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Discussion Paper

Beyond native title: multiple land use agreements and Aboriginal governance in the Kimberley

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SERIES NOTE

The Centre for Aboriginal Economic Policy Research (CAEPR) was established in March 1990 under an agreement between the Australian National University (ANU) and the Aboriginal and Torres Strait Islander Commission (ATSIC). CAEPR operates as an independent research unit within the University's Faculty of Arts and is funded by ATSIC, the Commonwealth Department of Social Security and the ANU. CAEPR's principal objectives are to undertake research to:

- investigate the stimulation of Aboriginal and Torres Strait Islander economic development and issues relating to Aboriginal and Torres Strait Islander employment and unemployment;

- identify and analyse the factors affecting Aboriginal and Torres Strait Islander participation in the labour force; and

- assist in the development of government strategies aimed at raising the level of Aboriginal and Torres Strait Islander participation in the labour market.

The Director of the Centre is responsible to the Vice-Chancellor of the ANU and receives assistance in formulating the Centre's research agenda from an Advisory Committee consisting of five senior academics nominated by the Vice-Chancellor and four representatives nominated by ATSIC, the Department of Employment, Education and Training and the Department of Social Security.

CAEPR DISCUSSION PAPERS are intended as a forum for the dissemination of refereed papers on research that falls within the CAEPR ambit. These papers are produced for discussion and comment within the research community and Aboriginal affairs policy arena. Many are subsequently published in academic journals. Copies of discussion papers can be purchased from the Centre for Aboriginal Economic Policy Research, Faculty of Arts, Australian National University, Canberra ACT 0200. Ph (06) 279 8211 Fax (06) 249 2789.

Professor Jon Altman
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Foreword

Between March and May 1995 the Centre for Aboriginal Economic Policy Research (CAEPR) sponsored a thematic seminar series titled 'Policy Aspects of Native Title'. The following eight seminars were presented:

- 'Relative allocative efficiency of the *Native Title Act 1993* and the *Aboriginal Land Rights Act 1976*' by Siobahn McKenna (March).
- 'Resource development agreements on Aboriginal land in the 1990s: features and trends' by Ciaran O'Faircheallaigh (March).
- 'Negotiations between Aboriginal communities and Mining companies: structures and process' by Ciaran O'Faircheallaigh (April).
- 'Tourism enterprise and native title: the Tjapukai Dance Theatre, Cairns' by Julie Finlayson (April).
- 'Funding native title claims: establishing equitable procedures' by Jon Altman and Diane Smith (April).
- 'Native title and land management' by Elspeth Young and Helen Ross (April).
- '*Native Title Act 1993*: latest developments and implementation issues for resource developers' by Jon Altman (May).
- 'Native title and regional agreements: the Kimberley case' by Patrick Sullivan (May).

Five of these seminars have now been revised into *CAEPR Discussion Papers Nos 85-89*. Of the others, Siobahn McKenna's seminar was published earlier as *CAEPR Discussion Paper No. 79* and Jon Altman and Diane Smith's seminar was published as 'Funding Aboriginal and Torres Strait Islander Representative Bodies under the *Native Title Act 1993*', (Issues Paper No. 8, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra).

Owing to the pressing public policy significance of the issues addressed in this series, these discussion papers are intentionally exploratory and aim to disseminate information to a wider audience than that able to attend the seminars at the Australian National University.

Jon Altman
Series Editor
July 1995

ABSTRACT

Aborigines make up by far the largest proportion of the long-term residents of the Kimberley region and much of the population living outside the major towns. They already control, by one means or another, considerable areas of land. The *Native Title Act 1993* offers the possibility of greater control still. They have a network of community-controlled functional organisations such as medical services, radio stations, service delivery resource agencies, cultural and language maintenance centres, and a publishing house. Not surprisingly with Canadian models before them and the example of the Torres Strait Regional Authority, the mood is growing among these organisations, in the communities, and with the political leadership, for greater regional autonomy and a form of Aboriginal governance in the region. This paper analyses the various pressures for a regional authority under the Aboriginal and Torres Strait Islander Commission (ATSIC), a regional agreement or various sub-regional agreements over multiple land use, and a form of regional Aboriginal governance. It points out the distinction between these three approaches to regional autonomy. It suggests that the need for the first is being driven by pressures for multiple access to land, while the proposal for the second is simply a means of more efficient delivery of Commonwealth development funding and may in the long term act as an impediment to greater autonomy. The third, regional governance, embraces the first two needs and goes beyond them to respond to the longstanding need, sharpened since the Mabo decision, for a new form of political accommodation between Aborigines and settlers in the Kimberley.

Acknowledgments

I am grateful to the Centre for Aboriginal Economic Policy Research for allowing me the opportunity to produce this paper while a Visiting Fellow at the Centre. During this period I benefited very much from extensive comments on prior versions of the manuscript by Jon Altman, David Martin and Elspeth Young, and from discussions with Will Sanders and John Taylor. I am also grateful for comments made by Howard Pedersen of the Kimberley Land Council. The major part of this paper began as a seminar discussion in the CAEPR series 'Policy Aspects of Native Title' and it has benefited from the insights offered by participants, particularly the discussant for my presentation Sandra Ellims, Office of Indigenous Affairs, Department of Prime Minister and Cabinet. Other parts of the paper were presented to the ATSIC conference on regional agreements held in Cairns on 29-31 May 1995. I am grateful for the invitation to attend this conference.

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Aborigines make up by far the largest proportion of the long-term residents of the Kimberley region and much of the population living outside the major towns. They already control, by one means or another, considerable areas of land. The *Native Title Act 1993* (NTA) offers the possibility of greater control still. They have a network of community-controlled functional organisations such as medical services, radio stations, service delivery resource agencies, cultural and language maintenance centres, and a publishing house. Not surprisingly with Canadian models before them, and the example of the Torres Strait Regional Authority (TSRA), the mood is growing among these organisations, in the communities, and with the political leadership, for greater regional autonomy and a form of Aboriginal governance in the region.

This paper analyses the various pressures for a regional authority under the Aboriginal and Torres Strait Islander Commission (ATSIC), a regional agreement or various sub-regional agreements over multiple land use, and a form of regional Aboriginal governance. It points out the distinction between these three approaches to regional autonomy. It suggests that the need for a regional agreement is being driven by pressures for multiple access to land, while the proposal for a regional authority on the TSRA model is simply a means of more efficient delivery of Commonwealth development funding and may in the long term act as an impediment to greater autonomy. A regional agreement may include regional governance, embracing the first two approaches and going beyond them to respond to the longstanding need, sharpened since the Mabo decision, for a new form of political accommodation between Aborigines and settlers in the Kimberley.

The popular view of the region, promoted in tourist and media descriptions and clearly informing government policy, is that the Kimberley is dominated by the pastoral industry, with significant inputs from mining and tourism and that most of the population, the majority white, live in the towns servicing these industries (Crough and Christophersen 1993: 53, 63-4). Aborigines, according to this stylised view, are a minority of welfare recipients mainly living in towns or large communities and they need to be brought into the mainstream economy. A number of studies of the region sponsored by the Kimberley Land Council (KLC) in recent years now challenge this view (Green and Hawke 1994; Crough and Christophersen 1993; KLC 1995). In an exhaustive study of the economic profile of the region, Crough and Christophersen conclude: 'In the absence of any major future non-Aboriginal population growth, the Aboriginal population can be regarded as the long-term demographic base of the region' (Crough and Christophersen 1993: 23).

Although the results of the Australian Bureau of Statistics (ABS) Census for 1991 show that of the Kimberley population of approximately 23,000 people 45 per cent are Aboriginal, there is reason to believe that the Aboriginal population could be as much as 50 per cent higher than this

(Crough and Christophersen 1993: 22). Absolute numbers, however, are not the major issue. More important is the information that Aborigines are the stable population and exhibit a more normal demographic profile. Of the respondents to the Census over five years of age 83 per cent had been resident at the same address, or in the same area five years previously, compared to 35 per cent of non-Aborigines. Non-Aborigines are concentrated in the 20-44 year age group while 50 per cent of the Aboriginal population is aged under 20 years (KLC 1995: 20). The non-Aboriginal population tends to reside in towns while the Aboriginal population is almost evenly divided between the towns and the bush. The six main Kimberley towns account for 76 per cent of the white population and 57 per cent of the Aboriginal population. However, the remainder of the Aboriginal population, and a significant proportion of the youth, resides in over 250 Aboriginal outstations and communities. It can safely be assumed that the 24 per cent of the non-Aboriginal population out of the towns can be found in one or two large settlements such as mines. In the Aboriginal communities 40 per cent of the population is under the age of 15 years. These communities account for 60 per cent of the Kimberley Aboriginal population aged 15-24 years, figures which, according to Dixon's report for the KLC, 'reflect an established trend for an increasing proportion of Aboriginal youth to be located outside townships, in remote communities' (KLC 1995: 23), while 'non-Aboriginal people in the 15-19 year age group are, in relative terms, largely absent from Kimberley post-compulsory education and training, opting for southern institutions or moving with their families to more established centres of population' (KLC 1995: 13).

Thus, the alternative picture emerging of the Kimberley is of a growing Aboriginal population occupying the remote areas and an itinerant white population, with a distorted age and gender structure largely occupying the towns (see KLC 1995: 22). The Kimberley economy is significantly dependent on government support for both Aborigines and whites (Crough and Christophersen 1993). The cattle industry is in decline with poor prospects (Western Australian Government 1985) and all sectors of the regional economy contribute only a small proportion of State gross domestic product (Crough and Christophersen 1993: 44). As Aboriginal people consolidate their infrastructure for self-management in their community organisations, they are increasingly arguing that the demographic and economic profile of the region requires greater regional autonomy in Aboriginal hands.

Pressure for increased regional autonomy can be dealt with under three headings: there is the need for change in development funding and service delivery, but there is also the need to coordinate local and sub-regional land use agreements which are now being entered into between Aboriginal groups and developers and government. Finally, there is the more fundamental need for a change in the political relationship between whites

and Aborigines which recognises the rights of indigenous people to self-determination in terms of international law and which addresses the national obligation to find an acceptable form of de-colonisation. The first of these needs could conceivably be met by a regional authority along the lines of the TSRA, but to meet the other requirements it would need to have in its charter the function of negotiating more fundamental change. The second level of need can be met by coordinating sub-regional agreements over multiple land use. However, regional coordination on the Canadian model is the key here if fragmentation and resulting inconsistency and inefficiency are to be avoided. Regional coordination, properly instituted, would begin to meet the third need, the requirement for Aboriginal governance, which is fundamentally political and could begin to satisfy Australia's domestic and international obligations to social justice.

A regional authority and control of development funding

Demands for greater Aboriginal autonomy in the Kimberley region began long before the Mabo decision. The need has been identified at least since the East Kimberley Impact Assessment Project began in 1984. The mass meeting of communities at Rugan which produced the Crocodile Hole Report, provided depth to the call for regional autonomy in 1991 (Coombs et al. 1989; KLC 1991; Crough and Christophersen 1993: 4-6). Some of the pressure arises from greater control over land and increasing political awareness since the establishment of the KLC in 1978. More particularly the failure by the Western Australian State Government to implement the recommendations of the Seaman Land Inquiry in 1985 led to greater land purchases by federal agencies, establishment of a living area program by the State government, and coincided with a increases in Aboriginal affairs funding under the Commonwealth Labor government. These developments have given Kimberley Aboriginal groups a base from which to claim further rights.

The establishment of ATSIC in 1989 was a step forward for Aboriginal self-determination. At the community level in the Kimberley today there is a very strong feeling that it has reached its limits and another step forward is needed. The ATSIC that was canvassed in the O'Donoghue Report of 1986 and even the ATSIC promised in Gerry Hand's first reading speech in 1987, is very different from the ATSIC actually delivered (O'Donoghue 1986: 41-4; Commonwealth of Australia 1987: 2,3,22). O'Donoghue carried out extensive consultations with communities and Hand followed this with his own tour of the country. It is significant, then, that in the original blueprint for ATSIC, proposed by Hand and initially suggested by Coombs, representation was not to be drawn from the Aboriginal public at large but from the existing communities and the community-based service organisations (O'Donoghue 1986: 19,31; Commonwealth of Australia 1987: 22).

These independent organisations now feel themselves to be disempowered by the system of directly-elected regional councils that has been provided. It is not surprising that discontent is most evident in the functional community organisations that rely on the decisions of Regional Councillors, Commissioners, and ATSIC functionaries for continued funding. While making great gains in representativeness, ATSIC has in other respects carried with it the baggage of the Department of Aboriginal Affairs (DAA). In particular the remaining centralised decision-making, the complex procedures for applications for development funds, the demands from outside the Commission for an accountability beyond the requirements for other statutory authorities, all cause an inconsistent delivery of program funds.

The submission of Independent Aboriginal Organisations of the Kimberley (IAOK) to the Chairman of the Council for Aboriginal Reconciliation in October 1994, titled *Towards Regional Autonomy* puts their feelings most forcefully:

> Both employees of Aboriginal organisations and communities and ATSIC regional officers share the same frustration with this onerous and burdensome funding and accountability process. The whole process is dominated by excessive paperwork, including funding applications, requests for additional information, quarterly and annual reporting, audit requirements, reporting under the Aboriginal Councils and Associations Act, and performance indicator reporting. The ATSIC administration cannot meet the demands of such a complex funding allocation system. Serious problems are occurring regularly as a result, and are regularly identified at Aboriginal meetings as a major source of frustration.
>
> Communities and organisations are experiencing problems of lost submissions and late releases forcing illegal deficit funding. Poor advice and inconsistent funding decisions have created disillusionment with a system that was at first seen as a positive step towards self determination (IAOK 1994: 7; see also Crough 1995: 3).

It must be remembered that ATSIC is not simply an amalgamation of the old DAA and ADC but was also a long awaited replacement for the National Aboriginal Conference (NAC). Whatever the experience of the rest of the country, the NAC functioned relatively well in Western Australia, and in the Kimberley particularly, in providing a political voice. Moreover, it was an Aboriginal political institution that cooperated very well with the non-statutory organisations such as the KLC and the various resource agencies and community organisations which in the Kimberley exert considerable local influence. The replacement of the NAC with Regional Councils whose function appeared to be simply to make recommendations about resource distribution was greeted with great reservation. The widespread feeling was that here was a structure that did not reflect local cultural alignments very well, and less so since the reduction in the number of Regional Councils. It left no room for the important purpose of representing Aboriginal political demands in the

Western Australian context. It was imposed upon an existing network of independent, Aboriginal-controlled community service organisations, and it was at bottom nothing more than a government bureaucracy with an Aboriginal front line (see IAOK 1994: 1). Calls for greater regional autonomy in the Kimberley, based on a thorough critique of ATSIC itself, have been formulated in the need for a more effective structure than ATSIC presently has. Not surprisingly, this has been rejected both by ATSIC and by government.

The frustration at the community level has probably been more firmly stated and more deeply felt precisely because of the greater confidence and control that ATSIC has promised and to some extent delivered. Community groups very rapidly took on the promise that ATSIC offered of greater involvement in their own development, and just as rapidly reached its limits. The initial reaction from the Minister and some sectors of ATSIC could be characterised in the old Australian proverb about the farmer whose 'chooks grew into emus and kicked the dunny over'. This stage of hurt and anger on the one side, and frustration and disappointment on the other, is now giving way to a new period where constructive solutions are sought. Examples of this are the ATSIC contribution on Regional Agreements to the Social Justice Package (ATSIC 1995: 55-64), a concerted body of opinion within ATSIC that regionalism furthers self-determination (see Sanders 1994: 12,22), and the organisation of conferences between land councils and Regional Councillors on the subject of regional agreements, such as at Cairns in May 1995.

Aboriginal community groups for their part have often wished to pursue regional autonomy outside the ATSIC structure. The reaction from government to any such suggestion has been enough to persuade them that, for the time being at least, this is not possible. At Yirra near Derby in October 1994 several regional community organisations held their Annual General Meetings consecutively over a five-day period which also included a continuous celebration of Aboriginal law and culture in the performance of public ceremonies. At the conclusion the visiting Minister for Aboriginal and Torres Strait Islander Affairs was very firmly told of the frustration community groups felt with the ATSIC structure and the possibility that a regional authority may ameliorate their problems with ATSIC. The reply, reiterated in response to nearly every question, was that the Minister was powerless, he had devolved all power to ATSIC and was very proud of this. Unless ATSIC Regional Councils and Commissioners took on board the question of regional self-government he could not become involved. Unmentioned, but perhaps more important, the various strategy and policy sections within ATSIC would also need to be convinced of the need for reform. Not surprisingly, the reaction appeared to those observing to be one of amazement and disappointment that the Minister would so distance himself from a responsible role, and advise them to seek recourse from the same institution that they were petitioning

him to reform. Robert Watson, a Regional Councillor and Chairman of Wanang Ngari resource agency in Derby replied to Minister Tickner: 'you've mentioned regional agreements in other parts of the world. We've got Aboriginal people who are frustrated with a bureaucracy (ATSIC) that we haven't even set up. You might not have the power to tell ATSIC what to do, but surely you've got the right to raise discussion, some power for that. I can't accept you going away and saying what you're saying. As the Minister for Aboriginal Affairs, surely you've got the ability to raise discussion and options.' The Minister did not reply to this (KLC Minutes, Yirra Meeting, October 1994, Derby).

Up against this kind of resistance the IAOK (also known as the Coalition of Kimberley Aboriginal Organisations or CKAO) met with ATSIC Regional Councillors in Kununurra in May 1995 and resolved to pursue a joint approach to the issue, but concrete attempts to implement this resolution have not so far been successful. Also, a national meeting on regional agreements organised by ATSIC for all Regional Council Chairs and Commissioners at Cairns later in May revealed within ATSIC the concern that moves towards regional self-government may threaten its existence. The presence of representatives of all major land councils at this meeting made it difficult to advance the calls for loyalty to the ATSIC structure exclusively, and in many cases there is cross-membership between Regional Councils, community service organisations and land councils. The land councils also were clearly the ones in most control of developed information or ideas on the issue. It is unfortunately probable that, until those in the higher reaches of ATSIC realise that ATSIC and the community organisations are on the same side in this debate, proposals will continue to be put forward in the suspicion that one side or the other is trying to take control of the entire process.

A regional authority with the mandate to negotiate a political settlement may meet some of the pressures for regional autonomy, but will by no means go all the way to meeting all of them. These are the pressures identified in the introductory passages of this paper as: the need for changes in development funding and delivery of development services by means of a regional authority, the need to coordinate local and sub-regional land use agreements which are now being entered into between Aboriginal groups and developers and government, and the more fundamental need for a change in the political relationship between whites and Aborigines that recognises Aboriginal rights and concedes a form of de-colonisation that meets international standards. A regional authority along the lines of the Torres Strait does not meet all these needs.

This is the only Regional Authority operating in Australia at the moment. It is worthwhile reproducing Part 28 of the *ATSIC Amendment Act (No. 3) 1993* (Part 3A, s.142A(1) of the ATSIC Act), which establishes the Authority, at length here, as it sets out what a regional authority actually is.

It reads as follows:

142A. (1) The TSRA has the following functions:

(a) to recognise and maintain the special and unique Ailan Kastom of the Torres Strait Islanders living in the Torres Strait area;

(b) to formulate and implement programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;

(c) to monitor the effectiveness of programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area, including programs conducted by other bodies;

(d) to develop policy proposals to meet National, State and regional needs and priorities of Torres Strait Islanders, and Aboriginal persons living in the Torres Strait area;

(e) to assist, advise and co-operate with Torres Strait Islander and Aboriginal communities, organisations and individuals at national, State, Territory and regional levels;

(f) to advise the Minister on:

  i. matters relating to Torres Strait Islander affairs, and Aboriginal affairs, in the Torres Strait area, including the administration of legislation;

  ii. the co-ordination of the activities of other Commonwealth bodies that affect Torres Strait Islanders, or Aboriginal persons, living in the Torres Strait area;

(g) when requested by the Minister, to provide information or advice to the Minister on any matter specified by the Minister;

(h) to take such reasonable action as it considers necessary to protect Torres Strait Islander and Aboriginal cultural material and information relating to the Torres Strait area if the material or information is considered sacred or otherwise significant by Torres Strait Islanders or Aboriginal persons;

(i) at the request of, or with the agreement of, the Australian Bureau of Statistics but not otherwise, to collect and publish statistical information relating to Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;

(j) such other functions as are conferred on the TSRA by this Act or any other Act;

(k) such other functions as are expressly conferred on the TSRA by a law of a State or of an internal Territory and in respect of which there is in force written approval by the Minister under section 142B;

(l) to undertake such research as is necessary to enable the TSRA to perform any of its other functions;

(m) to do anything else that is incidental or conducive to the performance of any of the preceding functions.

There follow sections detailing the Ministers power to require information, under paragraph (g) and the limits on its disclosure by the TSRA, and the express provision that the TSRA is not to acquire land.

Clearly this is an advisory and coordinating body with responsibility for planning and distributing program funding but no wider influence (except as may be conferred on it by Queensland legislation with the consent of the Minister). There is no doubt that in negotiating this agreement Torres Strait Island leaders also intended it to be a first step towards self-government but they may now be finding that it has closed the door on further developments for the near future (Sanders 1994: 14,16, and pers. comm.).

Regional and sub-regional agreements over land use

A regional agreement between various levels of government and an indigenous people who hold native title, as distinct from a regional authority to distribute development funds, arises out of the need for effective land management. It goes beyond this in many cases, however, since the regulation of multiple access to, use, benefit and protection of, Aboriginal land can require not simply a change of administration but of governance. This is clear when the aims of indigenous people in Canadian Regional Agreements are examined:

According to Richardson et al. the core objectives of indigenous people in Canadian Regional Agreements have been to:

i. define a new legal and political relationship between themselves and Canadian governments (the Federal government and the relevant Provincial and Territory governments);

ii. establish a clear framework concerning access to and use of land and resources that accommodates the needs of indigenous peoples and other interests;

iii. preserve and enhance the cultural and social wellbeing of indigenous societies;

iv. enable indigenous societies to develop self-governing institutions and an economic base which will assist them to participate effectively in decisions which affect their interests (Richardson et al. 1995: 2).

These, then, are political relationships entered into between distinct peoples which govern the ownership and use of land and resources. Australia has no tradition of dealing with its indigenous population as a distinct people or peoples, nor of recognising until very recently inherent indigenous rights to land (as opposed to land grants made on the basis of traditional association as under the *Aboriginal Land Rights (Northern Territory) Act 1976.* On the contrary, Australia has always dealt with indigenous issues as an administrative problem to be managed and controlled by effective administrative structures. A very pertinent example is the government's response to the Mabo decision. It did not choose the path of entering into a reconciliatory agreement over the principles of accommodation between two peoples, but moved immediately to translate the decision into a regulatory set of laws and programs for its containment within the existing framework of the Australian polity.

Aboriginal leaders can not help but be struck by the way that developments such as the establishment of ATSIC, the results of the Royal Commission into Aboriginal Deaths in Custody, and the NTA, to name only three examples, have been reduced from their original aim of recognising Aboriginal rights to the more manageable project of containing and administering the 'Aboriginal problem'. They will probably, then, be wary of entering into negotiations over further administrative structures without a good deal of careful scrutiny.

Nevertheless, the pressure for some form of greater regional autonomy is intense. It is being driven, as I have said by frustration at the community level, but also by the need to carry out agreements over joint land use at the local and sub-regional levels with or without an appropriate regional structure. There is the need to co-ordinate activity both for the productive use of land and for its conservation over large tracts of land. Large areas of land are already in Aboriginal hands as pastoral lease or Aboriginal reserve and they cover a number of different Aboriginal cultural groupings. Effective land management cannot take place at the regional and sub-regional level without involving Aboriginal land holders in strategic plans, consultations, negotiations, and finally binding agreements.

Multiple land use agreements are needed between white development interests and Aboriginal land holders and between and among Aboriginal groups themselves. Aborigines now hold 25 of the 98 pastoral leases in the Kimberley, and two more are in the final stages of purchase. Current holdings (not including the two stations under negotiation at the time of writing) amount to 5,136,711 hectares. They also have some control over about 5,032,128 hectares of Aboriginal Reserve land which is held by the State government's Aboriginal Lands Trust (ALT). This gives them control over 24 per cent of Kimberley land, which could rise substantially if future native title claims over conservation reserve, national park and vacant Crown land (VCL) are successfully mounted (Crough and Christophersen 1993: 53; Western Australian Department of Land (personal inquiry); Aboriginal Affairs Planning Authority 1994: 55-6, 60-2). Aborigines now own about 23 per cent of all pastoral land in the Kimberley and more purchases can be expected. The establishment of the Indigenous Land Corporation (or ILC) on 1 July 1995 could increase Aboriginal land holdings in the Kimberley in the next few years, and can be expected to pay attention to regional land management strategies.

Green and Hawke point out that '... it is generally true that Aboriginal properties are at the 'poor' end of the market, handicapped by one or more of the factors of size, quality of country, remoteness and difficult terrain. In many cases these are the reasons why they have been available for acquisition' (Green and Hawke 1994: 9). During the period of their study Aborigines owned 23 per cent of pastoral land but could account for only 9 per cent of total cattle numbers in the industry and only 5 per cent of turn off (Green and Hawke 1994: 10). They provide a number of reasons for this including low stock numbers at purchase and poor quality of land. A map of Kimberley pastoral stations and Aboriginal reserves superimposed on a satellite-based map of productive grassland would show four immediate matters to be taken into account:

i. Aborigines control the poorest land.

ii. Aborigines, if regarded as a corporate group, constitute the largest single landholder in the Kimberley.

iii. Many Aboriginal pastoral holdings and Reserves are contiguous or in close proximity to each other.

iv. Productive pastoral land bears no relationship to pastoral station or reserve boundaries (see Dillon 1986).

Both Aborigines and whites are demanding more uses of land than its reservation for a single category of enterprise can permit (Young and Ross 1994). Given the four most obvious characteristics above both sides have an interest in maximising productive use of land and working cooperatively for multiple use based on alternative land values.

Some alternative land values may be:

i. Aboriginal living areas.
ii. Aboriginal cultural and economic values shown in burning, moving over and inhabiting the land and expressed in such terms as 'looking after country'.
iii. Aboriginal hunting, fishing and camping for cultural and economic reasons.
iv. Preservation of sacred areas.
v. Conservation.
vi. Quarantine. Feral animal and noxious weed control.
vii. Non-aboriginal recreational and tourist access.
viii. Mineral exploration and mining.
ix. Alternatives to conventional pastoralism such as emu, camel, and crocodile farming.

With a range of other interests targeting their land for alternative uses, and taking into account its marginal productivity, Aboriginal land holders will increasingly have to enter into complex agreements both with outside interests and among themselves.

Firstly, there is the economic pressure to identify productive land and enter into agreement with neighbouring Aboriginal land holders to jointly operate an enterprise. The corollary of this is to take out of the attempt at production, land that is too degraded by over use, or land that will never provide a return. One area in the south Kimberley is an obvious place to attempt to negotiate such agreements. Here it is possible to journey for about two hundred kilometres in a northerly direction from the boundary of Lake Gregory station, then about two hundred kilometres in a north-westerly direction, to traverse seven pastoral stations, and not once to leave Aboriginal land. This great expanse is separated by only one other property on its western extent and one on its north western from two other large Aboriginal land holdings. Increasingly these gaps are being filled across the Kimberley, yet no large-scale attempt has been made to co-ordinate production across separately owned properties.

Forging agreements between these Aboriginal groups for the benefits of economies of scale from linking up productive areas is by no means easily done. Even harder is to bring together these disparate groups to take a common approach to outside interests in the land. These also do not confine themselves to station boundaries. Agreements with conservation bodies such as the Australian Nature Conservation Agency to take land out of production and cull feral animals, or agreements over mineral exploration or tourist access, will require coordination of the Aboriginal response across a locality or sub-region since the targetted areas must take into account land types, and not simply leaseholdings or other forms of title.

Yet in the example above the contiguous stations cover the territory of four language groups that have little in common with each other, and numerous other cultural and land-oriented sub-groupings such as historical station communities, dialectical areas, ceremonial affiliations, and clan groups. Disagreements among Aboriginal people over joint use and benefit of the land have often stood in the way of the purchase of stations and currently cause considerable disruption on a number of them. Attempts at cooperation across station boundaries can be expected at an early stage to fall foul of the lack of a common voice and lack of agreement over the legitimacy of any one group to negotiate.

The questions raised here, of which only the superficialities have been addressed, all call for regional and sub-regional coordination. There is the need for the initial investigation of a sub-region's potential as well as its social and cultural dynamics. Following this is the need for strategic plans to address the range of land values. Further still, agreements between developers, governments and Aboriginal interests need to be negotiated in a realistic and sustainable way by appropriate representatives. Moves in this direction can be expected with the establishment of a regional subsidiary of the ILC and by the extension of the Kimberley Land Councils Kimberley Aboriginal Pastoralists project (Green and Hawke 1994: 82-98).

Negotiations will need to take place with the entire range of Aboriginal interest groups, not simply with those that currently hold leasehold title to a pastoral station or reserve. Conceptions of Aboriginal land ownership and religious ties to the land do not always, perhaps rarely, overlap with current corporate forms of land ownership to any great extent. These forms of traditional attachment are too easily forgotten when hard-headed economic negotiations are taking place, but they will reappear when moves are made to convert reserves and pastoral stations to native title under the NTA. They should be addressed in any case. There has been a tendency for Aboriginal pastoralists and their funding agency, ATSIC, to embrace too wholeheartedly the current orthodoxy that Aboriginal alternative land values and commercially efficient enterprises do not mix. They believe the harmful results of having an Aboriginal community on the land, as distinct

from the stock operation itself, needs to be contained and regulated, and in many cases opposed. There is also a continuing tendency for funding agencies to believe that it is more efficient to administer and deliver services to Aborigines in large communities. This discourages more widespread use of reserve land. Increasingly, then, there is a division emerging among Aboriginal groups themselves between those that control land and those that want access to it.

These orthodoxies need to be challenged. Elementary observation indicates that small communities widely scattered, well-serviced, particularly with communications, and in easy reach of a resource centre, are probably a more effective use of the development dollar. Quantitative investigations should be carried out. If this more congenial use of the land is seen to be incompatible with other uses such incompatibilities need to be identified and strategies produced for overcoming them. For example, on pastoral stations efficient use of fencing can keep stock from river banks and yet allow human access. This can control the severe erosion apparent everywhere that stock has unrestricted access, and allow people with local knowledge a productive role in monitoring environmental damage, noxious weed control, and income supplementation from fishing and hunting. There are also the benefits in greater wellbeing from satisfying social and cultural needs. The expense involved is in the need to pipe water for stock to tanks, to create flood-water dams, put down bores, or to concentrate stock more heavily with the introduction of new food crops and drought resistant cattle breeds.

Aboriginal groups should be expected to be in the forefront of new methods so that both human needs and the demands of the cattle industry can be satisfied. It will take regional and sub-regional coordination by those who are sensitive to all the dynamics involved. On the one hand some pressure should be applied by those who have funded the purchase and management of land so that benefits are more widely spread. Amalgamating areas of productive land is important in maximising economic return. Just as important is requiring multiple access by dispossessed groups to take the pressure off overcrowded communities with their problems of ill-health, alcoholism, vandalism, over-use of housing resources, and community tensions. These too have an economic dimension that needs to be brought into the discussion. These are present needs arising out of the contemporary profile of land holding and Aboriginal residence patterns.

The discussion so far has identified the need for multiple land use agreements among Aborigines and between themselves and outside interests at the local and sub-regional levels. It also suggests that the problems of formulating agreements are not only technical but social and cultural and for this reason, if for no others, require Aboriginal regional planning, regulation, and administration. It would be more efficient and

ultimately sustainable if the principles of multiple land use could be established by means of a regional agreement between the three levels of government and Aboriginal interests. Such an agreement would also determine the level of administration and control of land use planning in Aboriginal hands, and an agreement could be negotiated under the terms of s.21(1)(b) of the *Native Title Act 1993*. So far in this discussion little attention has been paid to the impact of the Native Title legislation on the changes already under way in the relationship between Aboriginal and non-Aboriginal people in the Kimberley. The impact of the mediation provisions of the National Native Title Tribunal may be profound.

The need for negotiated agreements over land use will increase with the operation of the NTA, but not in the way originally envisaged. Relatively few practitioners are yet involved in current claims processes in Australia, but among those who are there is an increasing body of opinion that the NTA does not in fact truly recognise the principles of the Mabo decision. An Act that should be simply for the purpose of registering pre-existing title is in practice one where a great burden of proof is put on the titleholders to demonstrate that title exists and that it confers substantial rights. If this is achieved the Act then steps in to limit those rights for the sake of stability and continuity. The initial enthusiastic expectation that the Mabo decision would result in large amounts of land in the Kimberley passing into the unencumbered control of the indigenous owners now needs to be altered.

The procedure for establishing and registering Native Title is long and difficult and the rules are currently uncertain. Predictions about the outcome must take into account the possibility that no land will be successfully registered in the near future. More certainly, the gaining of partial rights will occur and shares in the benefit and use of the land will be negotiated with broader Australian interest groups. To some extent this is now emerging out of the Tribunal process, where considerable pressure is felt by the claimants to conclude negotiated settlements rather than risk all in the Federal Court (Sullivan 1995). Even those cases that do go to the Federal Court may result in the decision that some rights have been extinguished, even over Aboriginal reserves and conservation reserves, and that the remaining rights are not to be enjoyed exclusively but jointly with government and development interests.

There are several reasons for the disappointing application of the NTA in the Kimberley region:

i. There is little VCL in the Kimberley where Aboriginal title can most easily be proved to have survived. Much of it has reverted from pastoral leasehold that was abandoned or never taken up, and arguments that title has not been extinguished by the issuing of these leases will be difficult and time consuming to mount. VCL is in that category largely because it was of no use to whites. Since they settled elsewhere and Aborigines

settled with them there are problems of proof of continuity of occupation and continuation of a cultural system. Where this can be overcome there is no certainty Aborigines in all cases wish to return to this land. The economic benefits from regaining it will, due to the nature of the land, largely be limited to mineral exploitation, a benefit the Act explicitly tells them they have the right to negotiate over but not to refuse. The exception to this may be in some towns, such as Broome, where small pockets of VCL remain that have commercial value and bring the native titleholders into direct negotiation with others who have a need for the land.

ii. The continuation of native title may prove to be compatible with conservation reserves. This will serve to put the titleholders in a much stronger position to negotiate joint benefits than they presently have, but will probably not confer on them anything approaching full beneficial ownership.

iii. At present native title to Aboriginal reserve land must be claimed in the same way as any other category. If successful it may remove the reserve from the control of the State government's ALT, a statutory authority that holds all Aboriginal reserve land in the State. A permit is required from the ALT to enter an Aboriginal reserve. Permission is also needed from the ALT before mining can proceed. These provisions have been used to negotiate benefits from exploration and mining and would be removed under native title. However, on one reserve considerable advances have been made in negotiation with large-scale diamond exploration interests under the threat of a current native title claim. It is not yet certain that the right to negotiate provisions of the NTA, lacking the power to forbid access, will provide stronger protection than current paternalist arrangements.

iv. Converting Aboriginal pastoral leases to native title will bring the lease under the right to negotiate provisions of the NTA. It may also precipitate the kind of intra-Aboriginal access and living area agreements called for above. Since title would survive, whether the lease is cancelled or varied, it may lead to re-negotiation of pastoral station boundaries to put the industry on a more rational footing.

v. Access to non-Aboriginal pastoral leases continues to be denied on many Kimberley stations. Negotiations over a code of conduct for Aboriginal access have been stalled for some time, although there is growing interest among some more forward thinking pastoralists to revive the dialogue initiated by the KLC before the NTA came down. The NTA leaves the question open whether all aspects of title have been extinguished on land leased before 1975. The Mabo judges were divided. The Waanyi people's application for registration of native title over pastoral land was rejected but this is to be challenged (French 1995: 3-4). In any case a regional approach to agreement over use of Aboriginal land must include negotiation with the State government for Aboriginal access to land where title has been extinguished or will be difficult to establish.

For all of these reasons, regional coordination of a land use and management strategy is required for rational and sustainable development. The establishment of organisations that embody native titleholders and allow them to enjoy rights and negotiate terms with others is a priority and is already pushing the formulation of sub-regional and local agreements.

The very real problem at the moment is that this is being carried out without effective regional coordination.

This leads to the third level of pressure for a regional settlement that was introduced earlier in the discussion. This is the need for devolution of authority to Aboriginal representative organisations. Agreements at the local level that bear some of the characteristics of Canadian regional agreements for control over land will be struck, indeed are now being struck, without any formal regional negotiating system or overall plan in place. There is a danger that self-determination in the Kimberley will be undermined by these single purpose agreements at the local level lacking regional coordination. They may consist only of the conceding of rights for some form of conventional benefit devoid of real control. Side by side with this a regional authority could be limited to simply administering federal grant money, again without any formal ability to intervene in the social and political life of the region or the State. For these reasons, as previously suggested, any further consideration of a regional body for the devolution of funding decisions must also explicitly recognise such a body as transitional. It should be given the responsibility also to coordinate consultations and negotiations towards the kind of political realignment between sovereign peoples such as that called for in the ATSIC submission on Native Title Social Justice Measures (ATSIC 1995: 55-64).

From regional authority to Aboriginal governance

This discussion has so far pointed out the pressures present for some form of regional coordination of land use and a structure for Aboriginal political expression in the Kimberley. It is important now to begin discussing possible models, even though they may bear little relation to what is eventually achieved. This will focus the debate not only on what is required but the problems involved in the various means of achieving it.

Two questions need to be addressed. The first is what level of government is being considered? As French points out, the Mabo judgment starts from the proposition that Crown sovereignty is legitimate (since this sovereignty establishes the High Court it could hardly be otherwise) the question of sovereignty is therefore non-justiciable under domestic law (French 1995: 1). Nor is there the means to litigate outside the country, there is no court to try the proposition that Australian sovereignty has been illegally established and determine the consequences that could flow from such a finding. This does not mean, however, that there is no international law to cover the matter, there is a substantial amount. It has been plain to Aboriginal interests since the Mabo judgment, that recognising Australia was not legally *terra nullius* on conquest, calls into question the basis of the political relationship between the colonisers and the colonised. That the dispute cannot be litigated does not mean that the Aboriginal case has no substance. Nor does it mean that there is no international (or domestic)

recourse for Aboriginal people. Potential avenues of complaint range from seeking international support of the sort that Australia itself offered the independence movement in South Africa, to formal complaints at the United Nations in human rights forums and under international instruments to which Australia is, or has pledged to become, a signatory.

These avenues have been cultivated by Aboriginal interests for some time before the Mabo decision. So the assumption that the non-justiciable implications of the Mabo decision are dead issues is premature. They are alive in the minds of the Aboriginal leadership and will rise to haunt the Australian polity until a just settlement is made. Nevertheless, proposals for sovereign statehood will obviously remain beyond the realm of the achievable for the foreseeable future. On the other hand, modifications to the system of local government, which will be proposed below, are likely to satisfy a range of interests both Aboriginal and non-Aboriginal without straining credulity in the proposition.

The second question, which is now arising in the Torres Strait, ought to come to the forefront of thinking on regional governance (Sanders 1994). Is the goal Aboriginal self-government of Aboriginal people in Aboriginal areas, or is it Aboriginal dominated government of the entire region? The first approach is the most easy to attain, indeed a number of mechanisms to achieve some measure of this already exist (see Sullivan 1994). The establishment of a regional authority under the ATSIC Act would cement such an approach, perhaps irretrievably. The danger is that it will segregate, perhaps ghettoise, Aboriginal culture while allowing the more powerful European-based interests to take advantage of all mainstream opportunities. A more satisfactory approach would be to aim for a unified regional government with a fair electoral system reflecting Aboriginal control of the non-town areas as well as their considerable urban interests, and functionally linked to Aboriginal organisations and statutory authorities (such as the ILC). Again if the level of government aimed at is something on the model of local government, the proposal for Aboriginal regional governance, rather than Aboriginal self-government, is not too alarming to all concerned.

In outline such a proposal would see the present four shires in the Kimberley come together in a regional assembly that would also coincide with the ATSIC zone. The present shires would need to be divided into wards, where these do not already exist (for instance on the Dampier Land Peninsula) and the wards would need to directly elect representatives in much the same way as electoral divisions do in the State as a whole. This would have the effect of reducing the influence of the town vote and producing a fairer representation of country areas, again as it does in the State as whole, although in this case these areas happen to be largely Aboriginal. The Regional Councils would continue to exist. They could themselves be divided into the same wards, with Shire and Regional

Council boundaries amended slightly so that they are the same. The Aboriginal administration would exist inside the broader Aboriginal and non-Aboriginal combined government. For purely Aboriginal business, such as the distribution of program funding, they would meet as Aboriginal Regional Councils under a regional authority. For more general purposes the same individuals would meet with the elected representatives of the whole community as a regional forum of local government.

Broad suggestions are made about the level of regional government, how it may fit with existing forms of Aboriginal administration and local government, and the electoral process. There remains one important improvement to suggest. The elected arm of regional government needs to be integrated with functional bodies at the community level, both community or language grouping councils and community service organisations. At the regional level integration must be achieved with other statutory authorities, both Aboriginal such as the ILC, and non-Aboriginal such as the Kimberley Development Commission. This is necessary for effective regional land management.

These broad suggestions are made to foster debate and open up the discussion of practical steps to meet the needs of the emerging Kimberley cultural, social, and economic profile. These and any similar proposals will require amendments to current legislation and intricate negotiation of interests with Federal, State, and local government. Much of this must centre on funding questions of the kind recently canvassed in some depth by Crough (1995). Under present circumstances such suggestions may seem radical and likely to encounter the intractable opposition of existing non-Aboriginal interests, in particular the Shires and the State government. The intent of this paper has been to suggest that events may be carrying Kimberley people in this direction in any case. Increasingly, needs for multiple access to land in which Aborigines can now assert recognised rights will bring such suggestions from the realm of mere aspiration to the cold light of the negotiating table.

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