

Ideas Paper – Indigenous Land Administration and Economic Development

To: Expert Indigenous Working Group
COAG Investigation into Indigenous land administration and use

From: Maluwap Nona
Chair, Malu Lamar (Torres Strait Islander) Corporation RNTBC

Date: 15 April 2015

1. Background

- 1.1 Malu Lamar is the registered native title body corporate ("RNTBC"), for the Torres Strait sea determination area.
- 1.2 The sea rights include the right to take the resources of the sea for commercial purposes.
- 1.3 Indigenous land administration and economic development in the Torres Strait relates as much to sea as to land. COAG should adopt both a land and sea focus in the investigation.
- 1.4 In the Torres Strait the RNTBCs have established, own and operate Gur A Baradharaw Kod Torres Strait Sea and Land Council ("GBK"). It's aspiration is to deliver integrated land and sea administration support and economic development coordination in a native title context for RNTBCs and Traditional Owners.
- 1.5 GBK is currently seeking recognition as the Native Title Representative Body for the Torres Strait, replacing the Torres Strait Regional Authority, a statutory authority.

2. Ideas and Suggestions

- 2.1 The following is a list of general ideas for improving Indigenous land administration and economic development:-
 - (a) **Native Title Rep Bodies** - RNTBCs and Indigenous land-owning corporations for a region, should be given opportunity to assume more direct control of native title representative bodies/native title service providers. The land/sea entities would then be able to reprioritise representative body resourcing and expertise to land administration and economic development matters that require greatest attention on the ground. The GBK initiative in the Torres Strait is an example.
 - (b) **DOGIT/Reserve Transfers** - In Queensland, all remaining DOGITs and Indigenous reserves where there are native title determinations should be expeditiously transferred to the RNTBC for the land. The transfer process should be comprehensive and coordinated and address all outstanding Indigenous leasing and land tenure issues in the way referred to in the next idea. It is vital that when these land transfers occur, resourcing to the RNTBC goes with it.

- (c) **Community Based Tenure Resolution** – May individual Indigenous communities and/or native title determination areas, require “tenure resolution” projects. Native title determinations in the Torres Strait were amongst the first and did not deliver resolution of many outstanding land tenure matters.

In the Torres Strait, the different forms of land tenure are now so complex that they have become almost unworkable. Different types of tenure grants can be made under the *Land Act 1994* (Qld), the *Aboriginal Land Act 1991* (Qld), the *Torres Strait Islander Land Act 1991* (Qld), the *Aboriginal and Torres Strait Islander Land Holding Act 2013* and freehold title is now available under the *Aboriginal and Torres Strait Islander Land (Providing Freehold) Act 1994*.

For some Torres Strait Island communities, certain types of land tenure applications have remained unprocessed for decades.

A dedicated and coordinated land tenure project is required Island by Island.

- (d) **Rationalise Land Holding Entities** - Some Traditional Owner groups have multiple native title/land holding entities for different parts of their traditional land and seas. This encourages fragmentation, disputation, inefficiencies and prevents effective land asset planning and development. A program should be initiated to enable a Traditional Owner group to rationalise and combine multiple entities under a single, coordinated corporate structure.
- (e) **Resource Transfer** – Where there is a native title/land owning entity or Indigenous service provider, such as an RNTBC or an Indigenous owned native title rep body, relevant government resources and capabilities should be transferred to that organisation. There are government officers, expertise, systems and other capabilities held within Commonwealth and State agencies geared to Indigenous land matters that could sit within the Indigenous entity. This would ensure a transfer of capability and service delivery closest to the point of need. It would also maximise the efficiency and effectiveness of public resourcing for Indigenous land administration and economic development purposes.
- (f) **Private Sector Involvement** - Some of the best land administration expertise lies within private organisations. Innovative opportunities for native title/land owning entities to access that expertise should be considered. Equity participation by Indigenous entities in private service providers is an example. This would be along the lines of insurance companies which take an equity stake in the specialist insurance law firms that service the insurer's needs.
- (g) **RNTBC Capability and Resourcing** - All RNTBCs in the Torres Strait are limited by the fact that they have no direct capability themselves. Their boards are voluntary, they have no recurrent income, they have no management or other staffing resources etc. In addition to the other resourcing ideas referred to above, there should be a much greater recurrent funding flow direct to RNTBCs.

- (h) **Regional Back Office** – Within each region there are numerous native title/land owning and native title holding entities. Many perform similar land administration and economic development functions, albeit for different areas of land and/or seas. There are efficiency gains and cross-learning opportunities in providing a single back-office or secretariat service for all such entities on a regional basis. It is important however that all entities have their own opportunity to develop and pursue their own individual land administration and economic initiatives. The entities would all need to own the shared back-office service.
- (i) **Tools and Templates** – There is a big opportunity for user-friendly tools and templates to be developed for native title/land holding entities. In the process there is also opportunity for skills transfer, self-learning and empowerment. Tools and templates designed specifically for Indigenous entities could be developed in relation to land tenure (e.g. leasing), native title (e.g. ILUAs), cultural heritage (e.g. cultural heritage management plans and agreements) and other aspects of Indigenous land administration and business development.
- (j) **Economic Development ILUAs** – Government should sponsor the development of innovative economic development focused ILUAs. Malu Lamar has already put the idea forward in respect of Torres Strait fisheries. The Torres Strait has also developed a template public infrastructure and housing ILUA (currently awaiting sign-off by the Queensland Government). There are numerous mechanisms which can be included in ILUAs to encourage Indigenous economic development through joint ventures, equity participation and other commercial means for commercial operations involving fisheries, agriculture, tourism, resource development and other sectors.

3. Next Steps

- 3.1 This paper lists some initial broad ideas. There are Traditional Owners and others in the Torres Strait which can help develop any that may be of interest.
- 3.2 Malu Lamar would particularly appreciate the support of the Working Group in endorsing its proposal for development of a comprehensive Torres Strait fisheries reform proposal. Although that initiative is specific to the Torres Strait, there are aspects of it that may have broader application to sea country in other parts of Australia.
- 3.3 Details of Malu Lamar's work so far on fisheries reform is contained in the following Schedule.

Schedule

The Torres Strait Seas Situation

1. Native Title and the Torres Strait

- 1.1 Along with the High Court's *Mabo* decision, the Torres Strait is home to a landmark native title judgment in relation to the sea: *Akiba v Commonwealth* (the Torres Strait Regional Seas Claim Part A). The High Court decision was handed down on 7 August 2013.
- 1.2 Torres Strait Islanders lodged the claim in 2001. The Australian and Queensland Governments opposed some aspects. Amongst other things, they argued that the making by government of fishing legislation in the Torres Strait, had substantially extinguished some native title rights; particularly the right under traditional laws for Torres Strait Islanders to fish commercially and to trade in the resources of the sea.
- 1.3 The case was initially decided in favour of Torres Strait Islanders by Justice Finn on 2 July 2010. He found that the native title to the sea did include the right to take resources for any purpose (including commercial and trading purposes) and that this right had not been extinguished.
- 1.4 Government appealed that decision to the Full Federal Court. The Full Federal Court upheld the appeal.
- 1.5 However on 7 August 2013, the High Court overturned that decision and found that Torres Strait Islanders do have a native title right to take the resources of the sea for all purposes, including personal, domestic, commercial and trading purposes.
- 1.6 On 30 June 2014, Malu Lamar was appointed as the RNTBC.

2. Post Determination Opportunities

- 2.1 Economic development opportunities arising from the sea determination are affected by two features of the determination:-
 - (a) Native title must by law co-exist with other existing rights in the same area, such as non-Traditional Owner fishing licences.
 - (b) Generally speaking, native title is still subject to other legislation, such as the *Torres Strait Fisheries Act 1984* (Cth).
- 2.2 The *Torres Strait Fisheries Act 1984* established the Torres Strait Protected Zone, over the Torres Strait. It also established the Protected Zone Joint Authority ("PZJA"), which is responsible for the management of commercial and traditional fishing in the zone and designated adjacent seas.
- 2.3 The *Torres Strait Fisheries Act 1984* also gives effect to fisheries aspects in the Torres Strait Treaty.
- 2.4 Currently the commercial fisheries are dominated by what is called the "TVH sector". These are non-Traditional Owner fishers who, through access to "TVH licences" under the *Torres Strait Fisheries Act 1984* and use of their private

capital resources, have set up successful fishing businesses. Torres Strait Islanders may work for them as employees but, generally speaking, do not receive any economic benefit from the TVH sector.

- 2.5 Some Torres Strait Islanders fish commercially as individuals on a small scale. However they generally do not have the capital resources, sophisticated fishing equipment, sophisticated business structures and connections which enable them to compete effectively with the large, established TVH fishers.
- 2.6 Even where they do fish on their own account, Traditional Owner fishers (together called the "TIB sector"), are often obliged to sell their catch in an unprocessed state to "middle men". Unprocessed fish sells at the very lowest end of the value chain.
- 2.7 Because there are currently very few fish processing facilities in the Torres Strait and no direct export routes out of the Torres Strait, a common practice is for middle men to buy a Traditional Owner's catch cheaply and then ship it to southern ports where the value-adding is done and high value export transactions are made. Very little benefit comes back to the Indigenous TIB fishers themselves.
- 2.8 Malu Lamar is seeking holistic and comprehensive Torres Strait fisheries reform. Malu Lamar has made contact with Maori officials in New Zealand and has mapped out a model for fisheries reform based on the Maori experience.
- 2.9 There has been some early success. After lobbying by Malu Lamar in 2014, the PZJA resolved to support the aspiration of "100% ownership" of all Torres Strait fisheries by the Torres Strait's Indigenous people.
- 2.10 Work is now needed to develop a detailed fisheries reform proposal to turn this resolve into reality. Malu Lamar wants the reform proposal to entail both regulatory reform (delivering the 100% ownership aspiration) and commercial reform (perhaps involving the establishment of a Torres Strait Islander fishing cooperative).

3. Economic Opportunities from Fisheries Reform

- 3.1 Torres Strait Islanders have inherent fishing skills. The skills have been passed on from generation to generation and give Islanders the capability to very efficiently and effectively catch fish on a sustainable basis.
- 3.2 The Torres Strait has some of the richest and most diverse fisheries in Australia.
- 3.3 The marine environments in the Torres Strait include:-
 - (a) vast, unspoilt coral reefs;
 - (b) deep waters where fast flowing currents offer pristine ocean flows between the Coral Sea and the Arafura Sea; and
 - (c) mangrove and estuarine habitats adjacent to the vast coastline of PNG's Western Province and around many low-lying mangrove islands in the north of the Torres Strait.

- 3.4 These diverse marine ecosystems sustain the following fisheries:-
- (a) Tropical rock lobsters.
 - (b) Multiple species of prawns.
 - (c) Finfish including premium species such as coral trout, Spanish mackerel, barramundi and numerous types of excellent eating reef fish.
 - (d) "Hand collectable" fishery including trochus and Beche-de-Mer (sea cucumbers).
 - (e) Mud crabs.
 - (f) Pearl shell for which the Torres Strait was particularly famous in the nineteenth century.
- 3.5 Since undertaking its native title function, Malu Lamar has begun grappling with the limitations of native title. However it has also started to think innovatively about how the mix of legal rights coming out of the decision can be used to achieve real, practical economic development outcomes.
- 3.6 This includes consideration of how native title and associated procedural rights and compensation rights can be used as leverage to achieve fisheries reform.
- 3.7 In the commercial space, Malu Lamar has started to consider how Torres Strait Islanders can build their own fishing businesses based on their native title right to take sea resources. Preliminary work has been done on associated fish processing ideas, export ideas and the potential for favourable tax treatment under the native title payments provisions in the *Income Tax Assessment Act 1997* (Cth).

4. Torres Strait Fisheries Reform Proposal

- 4.1 Malu Lamar's board is comprised of the Chairs of all of the Torres Strait Islander RNTBCs for each Island.
- 4.2 Malu Lamar has no management, administration or office facilities of its own. Its board members perform their role voluntarily. Malu Lamar receives support on legal issues from the Native Title Office of the TSRA (the rep body), but is otherwise devoid of resourcing.
- 4.3 Development of the fisheries reform proposal requires further more detailed study of the New Zealand experience. It also requires high-level independent fisheries expertise to help develop detailed and sophisticated reform proposals. All of that requires resourcing.
- 4.4 In 2014 Malu Lamar applied to the Australian Government for a grant under its "Indigenous Advancement Strategy". On 4 March 2015, Malu Lamar received advice from the IAS that funding for only a fraction of the cost of developing the proposal has been approved.
- 4.5 Where to from here? Can the Working Group support Malu Lamar's fisheries reform initiative?