
- The process to have leases for indigenous and non-indigenous business on DOGIT and Aboriginal Freehold needs to be streamlined with proactive assistance and facilitation by Government. The timeframe needs to be much shorter with no undetermined impediments after commencement. The costs of the process (including ILUA and IDAS requirements) needs to be commensurate with the value of the land and its use.
- There is a need to facilitate indigenous and non-indigenous micro and small business enterprises to support tourism in National Parks. Arrangements for approvals and appropriate tenure (with dealable security) needs to be established (such as leases and concessions).
- On Cape York there are some leases due for renewal in the coming years. There needs to be specific recognition of these to ensure they have security of tenure and access to any new tenure arrangements.
- The Cape York Tenure Resolution process has been ongoing and appears to be continuing. There is substantial community concern about priorities and the ultimate land tenure mix across Cape York. The priorities for National Park acquisition and likely overall National Park estate should be publicly available.

Oral Presentation and Submission

We would ask to make an oral presentation to the Inquiry. We request that Guy Chester be invited to make the presentation to the Inquiry on our behalf. Guy can make such a presentation in either Brisbane or Cairns in late August.

Conclusion

We welcome the Government's decision to have the Inquiry into the future and continued relevance of Government land tenure across Queensland. We do ask that there be specific consideration of the issues related to Cape York.

Yours sincerely

Trish Butler
Chief Executive Officer.



Land Tenure on Cape York For Economic Development



Submission to the
Queensland Government Inquiry
Into The Future & Continued Relevance of
Government Land Tenure Arrangements In Queensland



Version 2.0



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Version Notes

Version 3.0: This version is the final for use by Cape York Sustainable Futures as a submission to government.

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Summary	4
Overview.....	4
Summary	4
Conclusions	5
Recommendations	5
Introduction	8
Current Land Tenure and Use.....	10
Cape York Land Tenures	10
Current Conservation Land Tenures	12
Aboriginal Land Tenures	13
Legislation	14
Aboriginal Land Act 1991	14
Cape York Peninsula Heritage Act 2007	15
Forestry Act 1959	17
Land Act 1994	17
Nature Conservation Act 1992	17
Sustainable Planning Act 2009.....	18
Native Title	20
Indigenous Land Use Agreements	21
Current Native Title Determinations and Claims.....	23
Tenure Opportunities.....	25
Lease Holdings	25
Deed of Grant in Trust (DOGIT).....	34
Aboriginal Freehold	38
National Park	42
National Park CYPAL	43
Reserve, State Land and Shire Land Lease	44
Economic Opportunities	45
Example Opportunities	45
Overview of Opportunities	46
Summary and Conclusions	48
Summary	48
Conclusions	50
Recommendations	51



Summary

Overview

Background

This submission is based on an initial discussion paper prepared for Cape York Sustainable Futures in early 2012, recognising that land tenure arrangements are a significant impediment to the economic development and the creation of self sustaining communities on Cape York.

The initial discussion paper was prepared with input from officers from the then Department of Environment and Resource Management. A draft was prepared and submitted to the informant officers and their comments have been incorporated. The submission assumes, that on the basis of our research and comments from the officers all chapters up to an including the conclusions are factual and present the present situation.

The recommendations in this submission is the work of EcoSustainAbility and Cape York Sustainable Futures and represents the recommended solutions to the significant land tenure issues with the current situation.

The focus of this report is Cape York. The situation on Cape York is particularly challenging owing to the very small proportion of freehold land, upon which much economic development and communities depend. It is recognised that whilst this report focuses on Cape York, the issues and recommended solutions may apply to elsewhere in Queensland. Having said that it may be important for the Inquiry to specifically recognise regional issues such as those in Cape York and other remote parts of Queensland.

Summary

Cape York Land Tenure

14.3 percent of Cape York is National Park, 23.3 percent is Aboriginal Shire Lease, DOGIT or Land Trust, 52.9 percent is lands lease (33.89 percent is actively pastoral properties, see section below) and 0.7 percent is freehold. Nature refuges (which overly other tenures) comprise 3.55 percent. Of critical importance to the economic development situation for Cape York is the very low proportion of freehold land and as such many development opportunities are constrained by the allowable purposes/uses of lease, trust and reserved land.

Tenure Options

This submission deals with the main non-freehold tenures on Cape York. There are a wide variety of tenures and the situation will almost always be unique given the various lease conditions, native title situation and the various corporate entities that may apply (Aboriginal land trust/prescribed body corporate/Aboriginal Council).

As an overview, the following arrangements are possible on the various tenures:

Pastoral Lease: There are a number of options:

Additional Purposes: Under the diversity policy, small scale uses such as farmstay in existing buildings appear allowable without any approval, more major uses requiring additional buildings etc. needs an additional uses to be added the lease conditions. This requires an application process by the lessee and may need a Development Approval (material change of use) and other approvals. Native title may be an issue and an Indigenous Land Use Agreement may be required.

The Diversity Policy overly constrains the additional uses. Of particular concern is the need to keep income generation from other uses to less than the main lease purpose. Where tourism use or conservation stewardship can generate greater income than pastoral use this should be allowed! The diversity policy would appear to discourage spelling and reduced stocking density for good land management and overly constrains the ability of leases to seek alternative sources of income.

The processes involved appears overly onerous, the need for an ILUA (and the consequent costs of the development of a specific ILUA for a proposal on one lease) means this becomes a constraint on opportunities being realised.

Excision of Lease: Where a small area of a lease is proposed for a more intensive use, such as a small resort, a shop or a roadhouse, excision of the lease would be required. The excised land must go to the lessee and there may be restrictions on the future dealing with the lease that could affect the leases use as unfettered security. This requires an application process by the lessee and will need a Development Approval and other subsequent approvals. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to government).

NOTE: Only current pastoral lessees may apply additional purpose and/or excision of their leases.

There is a significant issue for Cape York, with less than 1% freehold land, there is very limited ability for entrepreneurs to seek land for even minor opportunities.

Aboriginal Land DOGIT: An "entrepreneur" may express interest to an Aboriginal Council to create a lease. There is a process which will involve a Development Approval (reconfiguration of a lot) and other subsequent IDAS approvals. When the lease term will be more than thirty years consultation with traditional land owners is required, Ministerial consent is required and is subject to business planning and independent assessment of business plan and financial and managerial capacity of potential lessee. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Aboriginal Council).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. There are potential "Catch 22's" with the overall of dependencies for the ILUA/CATL and planning approvals which need to be resolved. Streamlined processes are needed with foster micro and small business entrepreneurs. The "risk capital" nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.



Aboriginal Land (land trust): An “entrepreneur” may express interest to an Trust to create a lease. There is a process which will involve a Development Approval (reconfiguration of a lot) and other subsequent IDAS approvals. When the lease term will be more than thirty years consultation with traditional land owners is required, Ministerial consent is required and is subject to business planning and independent assessment of business plan and financial and managerial capacity of potential lessee. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Trust).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. There are potential “Catch 22’s” with the overall of dependencies for the ILUA/CATL and planning approvals which need to be resolved. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.

National Park and National Park CYPAL: Essentially the Nature Conservation Act does allow for leases for commercial activities, however this is not normally offered as a result of an “entrepreneurial” application but rather a park management identified opportunity. For national park CYPAL the land trust has first rights to any opportunity. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Trust).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.

Conclusions

The creation of land parcels for small scale economic opportunities on Cape York, on the 90 percent of the Cape which is national park, aboriginal shire lease, DOGIT or land trust or lands lease (including pastoral leases is potentially a time consuming process with no certain outcome nor timeframe and cost.

Many processes involve an ILUA and this may involve protracted negotiations depending upon the interest by the claimants or prescribed body corporate. In some circumstances the negotiation of an ILUA may require financial considerations over and above lease payments, this means the outcome is uncertain and funding the ILUA process is “risk capital”...there is no link between the commercial value of the land parcel and use rights and the overall (combined) cost of the ILUA process, lease payments and IULA payments.

The recent development of the Pastoral ILUA template may be a step forward, however the ILUA process remains a constraint on modest additional uses of leases. Further guidance is required on what activities can be undertaken without the need for an ILUA and there may be a need for additional facilitation provided by Government to allow modest ventures to be realised without native title/approval costs which exceed the value of the venture.

Further, most dealings will require a development approval under IDAS (for a reconfiguration of a lot and/or material change of use, and then after the lease is granted operational works). Additionally, other approvals such as under *Wild Rivers* and *Vegetation Management*, *Coastal Management* and other legislation may be required (some of these are integrated into the IDAS process).

Given the various underlying tenures the different native title considerations and the various steps at which IDAS approvals may be required a unique critical path will need to be understood. For each process there are risks the application may be refused as there are dependencies which must be completed before potentially prohibitory processes can commence.

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the tenure and use rights is consistent with the commercial value of the land and use rights. There needs to be a process which reduces the “risk capital” nature of entering into the process...where there could be substantial sums invested in the ILUA ;process to have the IDAS process prohibit a development. A concurrent process without “Catch 22” interdependencies and where any veto of restrictive conditions are known before major expense is needed.

It is concluded that for the options above the process is most likely to take at least twelve months and when IDAS and ILUA processes are considered two years.

Recommendations

Overall Recommendations

There is an urgent and ongoing need to resolve land tenure issues to encourage private investment across Cape York.

Existing pastoral leases need greater security of tenure, the Delbessie and Cape York Heritage Act arrangements include onerous constraints and complex processes to achieve the requirements for longer terms and renewals, 99 year leases or freehold are recommended.

The diversity policy for pastoral leases needs to be relaxed and more economic opportunities (tourism, conservation and others) permitted for existing lessees.

There needs to be an accessible mechanism for entrepreneurs (indigenous and non-indigenous, family, private and corporate entities) to excise or create small leases for specific purposes (or indeed small freehold parcels) to facilitate economic opportunities in tourism, retail, services etc. across Cape York. The timeframe and costs of this needs to recognise and be commensurate with the value of such lands in a remote area with often only seasonal business potential.



There is an urgent need cut the red tape and expense of ILUA's, for pastoralists and entrepreneurs. A Government facilitation service is recommended to realise Cape York economic opportunities.

The process to have leases for indigenous and non-indigenous business on DOGIT and Aboriginal Freehold needs to be streamlined with proactive assistance and facilitation by Government. The timeframe needs to be much shorter with no undetermined impediments after commencement. The costs of the process (including ILUA and IDAS requirements) needs to be commensurate with the value of the land and its use.

There is a need to facilitate indigenous and non-indigenous micro and small business enterprises to support tourism in National Parks. Arrangements for approvals and appropriate tenure (with dealable security) needs to be established (such as leases and concessions).

On Cape York there are some leases due for renewal in the coming years. There needs to be specific recognition of these to ensure they have security of tenure and access to any new tenure arrangements.

The Cape York Tenure Resolution process has been ongoing and appears to be continuing. There is substantial community concern about priorities and the ultimate land tenure mix across Cape York. The priorities for National Park acquisition and likely overall National Park estate should be publicly available.

Cape York Land Tenure

For Cape York to prosper reasonable sustainable economic development which supports communities requires access to land for micro, small and medium size businesses. The creation of land parcels for small scale economic opportunities on Cape York, on the 90 percent of the Cape which is national park, aboriginal shire lease, DOGIT, land trust or lands lease (including pastoral leases) is potentially a time consuming process with no certain outcome nor timeframe and cost. The unique situation, with so little freehold on Cape York needs to be recognised, with a mechanism which allows the creation of land parcels with use rights in a cost effective way, with a certainty of process.

The process for the creation of these land parcels must be able to be commenced by any entrepreneur (whether a current leaseholder, native title holder, community member of any other person/entity)!

The end result needs to allow a tenure type with "bankable" security, which allows a bank mortgage or secured private equity investment over the lease/land parcel.

The time frame and cost to get to realising the land parcel as a dealable title needs to be streamlined.

The costs of land tenure processes, prior to planning approvals needs to be minimised, to avoid the risk of major expenditure on tenure creation (e.g. an ILUA process) then to have IDAS approval process prohibit or impose conditions which makes the proposal unviable. This risk approach needs to be resolved or all processes will involve significant "risk capital" just to gain tenure and approval!

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the tenure and use rights is consistent with the commercial value of the land and use rights. Presently, the cost of tenure creation in many instances significantly exceeds the land value ...this needs to be resolved or economic development will not be feasible.

There needs to be a process which reduces the "risk capital" nature of entering into the process...where there could be substantial sums invested in the ILUA ;process to have the IDAS process prohibit a development. A concurrent process without "Catch 22" interdependencies and where any veto of restrictive conditions are known before major expense is needed.

Whilst the regulatory nature of Government approvals and tenure processes are recognised (and whilst streamlining is needed, some process will remain), there needs to be a tenure advisory/facilitation service which provides free of charge support and advice to community/micro/small and medium business entrepreneurs

Many processes involve an ILUA and this may involve protracted negotiations depending upon the interest by the claimants or prescribed body corporate. In some circumstances the negotiation of an ILUA may require financial considerations over and above lease payments, this means the outcome is uncertain and funding the ILUA process is "risk capital"...there is no link between the commercial value of the land parcel and use rights and the overall (combined) cost of the ILUA process, lease payments and IULA payments. Whilst the commonwealth Native Title Act may constrain what the State of Queensland can do, there needs to be a process which facilitates small ILUA's (or better yet removes the needs for them for small scale community/micro/small/medium business proposals).

Most dealings require a development approval under IDAS (for a reconfiguration of a lot and/or material change of use, and then after the lease is granted operational works). Further other approvals such as under *Wild Rivers* and *Vegetation Management*, *Coastal Management* and other legislation may be required (some of these are integrated into the IDAS process). There is a need for a preliminary advice for these approvals to ensure planning restrictions are known before expensive costs for establishing the tenure are undertaken.

Given the various underlying tenures the different native title considerations and the various steps at which IDAS approvals may be required there needs to be an advisory service which sets out the critical path for any particular project in any place. For each process the risks and points at which the application may be refused should be advised and any dependencies which must be completed before potentially prohibitory processes can commence outlined.

Pastoral Leases - Diversity

Sustainable tourism on pastoral and other leases should be encouraged as a mechanism to offset the costs of land management and reduce the reliance on stock. Income for conservation land management/stewardship should not be constrained.



There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the use rights is consistent with the commercial value of the land and use rights. Presently, the cost of tenure creation in many instances significantly exceeds the land value ...this needs to be resolved or economic development will not be feasible.

The Diversity Policy needs urgent amendment to allow for larger income generation from tourism, conservation and other activities (such as alternative agriculture). The “not become the dominant or principal activity” needs to be reconsidered as other activities such as tourism and conservation may involve greater income than the pastoral use... this is not necessarily a bad thing, particularly if this allows reduced stocking densities and better land management!

Issues relating to native title need to be reviewed such that lease holders are not responsible for a site specific Indigenous Land Use Agreement to realise a modest tourism or conservation or other economic opportunity.

The limit of 16 Guests in four accommodation units in the diversity policy appears arbitrary and does not reflect a viable size for small scale lodge or resort. Financial feasibility work undertaken for CYSF has found 20 rooms to be a minimum viable for a small ecolodge, four accommodation units is usually not of a scale to sustain the services/facilities/marketing etc. to ensure viability.

The costs of obtaining approvals (including any IDAS/ILUA process) needs to be consistent with ensuring the financial feasibility of modest additional uses of leases.

There appears to be an opportunity to further expand the diversity policy to allow more significant development of additional uses, there needs to be guidelines to allow this and if the development is major there may be a consideration which does provide for amended lease payments (rather than this being a restriction on the commercial level of the use as it is now!).

Excision of Lease

Where a small area of a lease is proposed for a more intensive use, such as a small resort, a shop or a roadhouse, excision of the lease is required there needs to be a streamlined process. Where the current lessees agree, other parties should be able to apply for the excision.

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the excised lease is consistent with the commercial value of the lease and use rights. Presently, the cost of lease excision may exceeds the land value ...this needs to be resolved or economic development will not be feasible.

There should not be any restrictions on the future dealing with the lease that could affect the leases use as unfettered security.

If native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to government) there is a need for an advisory service to advise applicants on processes, ideally a government supported service would facilitate the ILUA for proponents!

Aboriginal Land DOGIT and Freehold

Fundamentally there needs to be a process to ensure an “entrepreneur” may express interest to an Aboriginal Council/land trust to create a lease.

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the lease is consistent with the commercial value of the lease and use rights. Presently, the cost of lease creation may exceed the land value ...this needs to be resolved or economic development will not be feasible.

Where the process will involve a Development Approval (reconfiguration of a lot) and other subsequent IDAS approvals and/or Ministerial consent is required there needs to be a process where a preliminary advice can be offered such that there are no expenses incurred on obtaining an ILUA/CATL etc. which are then wasted owing to planning restrictions prohibiting or conditioning the proposal to the extent it is no longer viable.

If native title is an issue and an Indigenous Land Use Agreement is required it is important to ensure the State Government assists to ensure that this does not require additional financial consideration beyond the lease rental paid to the Aboriginal Council or land trust. There is a need for an advisory service to advise applicants on processes, ideally a government supported service would facilitate the ILUA for proponents!

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. There are potential “Catch 22’s” with the overall of dependencies for the ILUA/CATL and planning approvals which need to be resolved. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.

National Park and National Park CYPAL

Guidelines for leases for commercial activities and publicly promoted processes to consider an “entrepreneurial” application are required.

For national park CYPAL the land trust has first rights to any opportunity. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Trust).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.



Introduction

Submission to Inquiry

This submission is based on an initial discussion paper prepared for Cape York Sustainable Futures in early 2012, recognising that land tenure arrangements are a significant impediment to the economic development and the creation of self sustaining communities on Cape York.

The initial discussion paper was prepared with input from officers from the then Department of Environment and Resource Management. A draft was prepared and submitted to the informant officers and their comments have been incorporated. The submission assumes, that on the basis of our research and comments from the officers all chapters up to and including the conclusions are factual and present the present situation.

The recommendations in this submission is the work of EcoSustainAbility and Cape York Sustainable Futures and represents the recommended solutions to the significant land tenure issues with the current situation.

The focus of this report is Cape York. The situation on Cape York is particularly challenging owing to the very small proportion of freehold land, upon which much economic development and communities depend. It is recognised that whilst this report focuses on Cape York, the issues and recommended solutions may apply to elsewhere in Queensland. Having said that it may be important for the Inquiry to specifically recognise regional issues such as those in Cape York and other remote parts of Queensland.

Background

There are a range of common and unique tenures across Cape York, the net result is that with little freehold, tenure is a potential impediment to realising economic opportunities, from micro-businesses to major private investment.

The various leasehold tenures have various conditions and restrictions which may limit opportunities. The various pastoral leases may be used for other activities under the diversity policy yet this appears to constrain viable enterprise. The various aboriginal tenures, from Aboriginal freehold to DOGIT lands have various mechanisms which may allow for commercial development, however the tenure options available for both traditional owners and third parties are somewhat unclear.

Submission to Inquiry

This submission outlines:

1. The current main tenures in Cape York.
2. A summary of the potential development rights ascribed by the tenure type;
3. Available mechanisms to alienate lots for specific purposes;
4. The ability of these developable tenures to be used for security for obtaining commercial finance.
5. Conclusions of the implications of the current situation and recommendations to increase the ability for the economic and community sustainability potential of Cape York to be realised.

This discussion paper does not specifically undertake any analysis of native title/indigenous land rights but does address potential tenure rights and dealings and opportunities for tenures such as Aboriginal Freehold and DOGIT leases etc. An overview of native title process implications is included.



The discussion paper does not address freehold land dealings. It is noted that there are a few areas of freehold land on Cape York and these may be available for realising economic opportunities. Similarly the discussion paper does not address the situation with land tenure and leases at Weipa. The discussion paper does not address resources uses such as quarrying and mining.

Approach

This discussion paper has been prepared on the basis of available literature and consultation with the various government agencies (particularly DERM), the discussion paper includes an overview of relevant legislation but does not purport to provide settled legal advice in relation to particular tenure dealings. Further, and although not lawyers will review legislation to provide the context for various arrangements.

Definition of Cape York Peninsula Area

For the purposes of this discussion paper, the ‘Cape York Peninsula Area’ is defined to include the Local Government Areas (LGAs) of¹: Aurukun, Cook, Hope Vale, Kowanyama, Lockhart River, Mapoon, Napranum, Northern Peninsula Area, Pormpuraaw, Torres (mainland Bamaga etc.), Weipa and Wujal Wujal

Acknowledgements

The original report to CYSF and this submission could not have been prepared without the patient explanations and proactive comments and support by Queensland Government officers, Deanna Holder, and Narelle Massey. Buzz Symonds provided useful critical review and background information and Rianha Rolland provided useful advice early in the process.

NOTE: Whilst the officers provided comments, the interrelationship between different legislation and policy is complex, any errors are the Author’s!

¹ The selection of LGAs to include is consistent with the report New Horizons and Opportunities (Cape York Sustainable Futures 2010)



Current Land Tenure and Use

Cape York Land Tenures

The allocation of land ownership and allowable uses is fundamental to the economy of a region. In Cape York there has been an ongoing evolution from mostly pastoral landholdings to many of these being transferred to various form of indigenous tenures and national parks including the Cape York specific “Cape York Peninsula Aboriginal Land National Park”. Table 1 sets out the current tenure of Cape York (using area of the Cape York Region, but excluding the Wet Tropics World Heritage Area and lands surround by the Wet Tropics, as these are not the subject of this report).

Table 2 shows the overlying or strata tenures. Table 3 shows the nature refuges and the underlying tenures of these.

In summary, 14.3 percent of Cape York is National Park, 23.3 percent is Aboriginal Shire Lease, DOGIT or Land Trust, 52.9 percent is lands lease (33.89 percent is actively pastoral properties, see section below) and 0.7 percent is freehold. Nature refuges comprise a 3.55 percent. Of critical importance to the economic development situation for Cape York is the very low proportion of freehold land and as such many development opportunities are constrained by the allowable purposes/uses of lease, trust and reserved land.

Table 1: Land Tenure of Cape York²

Base Tenure	LotPlan (Count)	Sum Area (km ²)	Percentage (%)
Aboriginal Shire Lease	1	7,383	5.1
Commonwealth Acquisition	1	3	0.0
Forest Reserve	1	0.001	0.0
Freehold	4,330	1,071	0.7
CYPAL National Park	11	8,719	1.9
Land Trust parcels (under the Aboriginal Land Act 1991)	78	14,467	10.0
Deed of Grant in Trust	36	11,818	8.2
Harbours and Marine	2	0.01	0.0
Housing Lease	2	0.002	0.0
Lands Lease	427	76,123	52.9
Mines Tenure	147	3,846	2.7
National Park (17 mainland National Parks)	75	17,742	12.3
Port and Harbour Boards	1	0.001	0.0
Reserve	583	5,608	3.9
State Forest	1	9	0.0
State Land	657	2,963	2.1
Timber Reserve	1	209	0.1

² The area considered is the Cape York Peninsula Region Boundary (but excluding the Wet Tropics World Heritage Area and the enclaves within the Wet Tropics World heritage Area of Ayton/Wujal Wujal/Bloomfield, Cape Tribulation, Cow Bay and the Daintree River Valley). Based on data provided by DERM current at 16 June 2011, however it is based on GIS data and various inaccuracies are inherent in the reporting. Aboriginal and Islander Land Leases and Aboriginal Reserves have not been specifically identified in the above data.



Table 2: Strata Tenures³

Strata Tenure (Land Lease)	LotPlan (Count)	Sum Area (km ²)
Occupation Licences	2	7
Permit to Occupy	22	4
Road Licence	10	2
Special Lease	4	0.41
Term Lease	4	39
Other	2	0.01

Table 3: Nature Refuges⁴

Name	Type	Detail	Area (km ²)
Annan River Area B Nature Refuge	Nature Refuge	Freehold	0.16
Annan River Area B Nature Refuge	Nature Refuge	Lands Lease	3
Annan River Nature Refuge	Nature Refuge	Aboriginal Land Trust	2
Artemis Antbed Nature Refuge	Nature Refuge	Lands Lease	21
Balclutha (Lava Hill) Nature Refuge	Nature Refuge	Aboriginal Land Trust	10
Balclutha Creek Nature Refuge	Nature Refuge	Aboriginal Land Trust	21
Esk River Nature Refuge	Nature Refuge	Lands Lease	1
Haggerstone Island Nature Refuge	Nature Refuge	Lands Lease	0.5
Harkness Nature Refuge	Nature Refuge	Lands Lease	1,336
Holroyd River Nature Refuge	Nature Refuge	Lands Lease	2,816
Kalpowar Nature Refuge	Nature Refuge	Aboriginal Land Trust	289
Kyerrwanhdha Nature Refuge	Nature Refuge	Aboriginal Land Trust	27
Kuuku Ya'u Nature Refuge	Nature Refuge		17
Lilyvale Nature Refuge	Nature Refuge	Aboriginal Land Trust	67
Melsonby (Gaarraay) Nature Refuge	Nature Refuge	Aboriginal Land Trust	36
Mount Croll Nature Refuge	Nature Refuge	Aboriginal Land Trust	51
Mungumby Creek Nature Refuge	Nature Refuge	Lands Lease	1
Rindopar AreaB Nature Refuge	Nature Refuge	State Land	1
Rindoparr Coordinated Conservation Area	Coordinated Conservation Area	Aboriginal Land Trust	10
Running Creek Nature Refuge	Nature Refuge	Aboriginal Land Trust	385
South Endeavour Nature Refuge	Nature Refuge	Freehold	41
Total	20		5,115

³ Strata tenures overly other tenures. See above footnote for source of data. Aboriginal and Islander Land Leases and Aboriginal Reserves have not been specifically identified in the above data.

⁴ Includes nature refuges in the Cape York Peninsula Region Boundary (but excluding the Wet Tropics World Heritage Area and the enclaves within the Wet Tropics World Heritage Area of Ayton/Wujal Wujal/Bloomfield, Cape Tribulation, Cow Bay and the Daintree River Valley). Based on data provided by DERM current at 16 June 2011, however it is based on GIS data and various inaccuracies are inherent in the reporting.

Table 4: Underlying Tenures of Nature Refuges⁵

Type	Tenure	Count	Area (km ²)
Coordinated Conservation Area	Aboriginal Land Trust	1	10
Nature Refuge	Aboriginal Land Trust	9	886
Nature Refuge	Freehold	2	41
Nature Refuge	Lands Lease	7	4,177
Nature Refuge	State Land	1	1

Current Conservation Land Tenures

There are other tenures and statutory land designations which have conservation effect, these include Wild Rivers designations and the various Planning Schemes in effect by local governments. There is of course also many tens of thousands of square kilometres of land which are indigenous and/or pastoral which may have significant conservation values and which comprise relatively intact natural landscapes.

Table 5 sets out the current conservation land tenures on Cape York (excluding Wild Rivers designations), these comprise 20 percent of Cape York.

Table 5: Conservation Land Tenures

Tenure	Number	Area (km ²)
National Park	17	17,742
CYPAL National Park	11	8,719
State Forest	1	9
Forest Reserve	1	209
Coordinated Conservation Area	1	10
Nature Refuge (on Aboriginal Land Trust)	10	886
Nature Refuge (on Freehold)	2	41
Nature Refuge (on Lands Lease)	7	4,177
Nature Refuge on State Land	1	1
Steve Irwin Wildlife Reserve	1	1,350
Kaanju Ngaachi IPA	1	2,000
<i>Total</i>		<i>29,177</i>

NOTE: Total Area of Cape York based on Table 1 is 143,992km²

Private Conservation

The Steve Irwin Wildlife Reserve (SIWR) is a pastoral lease managed as a conservation property and a tribute to Crocodile Hunter Steve Irwin. The 135,000 ha property (originally the pastoral property Bertiehaugh), is home to a set of important spring fed wetlands which provide a critical water source to threatened habitat, provide permanent flow of water to the Wenlock River, and is home to rare and vulnerable plants and wildlife. The Steve Irwin Wildlife Reserve (SIWR) was acquired as part of the National Reserve System Programme for the purpose of nature conservation with the assistance of the Australian Government, however the tenure remains a pastoral lease and subject to the conditions of that lease, there is no formal conservation status.

The Australian Wildlife Conservancy owns the Picaninny Plains pastoral lease.

⁵ As above.



Kaanju Ngaachi Wenlock and Pascoe Rivers Indigenous Protected Area

The Kaanju Ngaachi Wenlock and Pascoe Rivers Indigenous Protected Area (IPA) is Australia's 25th Indigenous Protected Area. It stretches across nearly 2,000 square kilometres of wet tropical forest and sand ridge country between Lockhart River, Coen and Weipa on Cape York. Like all of Australia's Indigenous Protected Areas, it protects some of the nation's rare and fragile environments for the benefit of all Australians.

The Indigenous Protected Area is managed by the Chuulangun Aboriginal Corporation and is a place of significant social, cultural, spiritual, historical and economic value for its traditional owners.

Tenure Dealings and Economic Opportunities

Many of the above conservation tenures such as nature reserve include provisions which may restrict the realisation of non-conservation economic opportunities on the land and may restrict the ability to create a tenure to facilitate opportunities. These considerations will be unique to the land parcel (e.g. to the nature refuge agreement for that land) and as such have not been considered in any detail for this report.

Aboriginal Land Tenures

Aboriginal and Torres Strait Islander Deed of Grant in Trust (DOGIT)

A freehold grant held in trust (a form of land tenure) under the *Land Act 1962* for the benefit of the Aboriginal or Islander inhabitants or for Aboriginal or Torres Strait Islander purposes under the *Land Act 1994*.⁶ Examples include Umagico and Mapoon DOGIT's. Unlike ordinary freehold, there are restrictions such as the land cannot be sold (inalienable), but the trustee can lease areas, e.g. for a business.

Aboriginal or Torres Strait Islander Freehold

A grant of freehold (a form of land tenure) under the *Aboriginal Land Act 1991* or *Torres Strait Islander Land Act 1991* held by a trustee (e.g. a land trust, registered native title body corporate, etc) for the benefit of Aboriginal people, Torres Strait Islander people or a specific group of Aboriginal people or Torres Strait Islanders and their ancestors and descendants.⁷ Examples—Lockhart River Mangkuma Land Trust land. Unlike ordinary freehold, there are restrictions such as the land cannot be sold (inalienable), but the trustee can lease areas, e.g. for a business.

Aboriginal or Torres Strait Islander Reserve

A form of land tenure where land is dedicated under the *Land Act 1994*, or previous land legislation, for Aboriginal purposes, as an Aboriginal reserve, for the benefit of Aboriginal inhabitants, for Torres Strait Islander purposes, or the benefit of Islander inhabitants.⁸ Example—Daintree Aboriginal Reserve. NOTE This report does not specifically address such reserves.

⁶ <http://www.derm.qld.gov.au/native/title/glossary.html>

⁷ <http://www.derm.qld.gov.au/native/title/glossary.html>

⁸ <http://www.derm.qld.gov.au/native/title/glossary.html>



Legislation

The following is a brief summary of relevant legislation, it is not meant to be an exhaustive analysis of relevant law and certainly does not attempt to address interaction of the range of laws to any circumstance:

Aboriginal Land Act 1991

This Act provides a scheme under which Aboriginal people can obtain secure title to certain categories of land, (i.e. existing Aboriginal reserves or Deeds of Grant in Trust and Shire Lease lands). Also *Torres Strait Islander Land Act 1991* similar provisions for Torres Strait Islander Land.

Leases

The following is some selected excerpts from the DERM website page on leasing land under the Act.¹⁰

Long-term leasing arrangements are available under the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*.

A registered lease provides a lessee with: exclusive occupation of land; the long-term security required to obtain a loan; and opportunity to build a home, develop a business, or install and operate infrastructure. In return, a lease can provide a lessor (the trustee of the land) with a return for the use of their land. Leasing will also be of general benefit to Aboriginal and Torres Strait Islander communities through the diversification of land use and stimulation of activities to improve social and economic wellbeing.

Granting a lease means that a trustee agrees to allow exclusive use of a parcel of the land by another party for an agreed purpose, period of time, price/rent, and can be limited by other terms and conditions.

If a lease is not renewed it will expire at the end of its term and the land reverts back to the control of the trustee.

Leasing Indigenous land provides home ownership opportunities for people and facilitates land-based economic development and infrastructure provision without affecting the underlying tenure of the communal land.

Types of leases

The main types of leases under the Acts are:

- Private residential purposes leases — renewable leases of 99 years for private residential purposes (also referred to as home ownership leases);
- commercial purposes—encouraging economic development by enabling the renewal of leases and longer term leasing of up to 99 years. There are strict criteria that must be met before a proponent can obtain a commercial lease for greater than 30 years;
- public infrastructure and social housing purposes—allowing the State to hold long-term and renewable leases of up to 99 years for public infrastructure purposes or for purposes under the *Housing Act 2003*. The Australian Government and the local authority for the land can also be granted long-term leases to provide public infrastructure.

⁹ <http://www.derm.qld.gov.au>

¹⁰ http://www.derm.qld.gov.au/indigenous/land/leasing_ind_land.html



In some communities there may be leases (or lease applications) under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (commonly referred to as the 'Land Holding Act' and 'Katter leases'). The Department of Environment and Resource Management is reviewing the Land Holding Act.

Obtaining a lease

Leases are granted by the trustee of the land. For Aboriginal or Torres Strait Islander Deeds of Grant in Trust (DOGITs) the trustee is the relevant Indigenous local council.

To obtain a lease a person (the lease applicant) must first lodge an application with the trustee.

To assist lease applicants and trustees to take advantage of, and implement these leasing arrangements the Department of Environment and Resource Management has prepared leasing manuals (see Appendix 2) to guide parties through the leasing process.

The manuals include conditional agreements to a lease, lease terms documents and template letters for trustees. To apply for a lease, an Expression of Interest form must be completed.

DERM has a Leasing Support Team in Cairns to assist or advise trustees and applicants.

Cape York Peninsula Heritage Act 2007

The aims of the Cape York Peninsula Heritage Act 2007 are to:

- ensure ecologically sustainable use of land, including pastoral land, in the Cape York Peninsula region
- recognise the economic, social and cultural needs and aspirations of Indigenous communities in relation to land use in the region
- recognise the contributions of the pastoral industry to the economy and land management in the region
- identify significant natural and cultural values of Cape York Peninsula.

The *Cape York Peninsula Heritage Act 2007* (the Act) was proclaimed on 2 November 2007. The Act affects:

- land trusts based in the Cape York region for Aboriginal land under the *Aboriginal Land Act 1991*
- the Aurukun Shire Council
- trustees of Deed of Grant in Trust land in the region under the *Land Act 1994*
- Cape York rural leaseholders under the *Land Act 1994*.

Benefits of the Act

DERM states that the benefits for the Indigenous community, pastoral industry and conservation groups, include:

- designation of Indigenous community-use areas in Aboriginal land, which are suitable for aquaculture, agriculture or grazing purposes; and creation of a limited capacity for clearing under the *Vegetation Management Act 1999* in those areas
- the protection of native title rights in the *Wild Rivers Act 2000*, and the setting aside of a reserve of water for Indigenous communities
- designation of areas of international conservation significance to initially recognise World Heritage values, and the development of integrated management plans for national parks and nature refuges in these areas
- the removal of impediments to the declaration of national parks by establishing joint management arrangements with Indigenous landholders



- the introduction of rural lease terms of up to 75 years (increased from a maximum of 50 years), subject to conditions regarding Indigenous land use agreements and leasehold land
- a requirement that the Minister for Natural Resources and Water consider the impact on the Cape York grazing industry for any decision to transfer a lease or to convert the lease to another tenure
- a requirement that the Minister for Natural Resources and Water and the Minister for Environment and Multiculturalism consult with an advisory committee comprising all key stakeholder interests.

“CYPHA amended the Aboriginal Land Act and Nature Conservation Act to provide for “national parks (CYPAL)” – which are both Aboriginal land and national park. It also amended legislation related to the Delbessie agreement” (pers comm. Buzz Symonds).

Advisory committees

The Cape York Peninsula Regional Advisory Committee and Cape York Peninsula Regional Scientific and Cultural Advisory committees have been established to advise the Minister for Natural Resources and Water.

Leases

The following is an extract from a DERM Fact Sheet (see also Appendix 3):¹¹

The Act provides leaseholders with the same security of tenure they have enjoyed in the past and ensures that the pastoral industry's interests are protected. It also provides incentives for leaseholders to apply for longer term leases (up to 75 years), subject to conditions.

Benefits for the pastoral industry

The Act contains a number of new provisions that will benefit the pastoral industry, including:

- *An ability for leaseholders to access rural lease terms of up to 75 years (increased from a maximum of 50 years) if they take action to protect world heritage values. They must also enter into an Indigenous land use agreement concerning use and access rights for Traditional Owners and maintain the lease land in good condition. Leaseholders can apply for the 75-year lease as part of their normal lease renewal process, provided all the criteria have been met.*
- *A requirement that the Minister for Natural Resources, Mines and Energy and Minister for Trade, considers the impact on the Cape York Peninsula grazing industry of any decision to surrender a lease in the interests of ensuring that a viable grazing industry remains part of the Cape York Peninsula future economy.*
- *A requirement that in implementing this legislation, the Minister for Natural Resources, Mines and Energy and Minister for Trade, and Minister for Climate Change and Sustainability will consult with an advisory committee comprising all key stakeholder interests including pastoralists, Aboriginal people, conservation interests, mining interests, tourism and local government.*

Indigenous Interests

The following is an extract from a DERM Fact Sheet:¹²

Under the Act, the Cape York Indigenous community will benefit from:

- *a new class of protected area to enable national parks to be created over Aboriginal land without the need for lease-back arrangements;*

¹¹ DERM Fact Sheet, Cape York Peninsula Heritage Act—leasehold land management - <http://www.derm.qld.gov.au/factsheets/pdf/land/1159.pdf>

¹² DERM Fact Sheet, Cape York Peninsula Heritage Act—what does it mean for the Indigenous community? - <http://www.derm.qld.gov.au/factsheets/pdf/land/1157.pdf>



- *designated Indigenous community use areas within Aboriginal land that are suitable for aquaculture, agriculture or grazing purposes and create, for those areas, a limited capacity for clearing under the Vegetation Management Act 1999;*
- *the protection of native title rights in the Wild Rivers Act 2000 and a reserve of water that will be set aside for Indigenous communities.*

Forestry Act 1959

This legislation provides for forest reservations; the management, silvicultural treatment and protection of State forests; and the sale and disposal of forest products and quarry material, which are the property of the Crown on State forests, timber reserves and on other lands; and for related purposes.

Land Act 1994

The Land Act covers the administration and management of non-freehold land and deeds of grant in trust, the creation of freehold land, and for related purposes.

Land to which this Act applies must be managed for the benefit of the people of Queensland, while ensuring that:

- resources are used and developed sustainably to meet existing needs, while they are conserved for future generations
- land is evaluated by appraising its capability and balancing its economic, environmental, cultural and social opportunities and values
- land is allocated for development according to the state's planning framework, and contemporary best practice is used in design and land management
- as it becomes available, land is allocated to those who will ensure it is used appropriately in a way that will support Queenslanders' economic, social and physical wellbeing
- land required for community purposes is retained in a way that protects and facilitates this purpose
- environmentally and culturally valuable and sensitive areas and features are protected
- the decision-making process includes consultation with community groups, industry associations and authorities
- administrative dealings are consistent and impartial; administration is efficient, open and accountable; a market approach to land dealings is employed, and adjusted for community benefits arising from the dealing.

Nature Conservation Act 1992

"The object of this Act is to conserve nature using an integrated and comprehensive conservation strategy for the whole of Queensland. The strategy includes:

- *gathering, researching, analysing, monitoring and disseminating information on nature; identifying critical habitats and areas of major interest; encouraging the conservation of nature by education and cooperative involvement of the community*
- *dedicating and declaring areas representative of the biological diversity, natural features and wilderness of the state as protected areas; and managing these areas*
- *protecting native wildlife and its habitat*
- *providing for the ecologically sustainable use of protected wildlife and areas*
- *recognising the interest of Aborigines and Torres Strait Islanders in nature, and involving them in its conservation*



- *involving landholders cooperatively in nature conservation.”*

Sections 34–39 of the *Nature Conservation Act* allows interests (leases etc.) to be created in protected areas providing they are consistent with the management principles outlined in the act and with any management principles and plans for the areas concerned.

Section 42AD of the *Nature Conservation Act* deals with leases on national park (CYPAL)¹³:

Sustainable Planning Act 2009

The *Sustainable Planning Act 2009* replaced the *Integrated Planning Act 1997* however it continues to provide the statutory basis for the IDAS (Integrated Development Assessment System).

This discussion paper does not attempt to describe nor evaluate the implications of the *Sustainable Planning Act 2009* nor *IDAS*, other than to note that many of the tenure creation processes to establish rights for a commercial development will require assessment under IDAS as well as the tenure dealing process.

The overall IDAS process is complicated and brings together over 60 potential permits and approvals run under a wide variety of legislation. Figure 1 indicates an example flow chart for a more involved IDAS process for an application involving public notification, an information request and referral to IDAS concurrence/referral agencies. Not all IDAS processes are this complicated! Having said this, the lack of a planning scheme for lands on Cape York not within Cook Shire does provide an extra challenge to assessment under IDAS.

The provisions of the *Sustainable Planning Act* and requirements for material changes of use applications and the IDAS process generally apply to all land tenures.

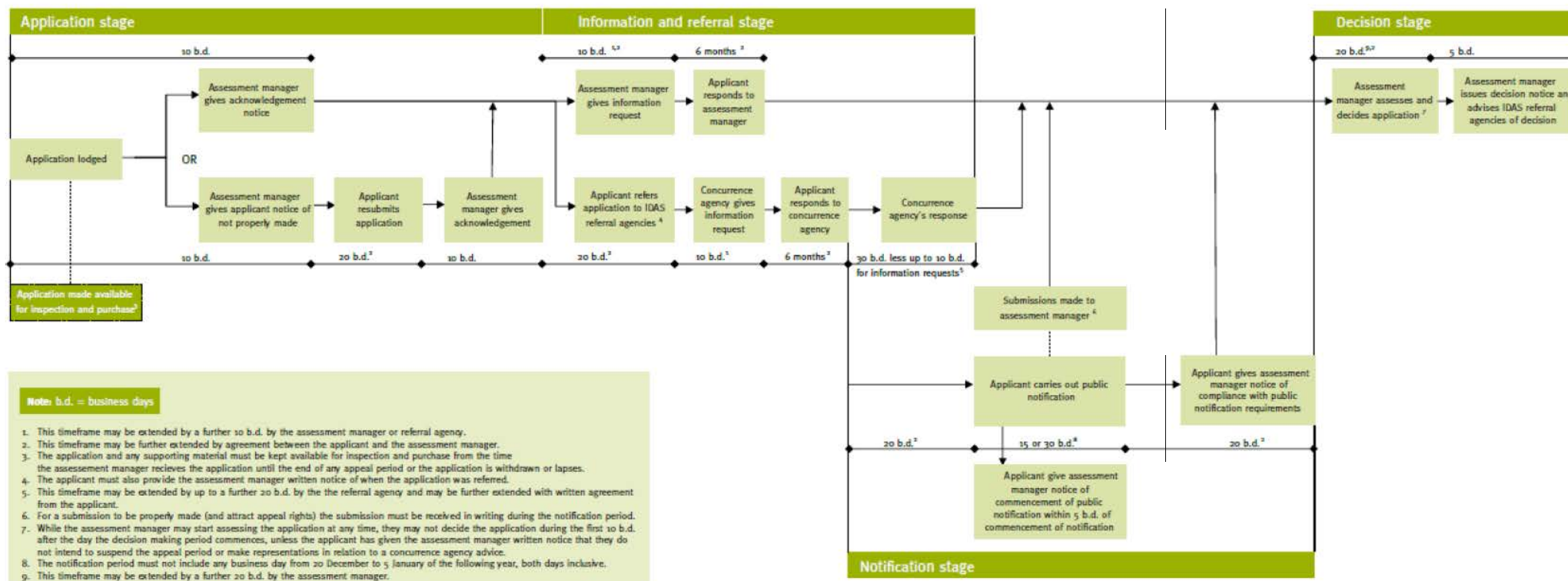
¹³ *Nature Conservation Act 1992*, Part 4 Protected areas, Page 42 Reprint 6I effective 2 December 2011



Cape York Land Tenure – Development and Security

Figure 1: IDAS Process

For application involving: public notification, information request, IDAS referral agencies





Native Title

Native title describes the rights and interests of Aboriginal people and Torres Strait Islanders people under their traditional laws and customs.

In the 1992 Mabo decision, the High Court held that the common law of Australia recognised a form of native title to land. So, in 1993, the Commonwealth passed the Native Title Act to recognise and protect these rights and interests. Queensland and other states and territories then introduced their own laws to fit under the umbrella of the Commonwealth Act.

Since Mabo, a number of other decisions have developed the common law principles of native title. For example, the Wik decision held that the grant of a pastoral lease did not necessarily extinguish native title. In the Fejo decision, the High Court confirmed that freehold title completely extinguished native title. In 2002, the High Court in the Ward decision considered a number of fundamental issues concerning native title's nature, scope and extent and the principles regarding its extinguishment.¹⁴

This report does not attempt to provide a comprehensive analysis of the implications of native title to land tenure dealings. However, it is noted that in many cases issues of a lease may be a future act

DERM administers the *Native Title (Queensland) Act 1993* which recognises and protects native title. It also has primary responsibility for implementing the *Commonwealth Native Title Act 1993* in Queensland. Importantly it is now a matter of statute law that decision relating to land use and tenure need to address various native title considerations. Put simply, the issuing of a lease for a commercial purpose over many of the tenure types prevalent on Cape York may require an Indigenous Land Use Agreement to be established prior to the lease being granted.

The following are a few extracts of definitions of terms relevant:

Future acts: *Actions such as granting an interest or carrying out development on land or waters that interferes with the enjoyment or exercise of native title. Some future acts extinguish native title, while others suppress it (the non-extinguishment principle) as set out in the Commonwealth Native Title Act 1993. Future acts include:*

- *registering a trustee lease*
- *granting a development approval*
- *constructing a community hall or public housing*

Indigenous land use agreement (ILUA): *A voluntary agreement about the use and management of an area of land or waters made between one or more native title parties, and others such as the State, a developer or a mining company. Once it has been registered by the National Native Title Tribunal, an ILUA is legally binding on the parties to the agreement, and all native title holders (and their successors) for that area.*

Native Title Representative Body (NTRB): *A regional organisation appointed by the Commonwealth minister responsible for the NTA, to represent Indigenous Australians in native title issues in a particular region. [NTRBs](#) provide native title services to persons who hold or may hold native title in their area or part of their area, and registered native title bodies corporate who represent those native title holders. Examples—Cape York Land Council, Torres Strait Regional Authority.*

¹⁴ http://www.derm.qld.gov.au/nativetitle/what_is.html



Indigenous Land Use Agreements

The following text provides an extract of DERMS summary of ILUA's on their website.¹⁵

The Commonwealth Native Title Act 1993 provides for Indigenous land use agreements (ILUAs) between native title holders or claimants and other interested parties about how land and waters in the area covered by the agreement will be used and managed in the future.

The Queensland Government, which is committed to resolving native title issues through negotiation rather than through costly and time consuming litigation, strongly supports these agreements.

ILUAs can also be an alternative to other processes under the Native Title Act 1993 (Cwlth).

Guidelines for Negotiation of an Indigenous Land Use Agreement

Guidelines for negotiation of an ILUA (area agreement) have been prepared by the department. These will assist clients who have had a land dealing approved by the department subject to the resolution of native title issues. They may also assist those who have been advised that an ILUA is the best way to proceed with their dealing.

The guidelines explain the:

- *different types of agreements*
- *steps to negotiating an ILUA*
- *process of registering an ILUA.*

It also includes a sample ILUA that is in a format that the State believes fulfils the legislative requirements of the Commonwealth Native Title Act 1993 and Native Title (Indigenous Land Use Agreements) Regulations 1999.

The guideline does not provide legal advice and encourages clients to seek independent legal advice. It also explains that the National Native Title Tribunal can help at all stages of the ILUA process by providing certain information and that the Native Title Representative Bodies are important parties in the process.

It is hoped that this guideline can add to the community's understanding about native title and the appropriate processes for taking account of this interest in land.

Pastoral ILUA template

The department, AgForce Queensland, Queensland South Native Title Services and North Queensland Land Council collaborated in 2010 and 2011 to develop the Pastoral Indigenous Land Use Agreement (Pastoral ILUA) template and associated guide. The negotiations were facilitated by the National Native Title Tribunal.

See Appendices 4A and 4B for the template and guide.

The template is intended to provide a simpler and less costly process for negotiating ILUAs. Until now, there hasn't been a standard agreement to assist Indigenous parties and leaseholders negotiate agreements.

The Pastoral ILUA template has been designed specifically to:

- *resolve native title in claim areas on the non-extinguishment principle by requiring the leaseholder to withdraw as a respondent to the indigenous party's native title claim while ensuring that the leaseholder's interests under the ILUA, the lease and a determination are protected*

¹⁵ <http://www.derm.qld.gov.au/native/title/dealings/agreements.html>



- address issues that usually are of concern to both Indigenous people and leaseholder, namely, permissible activities and conditions, restrictions, exclusions that apply to the conduct of the parties when the access and use rights are being exercised
- resolve issues with public liability insurance on behalf of native title holders
- be an access and use agreement for the purposes of the Land Act 1994 and the [Delbessie Agreement](#) for leaseholders seeking to qualify for select benefits that may be available to them when they enter into access and use agreements. This avoids the need for more than one ILUA to be negotiated for the lease land.

The Aboriginal and Torres Strait Islander Land Holding Bill 2011, introduced to Parliament on 29 November 2011, includes an incentive in the form of a rental discount of 25 per cent over five years for resolving native title over certain rural leasehold lands using the Pastoral ILUA template.

A lessee who enters into a Pastoral ILUA may apply for the rental discount if they:

- hold a Delbessie lease (a lease issued for grazing, agricultural or pastoral purposes that has an area more)
- register
- withdraw im
- source insurance if such a policy is required

The rental disco

ss.

Subject to the
lessees may apply
will be considered

2011 being passed, eligible
2017. No new applications

Consult the guide to the Pastoral ILUA template for more detailed information on the mandatory conditions and the benefits of using the template. The guide does not provide legal advice, and leaseholders and native title parties are encouraged to seek independent legal advice. The template, and guide, is also a useful reference for agreement-making generally.

Register of ILUAs

The National Native Title Tribunal (NNTT) maintains the [Register of Indigenous Land Use Agreements](#).

Importantly, once an ILUA is registered with the NNTT it has the same status as a legal contract, binding all native title parties to the terms of the agreement—including those who may not have been identified at the time the agreement was made. This gives all relevant parties the certainty and security they need.

ILUA Required for Dealing

Where DERM has determined that the creating of a lease or other dealing requires an ILUA:

The state can proceed with your dealing, and will act upon the ILUA:

- once it has been registered
- when any other requirements set out in the ILUA have been fulfilled
- when all other statutory provisions and conditions (i.e. non-native title matters)
- set out in your letter of offer have been satisfied.



Types of ILUA

A body corporate agreement applies where there has been a determination that native title exists over the whole of an agreement area, and a body corporate exists to hold native title or represent the native title holders. If this is the case, the proponents (for a dealing) are advised by the letter of offer (regarding a dealing) from the state. Note that if the area the subject of the ILUA is only partially covered by a determination of native title then an area agreement is the appropriate form of ILUA.

An area agreement (ILUA) is required if only *part* of the area of the proposed dealing is covered by one (or more) registered native title body corporate or if there is no registered native title body corporate for the area (where native title has not been determined).

There are various corporate entities with responsibilities to represent aboriginal land interests throughout Cape York. In particular, land Trusts, which administer land under the *Aboriginal Land Act* are not necessarily a body corporate as far as the *Native Title Act* is concerned. A report prepared by the National Native Title Tribunal discusses the various roles of organisations such as land Trusts, body corporate and the Cape York Land Council.¹⁶

Given this it is understood that a body corporate agreement would be applicable for sites such as the Wik and Wik Way People's claims (and #2 and #3 claims), Kowanyama People and Eastern Kuku Yalanji Peoples claims (see Appendix 5, which is a PDF file with embedded links to information on each claim/determination). For the vast majority of Cape York where determinations have not been made...an area agreement would be required.

Steps to Negotiating an ILUA (Area Agreement)

The development of an ILUA is likely to take at least a year and will involve the expense of conducting negotiations and legal advice, the DERM guideline states¹⁷:

As negotiating an ILUA can take a substantial amount of time and effort (you should allow one year or more), and may involve costs for you as the proponent, considering these steps carefully may help you to decide whether or not to proceed. If you do decide to go ahead, you should advise the department, seek legal advice to ensure that your objectives are met in any negotiations, and that what is agreed is adequately documented in your ILUA.

The following figure sets out the process as described by the DERM guideline (see Appendix 6).

Current Native Title Determinations and Claims

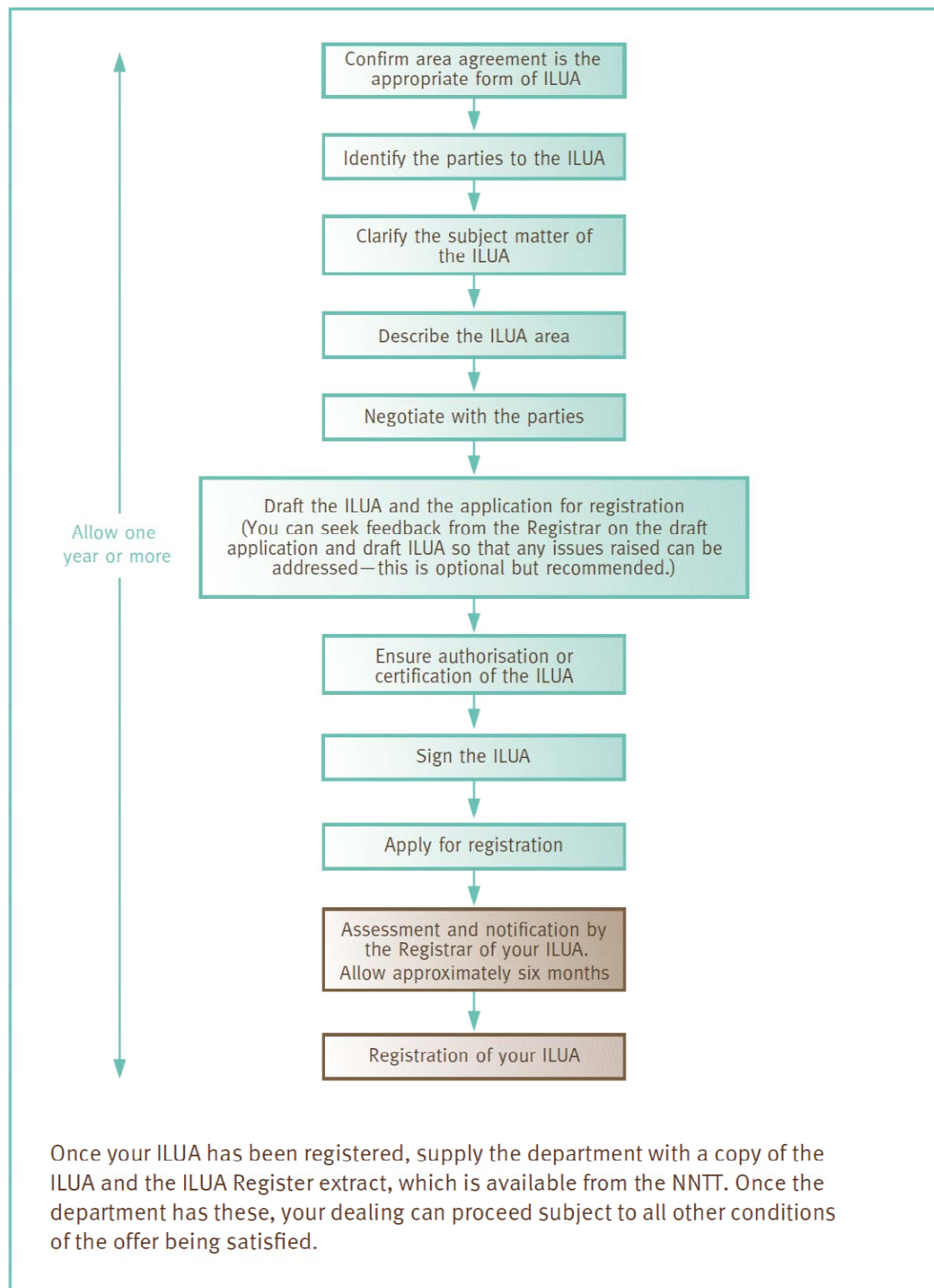
Appendix 5 has a figure of the latest map of claims and determinations on Cape York.

¹⁶ Memmott P and McDougall S (2003), *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title* (published by the National Native Title Tribunal and Cape York Land Council, sourced from- <http://www.nntt.gov.au/mediation-and-agreement-making-services/documents/holding%20title%20and%20managing%20land%20in%20cape%20york.pdf>)

¹⁷ Queensland Government, Department of Environment and Resource Management (2011) Guidelines for negotiating an Indigenous land use agreement (area agreement).



Figure 2: Area Agreement ILUA Process¹⁸



¹⁸ Queensland Government, Department of Environment and Resource Management (2011), Guidelines for negotiating an Indigenous land use agreement (area agreement).



Tenure Opportunities

This section sets out the options for the creation/alienation of land for economic development of pastoral leases, various aboriginal land tenures and national parks which comprise about 90 percent of Cape York.

Lease Holdings

There are 427, pastoral and other lease holdings covering 76,123 ha (or 53% of the Cape). For pastoral holdings there are a variety of mechanisms available to undertake additional economic activity:

- Diversification Policy
- Add Purpose
- Excise area (small lease excised for a purpose)
- Sub lease

Diversification Policy

DERM has established a policy for Diversification of Leases for Agricultural Purposes¹⁹ (Appendix 7). This policy applies to lessees that wish to undertake other (non-primary production) activities which do not interfere with the main purpose of the lease. The Policy states:

“When considering applications by lessees to use agricultural leases for additional purposes a proposed activity may be considered to be complementary even if it is not related to agriculture, if the activity contributes to the viability and ecological sustainability of the enterprise, and allows the activity of agriculture to flourish where otherwise it may not have. For this to occur, the activity must be of sufficiently small scale to ensure that it does not become the dominant or principal activity.”

Items in this section in italics are extracts from the Policy²⁰.

NOTE: There are a whole range of considerations in the Policy, the diversification must not limit the states potential use of timber or gravel resources.

The policy applies to a range of agricultural leases including pastoral holdings, perpetual leases for agricultural purposes and grazing homestead perpetual leases and allows for farm-based tourism, filmmaking and nature conservation. Given the policy only allows small scale such activities lease rental remain unchanged. However, development approval and/or material change of use applications may be required. The Policy allows:

- **Low key tourism – existing infrastructure and minimal capital investment** *“e.g. renovations to existing homestead, old shearers' sheds and workers cottages, camping in tents, fencing, walking tracks etcetera”*. Sub-purpose allowed subject to conditions (may require cultural heritage assessment).

¹⁹ Department of Environment and Resource Management (2007), Diversification of Leases for Agricultural Purposes PUX/901/337 Version 2 - http://www.derm.qld.gov.au/about/policy/documents/3337/slm_2005_1926.pdf

²⁰ Department of Environment and Resource Management (2007), Diversification of Leases for Agricultural Purposes PUX/901/337 Version 2 - http://www.derm.qld.gov.au/about/policy/documents/3337/slm_2005_1926.pdf



- **Low key tourism – additional infrastructure** – “...up to four accommodation units (catering for up to 16 guests), and an amenities building. These can be in addition to use of the existing homestead, shearers’ sheds or workers cottages.” Sub-purpose allowed subject to *Sustainable Planning Act 2009* approval for material change of use etc. may include conditions (may require cultural heritage assessment).
- **Documentaries and filmmaking** – policy allows for small scale/temporary as of right and more substantial productions subject to individual consideration.
- **Nature Conservation** – no approvals necessary, although for more specific conservation activities conditions to ensure State resources (timber and gravel etc.) can be harvested by the state may be imposed.
- **Vocational Training** – for training in pastoral activities, up to four accommodation units, 16 persons, plus supervisors accommodation and amenities/catering buildings (not stated by presumably also training facility!). In this instance the area may be sub-leased.

“Should a lessee wish to expand the new activity to the extent where it becomes the dominant activity, other options such as applying to freehold the lease or excise an area for the new activity may be considered. In such cases all relevant legislative, policy and planning requirements will need to be considered, including that this department may need to assess the most appropriate tenure and use of the land and whether the land is to be made available with or without competition.

To limit the risk of an additional use becoming an entity in its own right applications for additional purposes will be subject to the applicant agreeing to change the imposed conditions of lease (s.210) to preclude the future sub-leasing (s.334) of that part of the lease in isolation from the balance of the lease.”

Given all of the above, the diversification policy allows limited tourism as an economic activity provided only existing accommodation and four additional units are provided. However the overall requirement that the additional use not become the dominant one is a potential constraint even on the modest uses approved. A recent study²¹ found that available information on grazing income is limited but reached an approximate “assumption” of \$1.60 per hectare per annum. With an average area of pastoral properties on Cape York of 111,000ha, this equates to an annual income of \$177,600.

If existing infrastructure allows four rooms and additionally constructed infrastructure provides an additional four units, at a per room rate of \$150 per night²², an income of \$177,600 is achieved in 148 room nights per year (i.e. an occupancy rate of only 40%). Feasibility for tourism is generally assessed at a rate of 65% and as such should a pastoral lessee enter into tourism, and end up with a modest, but successful tourism venture, they risk exceeding their pastoral income and breaching the Policy:

“When considering applications by lessees to use agricultural leases for additional purposes a proposed activity may be considered to be complementary even if it is not related to agriculture, if the activity contributes to the viability and ecological sustainability of the enterprise, and allows the activity of agriculture to flourish where otherwise it may not have. For this to occur, the activity must be of sufficiently small scale to ensure that it does not become the dominant or principal activity. “

²¹ Chester G and Driml S (2011), The Potential Economic Benefits of Protecting and Presenting Cape York (draft report to DERM, produced in association with Cape York Sustainable Futures).

²² This would be considered to be a modest return per room night and income would be expected per bed (the four units allow 16 occupants) and there may also be income for meals and activities (such as a birdwatching, croc spotting tour or horesriding etc.).



The “*not become the dominant or principal activity*” aspect remains a constraint in the policy, although this could be outweighed by “*contributes to the viability and ecological sustainability of the enterprise*”. This creates a potential catch-22 situation, tourism could fund ecological sustainability, but then overtake the pastoral income. As an example a barely viable grazing enterprise (Cape York pastoralism has a challenge being viable), could have a successful tourism venture which presents Cape York’s landscapes, culture and nature as well as “outback” grazing experience, if profitable, this could allow the lessee to destock areas to maximise ecological sustainability however the maximising of non-pastoral income and reduction of pastoral income could fall foul of the “*not become the dominant or principal activity*” requirement.

Given the above, the diversity policy has certainly allowed some modest tourism, however it does have imbedded restrictions which could be constraints on allowing a viable enterprise. The Policy does envisage this and states:

“If the proposed additional use is assessed as being not complementary to the primary purpose of the lease (agriculture), then the application will usually be refused in the first instance, but alternative methods of handling the proposal could be examined to enable a diversified use to become a major use, such as:

- *excision of part of the existing lease and the issue of a term lease over that part, with or without competition;*
- *surrender of the whole lease and the issue of a new term lease or leases over the whole property, with or without competition; or*
- *conversion of the lease to freehold tenure.*

In such cases it is important to recognise that all relevant legislative, policy and planning requirements will need to be considered, including that this department may need to assess the most appropriate tenure and use of the land and whether the land may be made available with or without competition, and native title issues if any will need to be addressed.

Additional Purpose

The *Land Act* states:

Part 3 Leases

Section 154 Minister may approve additional purposes

- Minister may approve an application by lessee that lease be used for additional or fewer purposes.
- Any additional purpose must be complimentary to, and may not interfere with, the purpose for which the lease was originally issued.

Where more intensive than the diversity policy allows, there can be a process to add a purpose. Whilst the diversity policy would be likely to be applied for tourism, an argument may be able to be made that the use is “complementary” of the tourism has more than 4 unit/16 people capacity and it assists with the viability of the pastoral enterprise. This would be considered on a case by case basis and it would appear that the major factor would be ensure that grazing activity was still a major use of the broadacre lands and a major part (if not the most financially dominant) of the overall enterprise.

Other commercial enterprises such as a roadhouse, retail outlet etc. are not envisaged within the diversity policy. Excision is considered the most appropriate way to deal with commercial activities such as roadhouse and retail outlet. A road house is not considered complementary to a pastoral lease.²³

The diversity policy appears, on the face of investigation undertaken for this report to overly constrain the application of Section 154.

NOTE: There are likely to be native title considerations and the additional use may require an ILUA.

²³ Pers comm. Leanna Holder, DERM February 2012



The DERM has a policy relating to additional purposes of lease:²⁴ (Appendix 9)

An additional purpose should not result in a significant change i.e. to a "lesser" purpose or an upgrade of the lease.

The additional condition (that is required to be complimentary to the original purpose of the lease), would need to be assessed in accordance with the provisions of the Land Act, particularly the objects, and any requirements of the local government.

Any additional purpose that requires a change to the imposed conditions should ensure that the lease conditions also reflect the department's present requirements for conditions i.e. possible addition of conditions e.g. indemnity, or removal of conditions e.g. requiring clearing of timber.

Further, the application is to be accompanied by the written consent of all persons with a registered interest in the lease.

However, the application of the policy's detailed provisions appear to only apply to special leases and allowing residences on grazing leases.

Under Schedule 11 of the *Land Regulation 2009* the fee for an application for an additional purpose in accordance with section 154(1) of the *Act* is \$110.30 (Schedule 11 1(i)(ii)). The relevant forms and a guide are available on the DERM website.²⁵

The key steps for an additional purpose are:

1. Lessee makes application to DERM
2. DERM seeks response from key agencies (e.g. Council)
3. DERM makes an offer

In some instances the above may also require an operational works or material changes of use application and consideration under the *Sustainable Planning Act*. Presumably there is a step in the above process where DERM will give and offer or a resource entitlement to allow land owner endorsement to facilitate the *Sustainable Planning Act* process.

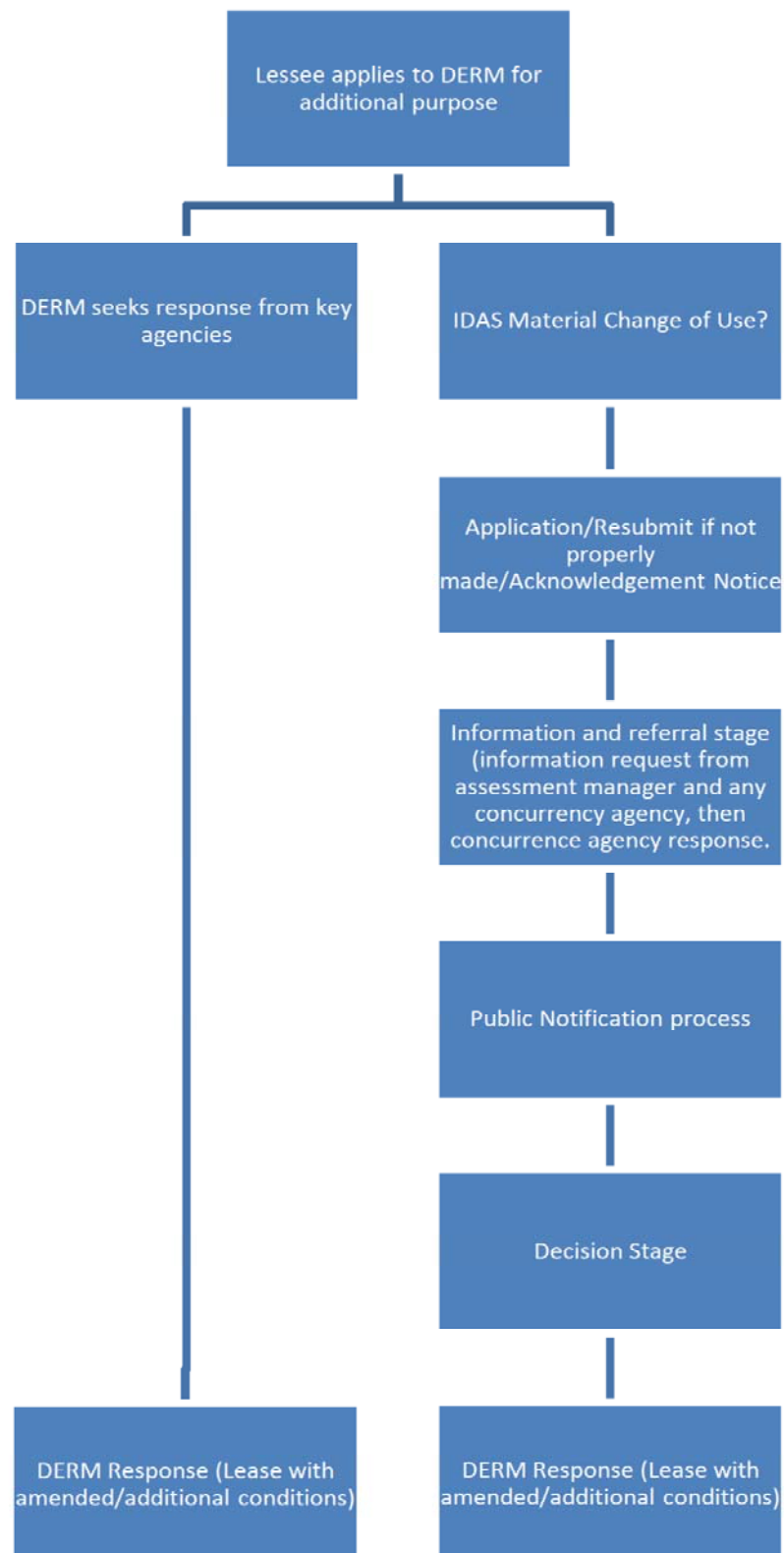
Figure 3 provides an overview of the key steps to the process.

²⁴ Department of Environment and Resource Management (2007), Additional Purposes of Lease PUX/901/333 source - http://www.derm.qld.gov.au/about/policy/documents/3352/slm_901_333.pdf

²⁵ http://www.derm.qld.gov.au/land/state/pdf/form_la00.pdf, http://www.derm.qld.gov.au/land/state/pdf/form_la13.pdf and <http://www.derm.qld.gov.au/factsheets/pdf/land/1124.pdf>



Figure 3: Overview of Process – Additional Purpose to Lease





Excise Area (Small Lease Excised for a Purpose)

The excision of a small area of a pastoral lease for a specific purpose for an economic enterprise would appear to be a logical outcome. This ensures the ongoing viability of the pastoral lease in its own right (provided sufficient lands remain in the pastoral lease). It also then establishes a specific tenure which would allow the lessee to raise finance. As such a pastoralist that wishes to start a commercial enterprise could excise a small area of lease, then use the new lease as security to be offered to obtain finance, or could establish a joint venture with investors or others.

It would appear that the restrictions of “complementary” use to existing leases would not apply. However, an ILUA is likely to be required. If the applicant is not the current lessee there may need to be competition in granting the lease.

The *Land Act* has specific provisions relating to leases and the need to ensure there is competition in allocation. There are however some exceptions, the legislative provisions and policies for their interpretation and application are set out in a DERM Policy²⁶:

The object of the Land Act 1994 (section 4) and the principles enunciated therein are highly relevant to consideration of applications for priority leasing or sale of State land assets. The priority provisions of the Land Act 1994 were put in place following community concerns about accountability in dealing with these valuable State owned assets. This policy gives further guidance on the application of the legislation.

The following extract of the Policy may be applicable, where a lessee applies to excise a small proportion of their lease, this may be able to be undertaken without needing to have competition:

It could be appropriate though to apply subsection 123(c) in instances where part of a lease has a more appropriate use from a land planning perspective and the lessee is prepared to surrender this part of the lease, the definition of which satisfies a long term lease. This situation can arise when the part in question is small relative to the parent lease (less than 10% of the area of the parent parcel). In considering section 123(c) the value of the parent lease must reflect the value of the lease for the purpose for which it was issued and not its development potential if it were held under freehold title. If a lease is within the last say 5 years of its term it would be inappropriate to apply section 123(c) as the land planning issues can be better dealt with through the lease renewal process.

If it is necessary to also ensure delivery of some other highly desirable community outcomes, then it may be appropriate to utilise a development style lease over the proposed development area, say for up to 5 years, to ensure such outcomes prior to the issue of a deed.

However, to reduce the potential for speculation in such leases, consideration should be given to requiring a substantial upfront payment of perhaps 50% of the land's unimproved value. It is not appropriate to issue such leases to, in any way, subsidise the lessee's proposed development.

There are many other issues, relating to access, native title, planning etc. which would be considerations and there is no clear application/consideration process for such a lease excision. One consideration is for there to be a decision relating to appropriate tenure, the Land Act states:

Section 16 Deciding appropriate tenure

- (1) Before land is allocated under this Act, the chief executive must evaluate the land to assess the most appropriate tenure and use for the land.
- (2) The evaluation must take account of State, regional and local planning strategies and policies and the object of this Act.

²⁶ Department of Environment and Resource Management (2007), Allocation of Land in Priority in terms of the Land Act 1994
http://www.derm.qld.gov.au/about/policy/documents/3341/slm_2006_2551.pdf



- (2A) Also, to the extent the land is in an urban development area, the evaluation must take account of, and give primary consideration to, any development scheme or interim land use plan under the *Urban Land Development Authority Act 2007* that applies to the land.
- (3) For Cape York agreement land, the evaluation may also take account of commitments and undertakings—
- (a) having effect in relation to tenure; and
 - (b) given by persons under, or arising from, a Cape York agreement.
- (4) Subsection (3) applies for 10 years after it commences.
- (5) This section does not apply to a grant of rail land in fee simple to the State.
- (6) In this section—
- Cape York agreement** means—
- (a) the Cape York Peninsula Land Use Heads of Agreement made on 5 February 1996; or
 - (b) the agreement made on 17 September 2001, headed ‘Deed of Endorsement Cape York Land Use Heads of Agreement’.
- Cape York agreement land** means unallocated State land to which a Cape York agreement applies.

The *Land Act* sets out a set of requirements for new leases, presumably this applies to a new lease created when excised from a current lease. Section 16 Deciding appropriate tenure, sections 121 Leases of unallocated State land and section 123 Priority Criteria must be taken into account when issuing a new lease.

Under Schedule 11 of the *Land Regulation 2009* the fee for an application to create a new excise a lease in accordance with section 121 of the *Act* is \$220.60 (Schedule 11 1(h)). The relevant forms and a guide are available on the DERM website.²⁷

The key steps for an application to excise a lease are:

1. Lessee makes application to DERM
2. DERM seeks response from key agencies (e.g. Council)
3. State Valuations make a report and valuation
4. DERM makes native title assessment (most likely needs an ILUA)
5. Offer made subject to requirements:
 - ILUA being registered
 - Survey of excision and balance lot
 - Payment of first years rent in advance
6. Lease established
7. Material change of use application (under *Sustainable Planning Act 2009*).

NOTE: In some circumstances, where native title negotiations are underway and there is evidence if this (but ILUA not necessarily registered) DERM may provide Resource Entitlement to allow the material change of use application to proceed concurrently with finalisation/registration of ILUA.

Figure 4 outlines an overview of the process. For each process the critical path and dependencies regarding the ILUA and IDAS processes may need to be uniquely considered.

²⁷ http://www.derm.qld.gov.au/land/state/pdf/form_la00.pdf, http://www.derm.qld.gov.au/land/state/pdf/form_la05.pdf and <http://www.derm.qld.gov.au/factsheets/pdf/land/1127.pdf>



Figure 4: Overview of Process – Excision of a Lease





Sub Lease

Division 3 of the *Land Act* allows for subleases. Overall, subleases must be approved by the Minister, may be subject to conditions on the lessor and sublessor and must be registered (usually requires a plan of survey). The DERM guide states:

Subleases must be consistent with the purpose and conditions of the Land Act lease.

If a lease is sublet (either in whole or part) the sublease must be registered in the Queensland Land Registry. The leaseholder continues to be liable for all the lease conditions.

Under Schedule 11 of the *Land Regulation 2009* the fee for an application for an application to sublease a lease in accordance with sections 332 (1) and/or (2) of the *Act* is \$110.30 (Schedule 11 1(t)). The relevant forms and a guide are available on the DERM website.²⁸

Overall it would appear that the use of a sublease (on a pastoral lease) has limited potential application to create lands for economic development opportunities.

A sublease may allow for the sublease to provide security to be offered for finance however this would only be for uses complementary to the prime use of the lease (e.g. the diversity policy).

Delbessie Agreement/ Cape York Heritage Act 2007

The Delbessie Agreement²⁹ aims to balance using rural land profitably with maintaining healthy land condition and adapting farming practices to address challenges such as climate change. The Agreement has been established through amendment to the *Land Act* to:

- allow longer lease terms;
- clarify the duty of care;
- require lease land condition to be assessed;
- establish land management agreements to require ongoing land management;
- promote voluntary conservation agreements and Indigenous access to State rural leasehold land for traditional purposes;
- establish a process if land is identified as having significant environmental values that should be conserved within the protected area estate (e.g. future national parks).

The lease term can be extended up to 50 years.

The purpose of this paper does not analyse the overall implications of the Delbessie Agreement on pastoral land holders. The Agreement states that the policy on diversification will be reviewed to ensure that activities, including additional uses such as ecotourism, farm stay, nature conservation and film-making, are carried out in accordance with the agreed management objectives for the natural and cultural values of the area.

Importantly, the Delbessie Agreement process for the renewal of leases assessing land lease condition, land management agreements, conservation agreements and indigenous access does not overtly allow for the review of the purposes of a lease to allow additional purposes other than what the diversification policy allows.

The *Cape York Peninsula Heritage Act 2007* (the Act) was proclaimed on 2 November 2007. DERM has produced a brochure regarding the effect of the Act on leasehold management³⁰:

²⁸ http://www.derm.qld.gov.au/land/state/pdf/form_la00.pdf, http://www.derm.qld.gov.au/land/state/pdf/form_la28.pdf, <http://www.derm.qld.gov.au/factsheets/pdf/land/1223.pdf> and http://www.derm.qld.gov.au/about/policy/documents/3663/slm_2006_2462.pdf
²⁹ Department of Natural Resources and Water (2007), Delbessie Agreement – State Rural Leasehold Land Strategy - http://www.derm.qld.gov.au/land/state/rural_leasehold/pdf/delbessie_agreement.pdf
³⁰ <http://www.derm.qld.gov.au/factsheets/pdf/land/1159.pdf>



“The Act contains a number of new provisions that will benefit the pastoral industry, including:

- An ability for leaseholders to access rural lease terms of up to 75 years (increased from a maximum of 50 years) if they take action to protect world heritage values. They must also enter into an Indigenous land use agreement concerning use and access rights for Traditional Owners and maintain the lease land in good condition. Leaseholders can apply for the 75-year lease as part of their normal lease renewal process, provided all the criteria have been met.*
- A requirement that the Minister for Natural Resources, Mines and Energy and Minister for Trade, considers the impact on the Cape York Peninsula grazing industry of any decision to surrender a lease in the interests of ensuring that a viable grazing industry remains part of the Cape York Peninsula future economy.*
- A requirement that in implementing this legislation, the Minister for Natural Resources, Mines and Energy and Minister for Trade, and Minister for Climate Change and Sustainability will consult with an advisory committee comprising all key stakeholder interests including pastoralists, Aboriginal people, conservation interests, mining interests, tourism and local government.”*

The World Heritage Convention and Operational Guidelines require the presentation as well as protection and conservation of world heritage sites, however the *Cape York Heritage Act* appears to envisage pastoral lands as only needing to fulfil the role of protection, conservation and rehabilitation of values in relation to any areas of world heritage which are pastoral lease. There do not appear to be any provisions relating to allowing ecotourism or other presentation activities on pastoral lands beyond the diversification policy.

Specifically, the *Act* does not appear to allow for any change of purpose in lease to accommodate any commercial activity other than pastoral and conservation.

Planning Approvals

In almost all cases an operational works approval or a material change of use and then an operational works approval would be required.

Summary

On pastoral leasehold land there is no specific opportunity for another party to identify and develop commercial activities. A sublease or excision may be possible with the current leaseholder's involvement concurrence, in almost all instances this will require material change of use and ILUA requirements.

For current leaseholders tourism may be undertaken (after approval of a change of lease purpose application if the tourism involves any new infrastructure). In many cases this will involve an ILUA and most likely a material change of use application.

Deed of Grant in Trust (DOGIT)

Aboriginal lands, established as Deed of Grant in Trust (DOGIT) cover almost 12,000 km² and 36 various areas. On Cape York, DOGIT areas include Hope Vale, Injinoo, Kowanyama, Lockhart River, Mapoon, Napranum, New Mapoon, Pormpuraaw and Umagico. The relevant Aboriginal Shire Council is the trustee for the DOGIT lands. The Councils have dual roles, as the trustee and as the relevant local government ...at times during the process described below this means they have dual functions with responsibilities under the *Aboriginal Land Act 1991* and under the *Local Government Act 2009* and the *Sustainable Planning Act 2009*. At times the Council must exercise these responsibilities with a “separation”.



The *Aboriginal Land 1991* allows leases for a variety of private, public and commercial uses to various entities. Relevant to this discussion paper, leases can be issued to an aboriginal person or another person for a commercial purpose for up to 30 years without Ministerial permission and up to 99 years with the Ministers permission.

Under Section 10(1) of the *Sustainable Planning Act* the granting of a lease for more than ten years overland that is part of a larger lot is defined a reconfiguring a lot (subdivision) and is therefore assessable development. Therefore for any application for a lease that is for more than ten years a development approval to reconfigure a lot is required. To apply for a development approval, a resource entitlement would be required from DERM.

DA for RoL over DOGIT land requires Evidence of Resource Entitlement prior to submitting the DA. If you have tenure you can apply to DERM for Resource Entitlement directly if not you need the Trustee to make the application. DERM is in the process of streamlining this requirement for certain types of leases that do not require the Minister's consent to the grant of the lease. This is not yet finalised but a process exists for applying for Resource Entitlement (the DERM website³¹ has the information).

For Evidence of Resource Entitlement to be given by DERM, Native Title would need to have been appropriately addressed prior, as such the full ILUA process may be required!

DERM has produced a manual for DOGIT leasing (see Appendix 9)³² and provides a support service. The process is described below (modified after the DERM Manual to focus on commercial leases) with the key steps being set out below (see also Figure 5 for an overview of the process):

- **1 Expression of Interest (EOI):** The potential lessee submits an EOI by completing the relevant form and providing any required supporting information or documents. The trustee acknowledges receipt of the EOI.
- **2 Receipt and review of the EOI:** The trustee reviews the EOI to check that form has been correctly completed by an eligible person and any required supporting information or documents have been supplied. If the EOI has not been correctly made, the trustee advises the potential lessee to correct the EOI.
- **3 Consideration of the EOI:** After receipt of a correctly made EOI, the trustee takes actions to confirm:
 - the proposed lease would benefit Aboriginal people particularly concerned with the land; and
 - there are no known conflicts with existing interests in the land.

Additional processes:

- For all leases over 10 years over land that is part of a larger lot, the trustee must seek development approval to reconfigure the lot.
- For all leases over 30 years on Aboriginal DOGIT land that has not been declared non-transferable, the trustee must explain to the Aboriginal people particularly concerned with the land the nature, purpose and effect of granting the lease, and give those people a suitable opportunity to express their views.
- If the trustee is unable to confirm any Step 3 considerations, the trustee should advise the potential lessee that the EOI cannot proceed and reject the EOI.

³¹ <http://www.derm.qld.gov.au/factsheets/pdf/land/1142.pdf>

³² http://www.derm.qld.gov.au/indigenous/land/pdf/manual_aboriginal_dogit.pdf



- **4 Confirmation to proceed:** After confirming Step 3, the trustee should advise the potential lessee that the EOI consideration can continue.
- **5 Preparation of the Conditional Agreement to Lease (CATL):** The trustee takes action to:
 - assess whether native title exists and, if so, identify how it should be addressed;
 - identify local government services to the land and their indicative costs;
 - determine the annual rent; and
 - identify any further registration requirements, including survey of the lot.

Additional processes: For the Injinoo, New Mapoon and Umagico divisions of NPARC the trustee must seek advice from the relevant land panel regarding the grant of the lease.

The trustee then records the outcomes of these actions in the CATL.

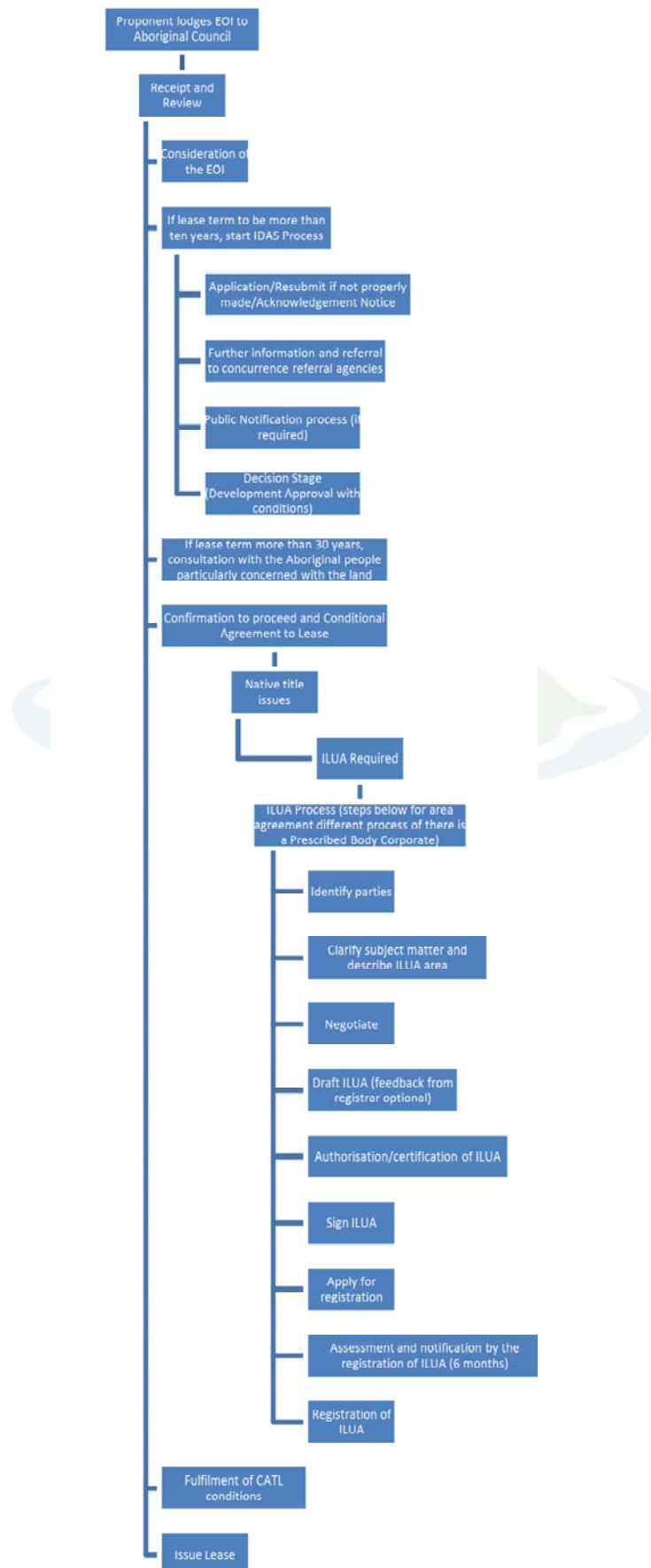
- **6 Offer of the CATL:** The trustee offers the CATL to the potential lessee, which:
 - confirms Step 3 considerations and the outcomes of Step 5 actions
 - identifies any further actions required of the potential lessee prior to the grant of the lease
 - identifies the costs and conditions of the lease if it was to be granted.
- **7 Consideration of the CATL:** The prospective lessee considers the CATL and advises the trustee whether they accept the CATL and intend to undertake the actions required by the CATL, if any, (such as an ILUA, survey or preparation of a business plan). If the prospective lessee does not accept the CATL, they should advise the trustee and withdraw the EOI.
- **8 Fulfilment of the CATL:** After advising the trustee that the CATL is acceptable, the prospective lessee fulfils actions required by the CATL, if any. If the prospective lessee is unable to fulfil the requirements of the CATL the trustee must reject the EOI.
- **9 Execution of the lease:** After fulfilment of the CATL actions the trustee and prospective lessee must execute the lease by endorsing the lease document.

Additional processes: For leases for a commercial purpose for between 30 and 99 years the trustee must seek and receive Ministerial approval for the grant of the lease before the lease can be executed and the lessee registers the lease.

For leases over 30 years for a commercial purpose, must provide to the Minister a business plan for the commercial purpose, evidence that the return on investment will be more than 30 years and other information required by the Minister. The Minister must then obtain an independent assessment of the business plan and the proposed lessee's financial and managerial capacity.



Figure 5: Overview of Process – Creating a Lease on DOGIT Land (less than 30 years).





- **10 Registration of the lease:** The prospective lessee registers the endorsed lease with DERM.

Native Title

The *Native Title Act 1993* still applies and whilst the Aboriginal council is trustee for the land they do not necessarily act for the native title holders of the land. The Council must make a native title determination and if native title has not been extinguished an ILUA may be required.

Competition

It would appear that the Council needs to consider an expression of interest on its merits, however it is conceivable that in some instances the consideration of benefit to the aboriginal people particularly concerned with the land may involve putting the proposal to market (e.g. tender) to ensure the greatest benefit can be obtained. Close liaison with the Council at the early stages of project conception would help to ensure that expenditure on feasibility and developing intellectual property about a project is not wasted in a site being put out for tender.

Other Approvals

Once a lease is granted further approval for commercial development may be required under the *Sustainable Planning Act 2009* for building work, plumbing or drainage work, operational work, reconfiguration of a lot and material change of use. Constraints on use of land and/or permissions may also be required by the *Wild Rivers Act 2005*, *Vegetation Management Act 1999*, and *Aboriginal Cultural Heritage Act 2003*.

Aboriginal Freehold

Aboriginal freehold lands, held by land trusts (other than Councils as trustees on DOGIT lands), cover almost 14,500 km² and 78 various areas. For each area a land trust has been established as the trustee for the lands. The *Aboriginal Land 1991* allows leases for a variety of private, public and commercial uses to various entities. Relevant to this discussion paper, leases can be issued to an aboriginal person or another person for a commercial purpose for up to 30 years without Ministerial permission and up to 99 years with the Ministers permission.

NOTE: Based on an understanding of its application, the process below has been adapted from the DERM DOGIT leasing manual.

Under Section 10(1) of the *Sustainable Planning Act* the granting of a lease for more than ten years over land that is part of a larger lot is defined a reconfiguring a lot (subdivision) and is therefore assessable development. Therefore for any application for a lease that is for more than ten years a development approval to reconfigure a lot is required.

Based on the DERM DOGIT leasing manual (see Appendix 9)³³ and given the land trust has responsibility under the *Aboriginal Land Act* but the relevant local government will have the responsibility under the Local Government and Sustainable Planning Acts. A potential process is described below (modified after the DERM Manual to focus on commercial leases) with the key steps being set out below (see also Figure 6 for an overview of the process):

- **1 Expression of Interest (EOI):** The potential lessee submits an EOI to the trustee. The trustee acknowledges receipt of the EOI.
- **2 Receipt and review of the EOI:** The trustee reviews the EOI to check that form has been correctly completed by an eligible person and any required supporting information or documents have been supplied. If the EOI has not been correctly made, the trustee advises the potential lessee to correct the EOI.

³³ http://www.derm.qld.gov.au/indigenous/land/pdf/manual_aboriginal_dogit.pdf



- **3 Consideration of the EOI:** After receipt of a correctly made EOI, the trustee takes actions to confirm:
 - the proposed lease would benefit Aboriginal people particularly concerned with the land; and
 - there are no known conflicts with existing interests in the land.

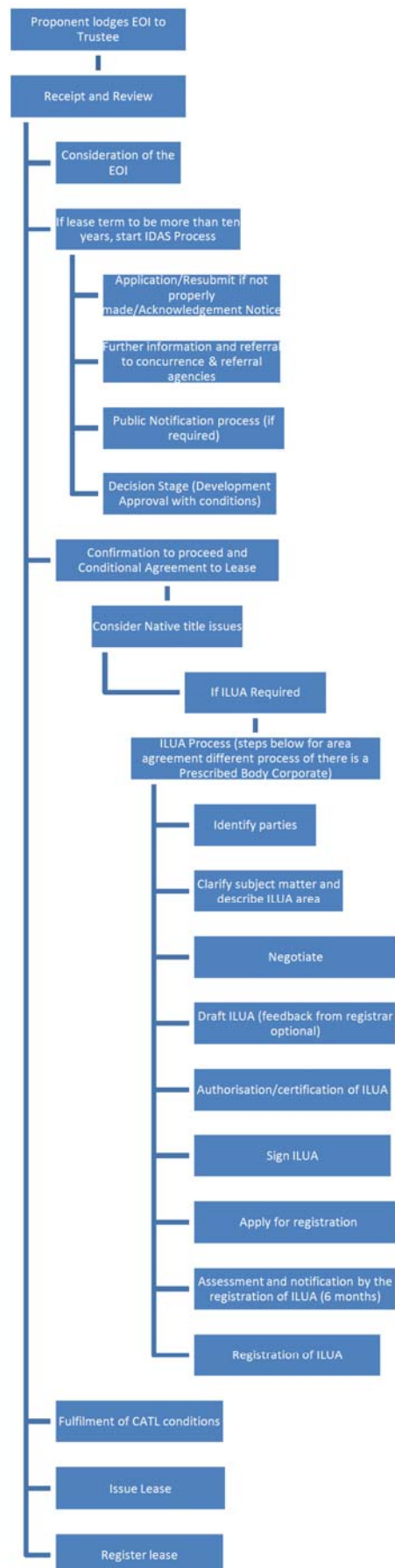
Additional processes:

- For all leases over 10 years over land that is part of a larger lot, the trustee must seek development approval (from the relevant Council) to reconfigure the lot.
- **4 Confirmation to proceed:** After confirming Step 3, the trustee should advise the potential lessee that the EOI consideration can continue.
- **5 Preparation of the Conditional Agreement to Lease (CATL):** The trustee takes action to:
 - assess whether native title exists and, if so, identify how it should be addressed
 - identify local government services to the land and their indicative costs
 - determine the annual rent





Figure 6: Overview of Process – Creating a Lease on Aboriginal Freehold





- identify any further registration requirements, including survey of the lot.

The trustee then records the outcomes of these actions in the CATL.

- **6 Offer of the CATL:** The trustee offers the CATL to the potential lessee, which:
 - confirms Step 3 considerations and the outcomes of Step 5 actions
 - identifies any further actions required of the potential lessee prior to the grant of the lease
 - identifies the costs and conditions of the lease if it was to be granted.
- **7 Consideration of the CATL:** The prospective lessee considers the CATL and advises the trustee whether they accept the CATL and intend to undertake the actions required by the CATL, if any, (such as an ILUA, survey or preparation of a business plan). If the prospective lessee does not accept the CATL, they should advise the trustee and withdraw the EOI.
- **8 Fulfilment of the CATL:** After advising the trustee that the CATL is acceptable, the prospective lessee fulfils actions required by the CATL, if any. If the prospective lessee is unable to fulfil the requirements of the CATL the trustee must reject the EOI.
- **9 Execution of the lease:** After fulfilment of the CATL actions the trustee and prospective lessee must execute the lease by endorsing the lease document.

Additional processes: For leases for a commercial purpose for between 30 and 99 years the trustee must seek and receive Ministerial approval for the grant of the lease before the lease can be executed and the lessee registers the lease.

- **10 Registration of the lease:** The prospective lessee registers the endorsed lease with DERM.

For leases over 30 years for a commercial purpose, must provide to the Minister a business plan for the commercial purpose, evidence that the return on investment will be more than 30 years and other information required by the Minister. The Minister must then obtain an independent assessment of the business plan and the proposed lessee's financial and managerial capacity.

Native Title

The *Native Title Act 1993* still applies and whilst the land trust is trustee for the land they do not necessarily act for nor represent all/any native title holders of the land. Where there has been a native title determination the land trust is not necessarily the prescribed body corporate. The trust must make a native title determination and if native title has not been extinguished an ILUA may be required.

Competition

It would appear that the Land Trust needs to consider an expression of interest on its merits, however it is conceivable that in some instances the consideration of benefit to the aboriginal people particularly concerned with the land may involve putting the proposal to market (e.g. tender) to ensure the greatest benefit can be obtained. Close liaison with the Land Trust at the early stages of project conception would help to ensure that expenditure on feasibility and developing intellectual property about a project is not wasted in a site being put out for tender.

Other Approvals

Once a lease is granted further approval for commercial development may be required under the *Sustainable Planning Act 2009* for building work, plumbing or drainage work, operational work, reconfiguration of a lot and material change of use. Constraints on use of land and/or permissions may also be required by the *Wild Rivers Act 2005*, *Vegetation Management Act 1999*, and *Aboriginal Cultural Heritage Act 2003*.



National Park

National Parks cover 17,700km² on Cape York. Sections 34–39 of the *Nature Conservation Act* allows interests (leases etc.) to be created in protected areas providing they are consistent with the management principles outlined in the act and with any management principles and plans for the areas concerned.

Subdivision 3 Interests in protected areas

34 Leases etc. over protected areas

(1) A lease, agreement, licence, permit or other authority over, or in relation to, land in a protected area (other than an agreement or a licence, permit or other authority issued or given under a regulation) may be granted, made, issued or given only—

(a) by—

(i) if the area is a national park (scientific), national park or national park (recovery)—the chief executive under this Act; or

(ii) if the area is a conservation park or resources reserve—the chief executive or trustees of the area with the consent of the chief executive; or

(b) under another Act by—

(i) the Governor in Council; or

(ii) someone else with the consent of the Minister or chief executive.

(2) A lease, agreement, licence, permit or other authority mentioned in subsection (1) must be consistent with—

(a) the management principles for the area; and

(b) if a management plan has been approved for the area, the management plan.

(3) This section does not apply to a protected area, or a part of a protected area, that is an indigenous joint management area.

Note— For a protected area, or part of a protected area, that is an indigenous joint management area, see section 42AN.

35 Chief executive's powers about permitted uses in national parks or national parks (recovery)

(1) The chief executive may grant, make, issue or give a lease, agreement, licence, permit or other authority over, or in relation to, land in a national park or national park (recovery) if—

(a) the use under the authority is only for a service facility; and

(b) the chief executive is satisfied—

(i) if the land is in a national park, the cardinal principle for the management of national parks will be observed to the greatest possible extent; and

(ii) if the land is in a national park (recovery), the management principle under section 19A(a) will be observed to the greatest possible extent; and

(iii) the use will be in the public interest; and

(iv) the use is ecologically sustainable; and

(v) there is no reasonably practicable alternative to the use; and

(c) the use under the authority is prescribed under a regulation made for this section to be a permitted use for the area.

(2) Subsection (1) has effect despite sections 15 and 34(2).

(3) This section does not apply to—

(a) a national park, or a part of a national park, that is an indigenous joint management area; or

(b) a national park (recovery), or a part of a national park (recovery), that is an indigenous joint management area.

Note— For an indigenous joint management area, see section 42AO.

36 Authorities for new national park or national park (recovery)

(1) This section applies if—

(a) land is dedicated as a national park or national park (recovery); and

(b) immediately before the dedication, the land was being used (the *previous use*) in a way that is inconsistent with the management principles of the park.

(2) The chief executive may grant an authority (a *previous use authority*) over, or in relation to, the land to allow the previous use to continue for no more than the allowable term after the dedication.

(3) However, a previous use authority must not be granted for a national park if the previous use was under a sales permit under the *Forestry Act 1959*, section 56.

(4) A previous use authority must not be renewed.

(5) This section—

(a) applies despite sections 15 and 34(2); but

(b) does not limit section 35.

(5A) This section does not apply to—

(a) a national park, or a part of a national park, that is an indigenous joint management area; or

(b) a national park (recovery), or a part of a national park (recovery), that is an indigenous joint management area.

Note— For an indigenous joint management area, see section 42AP.

(6) In this section— *allowable term*, for a previous use of a national park or national park (recovery), means a term no longer than—

(a) if the previous use was under a permit or lease as follows, the term that is the unexpired term of the permit or lease—

(i) an occupation permit under the *Forestry Act 1959*, section 35(1)(a) under which the right of occupation is only for a service facility;

(ii) a stock grazing permit under the *Forestry Act 1959*, section 35(1)(c);

(iii) an apiary permit under the *Forestry Act 1959*, section 35(1)(d);

(iv) a sales permit under the *Forestry Act 1959*, section 56, for the taking of plant parts if it does not authorise cutting or pruning of plants so severely that the plant is likely to die;

(v) a lease under the *Land Act 1994*; or

(b) otherwise—3 years after the dedication.

authority means an agreement or a lease, licence, permit or other authority.

plant parts means the flowers, foliage, seeds or stems of the plant.

37 Chief executive's powers to renew existing authorities for national parks

(1) In this section—



authority means a lease, agreement, permit or other authority (other than an authority permitting stock grazing or the location of beehives)—

- (a) granted, made, issued or given under the former Act or the *Land Act 1962* over, or in relation to, a national park under the former Act; and
- (b) in force immediately before the repeal of the former Act; and
- (c) continued in force under this Act.

former Act means the *National Parks and Wildlife Act 1975*.

(2) The chief executive may renew, or consent to the renewal of, an authority for the national park if the use under the authority is prescribed under a regulation made for this section to be a permitted use for the area.

(3) The authority may only be renewed for—

- (a) if no management plan is in force for the area when the renewal is granted—not longer than 10 years; or
 - (b) if a management plan is in force for the area when the renewal is granted—the term authorised under the plan.
- (4) The authority may be renewed subject to the conditions the chief executive considers appropriate.
- (5) This section has effect despite sections 15 and 34(2).

38 Leases may be granted under Land Act 1994

(1) Subject to subsection (2), a term lease under the *Land Act 1994* may be granted over any land within a protected area as if the land were reserved and set apart under that Act for public purposes.

(2) The lease must—

- (a) be consistent with—
 - (i) the management principles for the area; and
 - (ii) the management plan for the area; and
 - (b) be granted only with the consent of, and subject to the conditions decided by, the chief executive.
- (3) The *Land Act 1994* applies to the lease to the extent that it is not inconsistent with this Act.

39 Creation of interests in protected areas

Despite any other Act, an interest in land in a protected area may be created only in accordance with this Act.

Based on the above it is clear that it is possible for a lease for a commercial purpose to be issued on a National Park. Entrepreneurs can put proposals forward to DERM for assessment under these provisions. Proposals must be consistent with the management principles and management plan for the national park.

However, it is unusual that a lease is issued on the basis of an “application”, there are no published administrative procedures for such a response to an “entrepreneurial” request (however DERM advises that there are administrative procedures in place internally for such an application, but no recent examples were provided).³⁴ Rather the sections of the Act are more likely to be used where national park managers see a management benefit in having a lease for a commercial purpose (such as a concession).

Buzz Symonds provided the following advice, for national parks:

“Entrepreneurs can put proposals forward to DERM for assessment under these provisions. Proposals must be consistent with the management principles and management plan for the national park.”

National Park CYPAL

As of mid 2011, CYPAL national parks totalled 2,752 km², however this is likely to grow as the tenure resolution process proceeds.

Section 42AD of the Nature Conservation Act deals with leases on national park (CYPAL)³⁵:

42AD Leases etc. over national park (Cape York Peninsula Aboriginal land)

(1) A lease, agreement, licence, permit or other authority over, or in relation to, land in a national park (Cape York Peninsula Aboriginal land), other than an agreement or a licence, permit or other authority issued or given under a regulation, may be granted, made, issued or given only—

- (a) by the chief executive with the consent of the indigenous landholder for the land; or
- (b) by the indigenous landholder for the land with the consent of the chief executive.

(2) A lease, agreement, licence, permit or other authority mentioned in subsection (1) must be consistent with—

- (a) the management principles and management plan for the national park (Cape York Peninsula Aboriginal land); and
- (b) any indigenous land use agreement for the land; and
- (c) the indigenous management agreement for the land.

42AE Particular powers about permitted uses in national park (Cape York Peninsula Aboriginal land)

³⁴ Buzz Symonds advised that there are procedures in place, although unpublished to consider such a request.

³⁵ Nature Conservation Act 1992, Part 4 Protected areas, Page 42 Reprint 61 effective 2 December 2011



- (1) The chief executive and the indigenous landholder for land in a national park (Cape York Peninsula Aboriginal land), may grant, make, issue or give a lease, agreement, licence, permit or other authority over, or in relation to, the land if—
- (a) the use under the authority is only for a service facility; and
 - (b) the cardinal principle for the management of national parks will be observed to the greatest extent possible; and
 - (c) the chief executive and the indigenous landholder are satisfied—
 - (i) the use will be in the public interest; and
 - (ii) the use is ecologically sustainable; and
 - (iii) there is no reasonably practicable alternative to the use; and
 - (d) the use under the authority is prescribed under a regulation made for this section to be a permitted use for the protected area.
- (2) Subsection (1) has effect despite sections 15 and 42AD(2).

For the development of this discussion paper DERM provided one example Indigenous Management Agreement. Importantly the example agreement³⁶ reviewed contains clauses ensuring the Land Trust has first option on any tourism opportunities.

Based on the above it is clear that it is possible for a lease for a commercial purpose to be issued on a National Park CYPAL. Entrepreneurs can put proposals forward to DERM and the Land Trust for assessment under these provisions. Proposals must be consistent with the management principles and management plan, the ILUA and the Indigenous Management Agreement for the national park (CYPAL). As the Land Trust has the first option for tourism opportunities, it is likely that joint ventures between entrepreneurs and Land Trusts will be best placed to satisfy these requirements.

However, it is unlikely that a lease would be issued on the basis of an “application”. Rather the sections of the Act are more likely to be used where national park managers see a management benefit in having a lease for a commercial purpose (such as a concession) and this would be offered to the Land Trust in the first instance.

Buzz Symonds provided the following advice, for national parks (CYPAL):

“Entrepreneurs can put proposals forward to DERM and the Land Trust for assessment under these provisions. Proposals must be consistent with the management principles and management plan, the ILUA and the Indigenous Management Agreement for the national park (CYPAL). As the Land Trust has the first option for tourism opportunities, it is likely that joint ventures between entrepreneurs and Land Trusts will be best placed to satisfy these requirements.”

Reserve, State Land and Shire Land Lease

In the case of these tenures, it is likely that the overall provisions of the Land Act would apply to create a Lease and/or sublease.

³⁶ Rinyirru (Lakefield) Indigenous Management Agreement



Economic Opportunities

Example Opportunities

The creation of an alienated tenure for a specific enterprise is not a new concept...indeed it is essentially what freehold land is! The land use and tenure history of Cape York means there is very little freehold on the Cape. Further, the land tenure history means there are vast areas of the Cape where native title has not been extinguished and as such the creation of various tenure types or alienation for a specific user (e.g. a new lease or even freehold) is potential a future act which could extinguish native title.

By way of creating case studies, the following potential opportunities have been identified and are used as the basis for discussion below:

- Eco lodge or small resort.
- Roadhouse or retail outlet.
- Bush camp.
- Beach Hire/Birdwatching/Fishing shack
- Homestay/Farmstay

Ecolodge/Small Resort/Motel

For the purposes of a case study a small lodge of 12–25 rooms. The lodge/resort/motel would require land for the resort itself usually located on a scenic landscape feature. Road access would normally be required (unless on an island). Permanent structures, buildings, tanks, swimming pools, sheds, wastewater treatment etc. would be constructed

The level of investment is such that a mortgageable tenure would be required. If not freehold, a lease of at least 30 years is likely to be needed to ensure viable finance options with a sufficient security and length of tenure to enable a return on investment.

There are numerous other aspects required such as water supply, access for local tours (e.g. walking, fishing, birdwatching etc.).

Roadhouse or Retail Outlet

For the purposes of a case study a roadhouse lodge of 12–25 rooms. The roadhouse or retail outlet would require land for the facility itself usually located on a major road or at a key landscape feature. Road access would normally be required (unless on an island). The level of investment is such that a mortgageable tenure would be required.

The level of investment is such that a mortgageable tenure would be required. If not freehold, a lease of at least 30 years is likely to be needed to ensure viable finance options with a sufficient security and length of tenure to enable a return on investment.

Bush Camp

The creation of a low infrastructure bush camp, with minimal facilities and mostly semi-permanent infrastructure. This may be operated for a specific tour (e.g. a tour company bring their clients exclusively) or as a publicly available site.

The level of investment is such that a mortgageable tenure may not necessarily be required. A lease of at least 10 years is likely to be needed to ensure viable finance options with a sufficient security and length of tenure to enable a return on investment.



Beach Hire/Birdwatching/Fishing Shack

The creation of a low key semi-permanent facility such a beach hire operation (with a lockable structure to securely contain items and [perhaps small/basic caretakers accommodation). This style of facility may cater for hire of small boats on a beach/river/lagoon, as a base for guided tours such as birdwatching or fishing.

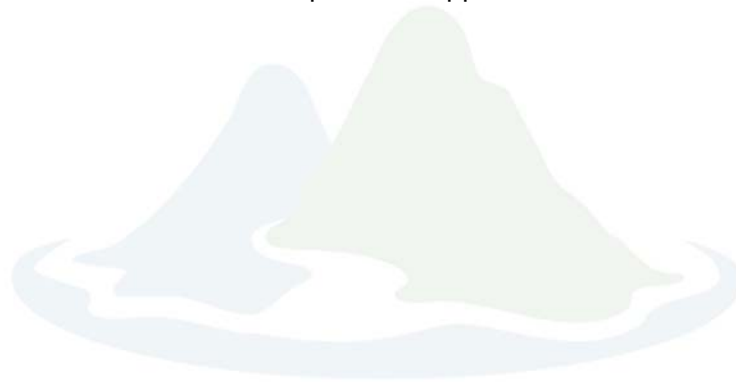
Homestay/Farmstay

The development of commercial accommodation as part of an existing residence (e.g. pastoral homestead) in a homestay/ bed and breakfast or “shearers” quarters type approach.

The level of investment is such that a separate mortgage able tenure may not necessarily be required. However, at least 10 years is likely to be needed to ensure viable finance options with a sufficient security and length of tenure to enable a return on investment.

Overview of Opportunities

The following table sets out an overview of the potential opportunities available for each main land tenure.





Cape York Land Tenure – Development and Security

Figure 7: Summary

	Pastoral Lease <i>Diversification Policy</i>	Pastoral Lease <i>Additional Purpose</i>	Pastoral Lease <i>Excision - Lease</i>	Aboriginal Land DOGIT	Aboriginal Land Land Trust	National Park &NP CYPAL
Overview of Opportunity	Only for current lessee	Only for current lessee	Only to current lessee	"Entrepreneur" proponent initiated. 10-30 years requires consultation process. >30 years needs ministerial consent, a business plan and independent assessment of financial and managerial capacity of lessee.	"Entrepreneur" proponent initiated. 10-30 years requires consultation process. >30 years needs ministerial consent, a business plan and independent assessment of financial and managerial capacity of lessee.	Priority for land trust enterprises. More likely when initiated by Park Management (?)
IDAS	May need a development approval for material change of use and operational works etc	May need a development approval for material change of use and operational works etc.	May need a development approval for material change of use and operational works etc.	Will need a reconfiguration of a lot (if lease term >10yrs), then possibly development approval for material change of use and operational works etc.	Will need a reconfiguration of a lot (if lease term >10yrs), then possibly development approval for material change of use and operational works etc.	May require IDAS process depending upon development.
Native Title	May not require any process.	May not require any process.	Most likely to need an ILUA, this is likely to require financial consideration in addition to lease costs.	Most likely to need an ILUA, this is likely to require financial consideration in addition to lease costs.	Most likely to need an ILUA, this is likely to require financial consideration in addition to lease costs.	May require an ILUA.
Security offered	Only existing lease, no additional title/security for finance.	Only existing lease, some additional title/security for finance as purpose overtly allowed.	Specific title provided. May need to be linked to main lease and therefore future dealing restricted (if so use for finance security limited).	Specific title provided.	Specific title provided.	Specific title provided.
Ec lodge or small resort/motel	Restricted to existing buildings and four additional rooms.	Restricted to existing buildings and four additional rooms.(Any room for negotiation?) Expense of ILUA/IDAS process difficult to amortise with four rooms.	Potential, must be less than 10% of lease area and pastoral lease still viable. No restriction on size.	Yes, although expense of lease creation, ILUA/IDAS processes and any ILUA consideration in addition to rent to Council may affect viability.	Yes, although expense of lease creation, ILUA/IDAS processes and any ILUA consideration in addition to rent to Trustees may affect viability.	Would need to be supported by Park Management and/or Land Trust. May also need IDAS/ILUA.
Roadhouse or retail outlet	No.	No	Potential, must be less than 10% of lease area and pastoral lease still viable.	Yes, although expense of lease creation, ILUA/IDAS processes and any ILUA consideration in addition to rent to Council may affect viability.	Yes, although expense of lease creation, ILUA/IDAS processes and any ILUA consideration in addition to rent to Trustees may affect viability.	Would need to be supported by Park Management and/or Land Trust. May also need IDAS/ILUA
Bush camp	Allowed (possibly even without a change of purpose)	Potentially allowed.	Yes, although expense of excision ILUA/IDAS etc. probably not viable.	Yes, although expense of lease creation, ILUA/IDAS processes and any ILUA consideration in addition to rent to Council may affect viability.	Yes, although expense of lease creation, ILUA/IDAS processes and any ILUA consideration in addition to rent to Trustees may affect viability.	Would need to be supported by Park Management and/or Land Trust. May also need IDAS/ILUA
Beach hire/fishing shack	Possibly allowed (new infrastructure?).	Not mentioned in diversity policy, but could be negotiated (?).	Yes, although expense of excision, ILUA/IDAS etc. probably not viable.	Yes, although expense of lease creation, ILUA/IDAS etc. probably not viable.	Yes, although expense of lease creation, ILUA/IDAS etc. probably not viable.	Would need to be supported by Park Management and Land Trust. May also need IDAS/ILUA
Homestay/farm stay	If no additional buildings probably allowed without additional approvals...may require IDAS (?)	If additional buildings, but could be negotiated (?).	Unlikely to be able to separate existing dwelling from pastoral lease. Therefore if new building same as hotel above.	Yes, although expense of lease creation, ILUA/IDAS etc. probably not viable.	Yes, although expense of lease creation, ILUA/IDAS etc. probably not viable.	Would need to be supported by Park Management and Land Trust. May also need IDAS/ILUA



Summary and Conclusions

Summary

Cape York Land Tenure

14.3 percent of Cape York is National Park, 23.3 percent is Aboriginal Shire Lease, DOGIT or Land Trust, 52.9 percent is lands lease (33.89 percent is actively pastoral properties, see section below) and 0.7 percent is freehold. Nature refuges (which overly other tenures) comprise 3.55 percent. Of critical importance to the economic development situation for Cape York is the very low proportion of freehold land and as such many development opportunities are constrained by the allowable purposes/uses of lease, trust and reserved land.

Tenure Options

This submission deals with the main non-freehold tenures on Cape York. There are a wide variety of tenures and the situation will almost always be unique given the various lease conditions, native title situation and the various corporate entities that may apply (Aboriginal land trust/prescribed body corporate/Aboriginal Council).

As an overview, the following arrangements are possible on the various tenures:

- **Pastoral Lease:** There are a number of options:
 - Additional Purposes: Under the diversity policy, small scale uses such as farmstay in existing buildings appear allowable without any approval, more major uses requiring additional buildings etc. needs an additional uses to be added the lease conditions. This requires an application process by the lessee and may need a Development Approval (material change of use) and other approvals. Native title may be an issue and an Indigenous Land Use Agreement may be required.

The Diversity Policy overly constrains the additional uses. Of particular concern is the need to keep income generation from other uses to less than the main lease purpose. Where tourism use or conservation stewardship can generate greater income than pastoral use this should be allowed! The diversity policy would appear to discourage spelling and reduced stocking density for good land management and overly constrains the ability of leases to seek alternative sources of income.

The processes involved appears overly onerous, the need for an ILUA (and the consequent costs of the development of a specific ILUA for a proposal on one lease) means this become a constraint on opportunities being realised.

- Excision of Lease: Where a small area of a lease is proposed for a more intensive use, such as a small resort, a shop or a roadhouse, excision of the lease would be required. The excised land must go to the lessee and there may be restrictions on the future dealing with the lease that could affect the leases use as unfettered security. This requires an application process by the lessee and will need a Development Approval and other subsequent approvals. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to government).

NOTE: Only current pastoral lessees may apply additional purpose and/or excision of their leases.



There is a significant issue for Cape York, with less than 1% freehold land, there is very limited ability for entrepreneurs to seek land for even minor opportunities.

- **Aboriginal Land DOGIT:** An “entrepreneur” may express interest to an Aboriginal Council to create a lease. There is a process which will involve a Development Approval (reconfiguration of a lot) and other subsequent IDAS approvals. When the lease term will be more than thirty years consultation with traditional land owners is required, Ministerial consent is required and is subject to business planning and independent assessment of business plan and financial and managerial capacity of potential lessee. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Aboriginal Council).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. There are potential “Catch 22’s” with the overall of dependencies for the ILUA/CATL and planning approvals which need to be resolved. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.

- **Aboriginal Land (land trust):** An “entrepreneur” may express interest to an Trust to create a lease. There is a process which will involve a Development Approval (reconfiguration of a lot) and other subsequent IDAS approvals. When the lease term will be more than thirty years consultation with traditional land owners is required, Ministerial consent is required and is subject to business planning and independent assessment of business plan and financial and managerial capacity of potential lessee. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Trust).
- *The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. There are potential “Catch 22’s” with the overall of dependencies for the ILUA/CATL and planning approvals which need to be resolved. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.*
- **National Park and National Park CYPAL:** Essentially the Nature Conservation Act does allow for leases for commercial activities, however this is not normally offered as a result of an “entrepreneurial” application but rather a park management identified opportunity. For national park CYPAL the land trust has first rights to any opportunity. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Trust).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.



Conclusions

The creation of land parcels for small scale economic opportunities on Cape York, on the 90 percent of the Cape which is national park, aboriginal shire lease, DOGIT or land trust or lands lease (including pastoral leases is potentially a time consuming process with no certain outcome nor timeframe and cost.

Many processes involve an ILUA and this may involve protracted negotiations depending upon the interest by the claimants or prescribed body corporate. In some circumstances the negotiation of an ILUA may require financial considerations over and above lease payments, this means the outcome is uncertain and funding the ILUA process is “risk capital”...there is no link between the commercial value of the land parcel and use rights and the overall (combined) cost of the ILUA process, lease payments and IULA payments.

The recent development of the Pastoral ILUA template may be a step forward, however the ILUA process remains a constraint on modest additional uses of leases. Further guidance is required on what activities can be undertaken without the need for an ILUA and there may be a need for additional facilitation provided by Government to allow modest ventures to be realised without native title/approval costs which exceed the value of the venture.

Further, most dealings will require a development approval under IDAS (for a reconfiguration of a lot and/or material change of use, and then after the lease is granted operational works). Additionally, other approvals such as under *Wild Rivers* and *Vegetation Management, Coastal Management* and other legislation may be required (some of these are integrated into the IDAS process).

Given the various underlying tenures the different native title considerations and the various steps at which IDAS approvals may be required a unique critical path will need to be understood. For each process there are risks the application may be refused as there are dependencies which must be completed before potentially prohibitory processes can commence.

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the tenure and use rights is consistent with the commercial value of the land and use rights. There needs to be a process which reduces the “risk capital” nature of entering into the process...where there could be substantial sums invested in the ILUA ;process to have the IDAS process prohibit a development. A concurrent process without “Catch 22” interdependencies and where any veto of restrictive conditions are known before major expense is needed.

It is concluded that for the options above the process is most likely to take at least twelve months and when IDAS and ILUA processes are considered two years.



Recommendations

Overall Recommendations

There is an urgent and ongoing need to resolve land tenure issues to encourage private investment across Cape York.

Existing pastoral leases need greater security of tenure, the Delbessie and Cape York Heritage Act arrangements include onerous constraints and complex processes to achieve the requirements for longer terms and renewals, 99 year leases or freehold are recommended.

The diversity policy for pastoral leases needs to be relaxed and more economic opportunities (tourism, conservation and others) permitted for existing lessees.

There needs to be an accessible mechanism for entrepreneurs (indigenous and non-indigenous, family, private and corporate entities) to excise or create small leases for specific purposes (or indeed small freehold parcels) to facilitate economic opportunities in tourism, retail, services etc. across Cape York. The timeframe and costs of this needs to recognise and be commensurate with the value of such lands in a remote area with often only seasonal business potential.

There is an urgent need cut the red tape and expense of ILUA's, for pastoralists and entrepreneurs. A Government facilitation service is recommended to realise Cape York economic opportunities.

The process to have leases for indigenous and non-indigenous business on DOGIT and Aboriginal Freehold needs to be streamlined with proactive assistance and facilitation by Government. The timeframe needs to be much shorter with no undetermined impediments after commencement. The costs of the process (including ILUA and IDAS requirements) needs to be commensurate with the value of the land and its use.

There is a need to facilitate indigenous and non-indigenous micro and small business enterprises to support tourism in National Parks. Arrangements for approvals and appropriate tenure (with dealable security) needs to be established (such as leases and concessions).

On Cape York there are some leases due for renewal in the coming years. There needs to be specific recognition of these to ensure they have security of tenure and access to any new tenure arrangements.

The Cape York Tenure Resolution process has been ongoing and appears to be continuing. There is substantial community concern about priorities and the ultimate land tenure mix across Cape York. The priorities for National Park acquisition and likely overall national park estate should be publicly available.

Cape York Land Tenure

For Cape York to prosper reasonable sustainable economic development which supports communities requires access to land for micro, small and medium size businesses. The creation of land parcels for small scale economic opportunities on Cape York, on the 90 percent of the Cape which is national park, aboriginal shire lease, DOGIT, land trust or lands lease (including pastoral leases) is potentially a time consuming process with no certain outcome nor timeframe and cost. The unique situation, with so little freehold on Cape York needs to be recognised, with a mechanism which allows the creation of land parcels with use rights in a cost effective way, with a certainty of process.

The process for the creation of these land parcels must be able to be commenced by any entrepreneur (whether a current leaseholder, native title holder, community member of any other person/entity)!



The end result needs to allow a tenure type with “bankable” security, which allows a bank mortgage or secured private equity investment over the lease/land parcel.

The time frame and cost to get to realising the land parcel as a dealable title needs to be streamlined.

The costs of land tenure processes, prior to planning approvals needs to be minimised, to avoid the risk of major expenditure on tenure creation (e.g. an ILUA process) then to have IDAS approval process prohibit or impose conditions which makes the proposal unviable. This risk approach needs to be resolved or all processes will involve significant “risk capital” just to gain tenure and approval!

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the tenure and use rights is consistent with the commercial value of the land and use rights. Presently, the cost of tenure creation in many instances significantly exceeds the land value ...this needs to be resolved or economic development will not be feasible.

There needs to be a process which reduces the “risk capital” nature of entering into the process...where there could be substantial sums invested in the ILUA ;process to have the IDAS process prohibit a development. A concurrent process without “Catch 22” interdependencies and where any veto of restrictive conditions are known before major expense is needed.

Whilst the regulatory nature of Government approvals and tenure processes are recognised (and whilst streamlining is needed, some process will remain), there needs to be a tenure advisory/facilitation service which provides free of charge support and advice to community/micro/small and medium business entrepreneurs

Many processes involve an ILUA and this may involve protracted negotiations depending upon the interest by the claimants or prescribed body corporate. In some circumstances the negotiation of an ILUA may require financial considerations over and above lease payments, this means the outcome is uncertain and funding the ILUA process is “risk capital”...there is no link between the commercial value of the land parcel and use rights and the overall (combined) cost of the ILUA process, lease payments and IULA payments. Whilst the commonwealth Native Title Act may constrain what the State of Queensland can do, there needs to be a process which facilitates small ILUA's (or better yet removes the needs for them for small scale community/micro/small/medium business proposals).

Most dealings require a development approval under IDAS (for a reconfiguration of a lot and/or material change of use, and then after the lease is granted operational works). Further other approvals such as under *Wild Rivers* and *Vegetation Management*, *Coastal Management* and other legislation may be required (some of these are integrated into the IDAS process). There is a need for a preliminary advice for these approvals to ensure planning restrictions are known before expensive costs for establishing the tenure are undertaken.

Given the various underlying tenures the different native title considerations and the various steps at which IDAS approvals may be required there needs to be an advisory service which sets out the critical path for any particular project in any place. For each process the risks and points at which the application may be refused should be advised and any dependencies which must be completed before potentially prohibitory processes can commence outlined.

Pastoral Leases - Diversity

Sustainable tourism on pastoral and other leases should be encouraged as a mechanism to offset the costs of land management and reduce the reliance on stock. Income for conservation land management/stewardship should not be constrained.



There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the use rights is consistent with the commercial value of the land and use rights. Presently, the cost of tenure creation in many instances significantly exceeds the land value ...this needs to be resolved or economic development will not be feasible.

The Diversity Policy needs urgent amendment to allow for larger income generation from tourism, conservation and other activities (such as alternative agriculture). The “not become the dominant or principal activity needs to be reconsidered as other activities such as tourism and conservation may involve greater income than the pastoral use... this is not necessarily a bad thing, particularly if this allows reduced stocking densities and better land management!

Issues relating to native title need to be reviewed such that lease holders are not responsible for a site specific Indigenous Land Use Agreement to realise a modest tourism or conservation or other economic opportunity.

The limit of 16 Guests in four accommodation units in the diversity policy appears arbitrary and does not reflect a viable size for small scale lodge or resort. Financial feasibility work undertaken for CYSF has found 20 rooms to be a minimum viable for a small ecolodge, four accommodation units is usually not of a scale to sustain the services/facilities/marketing etc. to ensure viability.

The costs of obtaining approvals (including any IDAS/ILUA process) needs to be consistent with ensuring the financial feasibility of modest additional uses of leases.

There appears to be an opportunity to further expand the diversity policy to allow more significant development of additional uses, there needs to be guidelines to allow this and if the development is major there may be a consideration which does provide for amended lease payments (rather than this being a restriction as the commercial level of the use as it is now!).

Excision of Lease

Where a small area of a lease is proposed for a more intensive use, such as a small resort, a shop or a roadhouse, excision of the lease is required there needs to be a streamlined process. Where the current lessees agree, other parties should be able to apply for the excision.

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the excised lease is consistent with the commercial value of the lease and use rights. Presently, the cost of lease excision may exceed the land value ...this needs to be resolved or economic development will not be feasible.

There should not be any restrictions on the future dealing with the lease that could affect the lease's use as unfettered security.

If native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to government) there is a need for an advisory service to advise applicants on processes, ideally a government supported service would facilitate the ILUA for proponents!

Aboriginal Land DOGIT and Freehold

Fundamentally there needs to be a process to ensure an “entrepreneur” may express interest to an Aboriginal Council/land trust to create a lease.

There is a need for a simple approach, with a time-bound process and which ensures the cost of creation of the lease is consistent with the commercial value of the lease and use rights. Presently, the cost of lease creation may exceed the land value ...this needs to be resolved or economic development will not be feasible.



Where the process will involve a Development Approval (reconfiguration of a lot) and other subsequent IDAS approvals and/or Ministerial consent is required there needs to be a process where a preliminary advice can be offered such that there are no expenses incurred on obtaining an ILUA/CATL etc. which are then wasted owing to planning restrictions prohibiting or conditioning the proposal to the extent it is no longer viable.

If native title is an issue and an Indigenous Land Use Agreement is required it is important to ensure the State Government assists to ensure that this does not require additional financial consideration beyond the lease rental paid to the Aboriginal Council or land trust. There is a need for an advisory service to advise applicants on processes, ideally a government supported service would facilitate the ILUA for proponents!

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. There are potential “Catch 22’s” with the overall of dependencies for the ILUA/CATL and planning approvals which need to be resolved. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.

National Park and National Park CYPAL

Guidelines for leases for commercial activities and publicly promoted processes to consider an “entrepreneurial” application are required.

For national park CYPAL the land trust has first rights to any opportunity. Native title may be an issue and an Indigenous Land Use Agreement may be required (this may require additional financial consideration beyond the lease rental paid to the Trust).

The need for an ILUA, with the consequent uncertainty, time delays and cost means this becomes a significant constraint on realising potential opportunities. Streamlined processes are needed with foster micro and small business entrepreneurs. The “risk capital” nature of establishing the tenure for an opportunity and time of potential process causes such a delay as to become a significant impediment to projects.