

ELECTRONIC VERSION

CAPE YORK LAND USE HEADS OF AGREEMENT

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ABSTRACT

Cape York is the largest and least disturbed wilderness region in Australia. There are at least three key stakeholders in the Cape: the indigenous inhabitants, the pastoralists and the conservationists. The Cape York Land Use Heads of Agreement, was brokered on 5 February 1996 between these three groups, but neither the tourism nor mining sectors were involved in these negotiations. Both the federal Labor party and coalition parties pledged \$40 million towards the Agreement's implementation.

There are potential gains from the Agreement for all three participating stakeholders. The agreement recognises that the indigenous inhabitants are entitled to access to areas of traditional significance, that the pastoralists have legal rights and concerns related to their industry and lifestyle, and that there are areas on the Cape Peninsula of significant conservation and heritage value.

While the three groups of stakeholders do not necessarily have the formal authority to bind anyone to a land use agreement, the agreement provides the framework for the subsequent involvement of government and individual stakeholders. The federal government has continued to support the agreement, although the proposed disbursement of the \$40 million package has been contentious. However, the state government has declined to sanction any land use agreements while the government was fighting other claims in the High Court.

There are important precedents for land use agreements in Canada, and some principles used in their formulation may be applicable to Australian conditions.

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We have had shadows hanging across the landscape. Black shadows, white shadows and grey shadows. We have had years of legal uncertainty and it wasn't the Government and courts that made this agreement happen - people made this happen. Clive Quartermaine, owner of the Meluna cattle station near Weipa.¹

1. INTRODUCTION

The Cape York Peninsula is Australia's largest and least disturbed wilderness region, an area just short of the size of Victoria. In the mid-1990s it became apparent that the region presented an “*opportunity to plan an indigenous wilderness domain which is committed to the conservation and protection of its cultural and natural values*” and which had “*as its over-riding principle the preservation, management and enhancement of a vital indigenous wilderness for the benefit of future generations*”.²

Almost 60 percent of the Cape York Peninsula is under pastoral term lease. There are approximately 112 pastoral leases on Cape York Peninsula with an average of almost 84 000 hectares and value (for pastoral purposes) of about \$4 a hectare.

Some 15 percent of the Peninsula is under Aboriginal and Torres Strait Islander control. Much of the Deed of Grant in Trust land is being transferred into inalienable freehold, which cannot be transferred to anyone but the Crown. The land may be leased and any rental retained by the grantees. The rest of the Peninsula (approximately 28 percent) comprises national parks (11 percent) and a variety of other tenures, including special leases and venues.³

A potential key element in the Peninsula's future is the Cape York Land Use Heads of Agreement, brokered on 5 February 1996 between three key stakeholders on the Cape, the indigenous inhabitants, the pastoralists, represented by the Cattlemen's Union, and the conservation movement. However, it has not been sanctioned by the State government, and has no standing in law.

¹ Mark Horstman, ‘Black Shadows, White Shadows, Grey Shadows: Does The Cape York Regional Agreement Provide a Model for the Reconciliation Process?’ *Arena Magazine*, No 22, April- May 1996, pp 26-31 at p 31.

² Noel Pearson, ‘Cape York Peninsula: the Land Needs its People’, *Arena Magazine*, No 19, October-November 1995, pp 39-41 at p 39.

³ Queensland, Department of Local Government, Cape York Regional Advisory Group, *Our Land our Future: Cape York Peninsula Land Use Strategy: a strategy for sustainable land use and economic and social development: Stage 2 Report*, 1997, p 148.

1.2 THE BACKGROUND TO THE AGREEMENT

Regional agreements are relatively new to Australia. With the recognition of native title through the Mabo decision, and the *Native Title Act 1993* (Cth), Aboriginal communities in Australia are now in a somewhat better position to consider new policies, such as negotiated regional agreements, for the settlement of their outstanding claims. While previous Aboriginal involvement in land use and environmental management outside of Aboriginal reserves was previously limited to co-management with government conservation agencies, the Mabo decision provided an opportunity to expand the involvement of indigenous people from co-management to self-management, through the regional agreements strategy. This course of action is most applicable to those areas where sizeable indigenous communities maintain a strong connection to their traditional lands. Examples of this include the Kimberleys, Arnhem Land and the Cape York Peninsula.⁴

The first step towards the Cape York Land Use Heads of Agreement was taken in August 1994 when 80 people, including cattlemen, politicians, Aborigines, foresters, miners, business people, environmentalists and local residents met in Coen, a small town on the central peninsula. After some hard-line proposals were moved by members of the various groups and subsequently rejected, the people at the meeting, “*tired of confrontation, apprehensive about the security of their leases and livelihoods, dismissive of the assurances of southerners, and concerned for the harmony of relations between the Aboriginal and non-Aboriginal communities in the Peninsula*”⁵ eventually passed a resolution that was to become, in the words of one observer, “*the turning point in the long march to reconciliation in Cape York Peninsula.*”⁶ The resolution was:

... that pastoral leaseholders are entitled to enjoy their rights, industry and lifestyle; that Aboriginal people are entitled to enjoy their rights, industry and culture; that all pastoral leases should be secure against native title claim, provided:

-that traditional Aboriginal people be entitled to access to their traditional lands for traditional purposes, and that these rights extend to pastoral leases where the access does not diminish the rights of pastoral leaseholders

⁴ B J Richardson, D Craig and B Boer, ‘Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential Application to Australia - Parts 1 and 2’, *Environmental and Planning Law Journal*, 11(4), August 1994, pp 320-43 and 11(5), October 1994, pp 357-81.

⁵ Horstman, p26.

⁶ Horstman, p 27.

-that government is obliged to preserve and protect those rights through legislation;

- that wherever possible, pastoral leaseholders and Aboriginal people with traditional interests resolve issues and conflict through direct negotiation in good faith.⁷

In November 1995 Rick Farley, executive member for the Council for Aboriginal Reconciliation, was invited to address a Cattlemen's Union meeting in the Cape. Noel Pearson, executive director of the Cape York Land Council was drawn into establishing negotiations directly between the cattlemen and Aborigines. The rationale behind the negotiations was to establish a regional agreement to give Aborigines access to cattle leases to visit sacred sites and carry out traditional ceremonies. In return, there were to be no land claims under the Native Title Act.

The 'green lobby' joined the negotiations after the Goss Government announced the establishment of a 3.6 million hectare conservation zone running right down the east side of Cape York. The proposed creation of the conservation zone acted as a strong incentive for the Cattlemen's Union, besieged by falling beef prices, plummeting land values and short-term leases, to negotiate with the environmental interests who in turn were seeking World Heritage listing for parts of the Cape and the conservation of delicate ecosystems. (The zone, however, was later abandoned by the Coalition government.)⁸ There had already been uncertainty about future land use in the region since the establishment of the Cape York Peninsula Land Use Strategy (CYPLUS).⁹ CYPLUS was established after concerns from Aborigines and conservationists about plans to build a satellite-launching complex on the Cape.¹⁰

⁷ Horstman, p 27.

⁸ Colin Menzies, 'Cape York alliance angry at Premier', *Australian Financial Review*, 22 May 1996, p 43; Brian Williams, 'Government will not make Cape graziers sell', *Courier Mail*, 25 May 1996, p3; Brian Williams, 'Shades of green', *Courier Mail*, 20 July 1996, p 25.

⁹ CYPLUS, the Cape York Peninsula Land Use Strategy, is a joint Queensland and Commonwealth Government project to provide for ecologically sustainable development in Cape York. The project started in August 1992 with the establishment of a taskforce and office in Cairns. Stage 1 of the project included a Natural Resources Analysis Program, a Land Use Program, a Public Participation Program and computerisation of the information so that it would be available on a Land Information system. Stage 1 was largely completed in 1995.

¹⁰ Benjamin Haslem, , 'Greenie wooing' by Goss irks cattlemen', *Australian*, 15 July 1995, Property Section p 6.

After three months of negotiations, the Cape York Land Use Heads of Agreement was signed on 5 February 1996. The document was signed by the Cape York Land Council, the Peninsular Regional Council of ATSIC, the Cattlemen's Union of Australia Inc, the Australian Conservation Foundation, and the Wilderness Society. The interests of three key stakeholders in land use in Australia were covered by the Agreement. The traditional Aboriginal owners were represented by the Cape York Land Council and the Peninsular Regional Council of ATSIC. The Cattlemen's Union of Australia Inc represented the interests of pastoralists. The environmental interests in land use on the Cape were represented by the Australian Conservation Foundation and The Wilderness Society. A federal election campaign was in progress when the Agreement was reached. Both the federal Labor and coalition parties pledged \$40 million towards its implementation.

Most observers welcomed the agreement. The then Prime Minister, Paul Keating, saw the Agreement as "*a watershed in the reconciliation process and a major boost for environmental protection of one of our most pristine regions*", further noting:

*This is what the reconciliation process is all about. Coming together, recognising that beyond our differences we share a common purpose and a common interest in a special land, a land in which all our futures are intertwined and inseparable.*¹¹

Patrick Dodson, then Chairperson of the Council for Aboriginal Reconciliation, said the Agreement was a significant step for reconciliation on the Cape and that it could serve as a model for the rest of Australia:

*... the agreement resolves potential areas of conflict over land use without recourse to the courts or divisive political debate. The parties have taken a mature approach which recognises Aboriginal connections to the land even though that connection is not defined in written law. All parties have been prepared to make critical compromises to achieve a balanced outcome.*¹²

2 THE TERMS OF THE AGREEMENT

Under the agreement¹³ the Cattlemen's Union (CU), the Australian Conservation Foundation (ACF) and The Wilderness Society (TWS) acknowledged that the Aboriginal people, represented by the Cape York Land Council (CYLC) and the Peninsular Council, were the original inhabitants of Cape York and were entitled to

¹¹ P J Keating, 'Cape York Agreement a triumph for reconciliation and the environment', Press Release, 5 February 1996.

¹² 'Chairperson Welcomes Announcement of Cape York Land-Use Agreement', *Torres News*, 9-15 February 1996, p 5.

¹³ The full text of the Agreement is included as **Appendix A** to this Bulletin.

access to areas of traditional significance (**Clause 1**). The Aboriginal people, the ACF and TWS affirmed that Cape York pastoralists (including non-CU members) had legal rights and concerns related to their industry and lifestyle (**Clause 2**). All parties acknowledged the existence of areas of significant conservation and heritage value (**Clause 3**). They agreed to encourage negotiations between pastoralists and the State Government with regard to the East Coast Wilderness Zone (**Clause 4**).

All parties agreed to “*work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interests in the area.*” (**Clause 5**). Subject to this clause, all parties also affirmed their commitment to the development of a sustainable cattle industry on Cape York Peninsula (**Clause 6**).

The parties agreed to jointly approach the State Government to secure upgraded lease tenure for pastoral properties and to restructure lease boundaries under the existing provisions of the Queensland *Land Act* (**Clause 7**). The CU and the CYLC agreed to make joint approaches to secure investment for the development of the cattle industry through the Indigenous Land Corporation, the Rural Adjustment Scheme and other sources (**Clause 8**).

The Aboriginal people agreed to exercise any native title rights in a way that would not interfere with the rights of pastoralists (**Clause 9**). In return, pastoralists agreed to permit continuing rights of access for traditional owners to pastoral properties for traditional purposes, such as the exercising of hunting and fishing rights, access to sites of significance and for traditional ceremonies and the protection and conservation of cultural heritage (**Clause 10**). These rights were to be attached to the lease title and to be consistent with a detailed code of conduct to be developed between pastoralists and traditional owners. The code of conduct will ensure that leaseholders are protected from public liability claims arising from the exercise of access rights (**Clause 11**). The code of conduct for access shall be a minimum standard to apply to the region, but there shall also be provision for additional features to be negotiated between traditional owners and individual landholders (**Clause 12**).

All parties agreed that when areas of high conservation and cultural value were identified according to national and international objective criteria, the landholders should enter into appropriate agreements to protect the area under State or Commonwealth provisions, including World Heritage listing. This included the provision of funds for the management of the area and the monitoring of the agreements (**Clause 13**).

No private leasehold or freehold land shall be compulsorily acquired without prior negotiation with the landowner and, even then, not until all reasonable avenues of negotiation are exhausted (**Clause 14**). The purchase of land for the protection and management of cultural and environmental values shall only take place as land

becomes available commercially (**Clause 15**). With regard to this, all parties support the establishment of a fund for such purchases by the Commonwealth government. The fund shall also contain funds for the effective management of land purchased by the fund (**Clause 16**). Land purchased through the fund shall be assessed for World Heritage values (**Clause 17**).

The method of management of land purchased through the fund shall be negotiated between the Commonwealth and State governments and traditional owners and shall be based on culturally and ecologically sustainable use of the lands resources to achieve Aboriginal economic viability. Negotiations will involve relevant community organisations and traditional owners on a sub-regional basis (**Clause 18**).

The nomination for World Heritage listing of any land on Cape York Peninsula shall proceed only where there is a management arrangement which is negotiated with all landholders who may be directly affected by such a listing (**Clause 19**).

The parties shall approach the Commonwealth and the State to become parties to this agreement process. The parties are committed to pursuing agreements with the mining and tourism industries and with other industries in Cape York Peninsula (**Clause 20**).

According to the Council for Aboriginal Reconciliation, there are potential gains for all three groups of signatories in the Agreement. These are summarised below.

Cattlemen would gain:

- security in relation to native title
- guaranteed ability to negotiation on any conservation initiative on the Cape
- restructure of leases and upgrading of tenure
- improved ability to attract investment, restore capital values and develop the live cattle export trade.

Aboriginal people would gain:

- resolution of native title issues by negotiation rather than by litigation
- access to pastoral leases as a condition of the restructure of leases to hunt, fish and camp, to visit sites of significance, to perform ceremonies under traditional law, and to protect and conserve cultural heritage
- title to pastoral leases that are purchased for their high conservation value
- an improved economic base.

Environmentalists gain:

- assessment and protection of World Heritage values throughout the Cape
- environmentally sustainable land use management
- a Commonwealth fund to purchase land with assessed high natural and cultural values

- money to manage land purchased through the fund.¹⁴

3. FEATURES OF THE AGREEMENT

As Rick Farley outlined in a conference paper presented at Darwin in August 1996, there are certain significant features and implications of the Cape York Agreement.

It is an agreement between representatives of particular groups of stakeholders who do not necessarily have formal legal authority to bind anyone to an agreement. While it provides the framework for subsequent involvement of governmental and individual stakeholders, whose agreement is essential to any implementation, it is not a formal agreement binding on any government or individual titleholder.

There are incentives within the agreement to encourage individual titleholders to bring themselves within its framework. For example, under Clause 7 all parties agree to approach the State Government to upgrade existing leases, under Clauses 10, 11 and 12, pastoralists agree to defined access rights for indigenous people under an agreed code of conduct and as a condition of their tenure, and indigenous people agree not to exercise native title rights in any ways that interfere with pastoral activities.

Within the agreement, there is no determination as to whether or not native title exists. This is because the need for ‘peaceful coexistence’ is a matter of reality even if native title has been extinguished.

Under Clause 10, indigenous access rights are clearly defined and they are specified to mean ‘right to hunt, fish and camp’, ‘access to sites of significance’, ‘access to ceremonies under traditional law’ and ‘protection and conservation of cultural heritage.’ In reciprocation, an integral feature of the Agreement is the exchange of these access rights for an undertaking not to exercise any native title rights in ways that will adversely affect pastoralists.¹⁵ Any legal effectiveness of this exchange naturally depends on government implementation of some of its features in relation to changes to regulatory measures governing land tenure. However, it intrinsically

¹⁴ ‘Something for Everyone on the Cape: A Model for Regional Land-Use Agreements’, *Walking Together*, May 1996, p 5.

¹⁵ Rick Farley, ‘Regional Agreements as Alternatives to Mediation - What is the Commercial Impact of the Historic Cape York Agreement?’ Conference Paper, *Native Title: Commercial Realities of the Coalition’s Change Agenda*, Darwin, 27 August 1996, pp 4-7, cited in Bryan Horrigan, ‘Native Title Overview: Commercial Dimensions and Ongoing Developments’, in Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title*, Federation Press, Brisbane, 1997, p 18.

relegates the legal question about the existence or extinguishment of native title to a position of secondary importance.

The Agreement brings together the concurrence of all stakeholders within a wider, integrated framework of conciliation involving environmental and cultural protection and management, including the facilitation and regulation of listing of areas for wilderness and heritage protection under local, national and international obligations. The said protection includes indigenous and other interests.

Mark Horstman, an ecologist and researcher for the Australian Conservation Foundation, who worked with the Cape York Land Council to organise the campaign for a regional agreement; with CYPLUS to design a research program to guide regional planning for ecological sustainability, and with the ACF to develop joint strategies between Aboriginal organisations and the conservation movement in Cape York Peninsula, sees the Agreement as one that ‘elegantly dovetails’ the needs of the three groups involved. According to Horstman:

The strength of the agreement is in shifting the focus away from endless debate over the rights or wrongs of native title, cattle and conservation, to outlining a framework that the stakeholders agree is a fair and balanced process through which to meet their aspirations. It is a pragmatic solution born of lateral thinking.¹⁶

The Agreement requires Commonwealth and state government endorsement because of the implications for land tenure and land resource management. However, at the time of writing, the Commonwealth government’s provisional support for the Agreement contrasts with the opposition of the Queensland government, which has affirmed that no land use agreements will be sanctioned while other claims are being contested in the High Court.¹⁷

Government involvement in any regional agreement is, as Patrick Sullivan of the Institute of Aboriginal and Torres Strait Islander Studies notes, extremely desirable for at least two reasons:

One is that the government be involved in negotiating the devolution of some kinds of governmental power, at the very least of the sort that local government now controls, and also that government have a continuing role as a party to the agreement to monitor and sanction it. The other aspect is the need to meet the growing suspicion on the part of government of interested parties sitting down to

¹⁶ Horstman, p 28.

¹⁷ Bryan Horrigan, ‘Native Title Overview: Commercial Dimensions and Ongoing Developments’, in Bryan Horrigan and Simon Young, (eds), *Commercial Implications of Native Title*, Federation Press, Brisbane, 1997, pp 2-28 at pp 18-19.

make decisions about land that the government feels are properly reserved to itself.¹⁸

As Sullivan explains, governments of all levels have the responsibility of seeing that long-term needs and broad social requirements of the people affected by any regional agreement are not sacrificed in order to deal with intermediate difficulties. If government is left out of the picture, or if parallel approaches to a problem are developed, then negotiations are clouded by uncertainty. Significant players in the negotiations may feel that they can achieve better results for themselves “*by boycotting proceedings and directly lobbying governments for precipitous legislative solutions*”.¹⁹

As of January 1998 the Agreement does not cover all commercial interests in the Cape, although in May 1996 it was envisaged that the signatories would pursue agreement with the mining, tourism and other industries in the region.²⁰ When the Agreement was signed, Michael Pinnock, executive director of the Queensland Mining Council expressed concern that it contained references to world heritage, which in the past had meant no-go areas for miners, and said “*The mining industry has not been consulted in the remotest sense about this*”.²¹

The Queensland Mining Council also abstained from voting on the resolution of CYRAG “*that in the CYPLUS process, Pastoral lease tenure issues be resolved within the context of the Cape York Land Use Heads of Agreement*” on the basis that it was not a party to the Heads of Agreement and therefore it should not hold a view on the issue.²²

4. ADVANTAGES OF NEGOTIATED REGIONAL AGREEMENTS

Until comparatively recent times, agreements involving the use of indigenous land centred around the negotiated payment for use of resources on Aboriginal held land,

¹⁸ Patrick Sullivan, ‘Regional Agreements in Australia: an Overview Paper’, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Titles Research Unit, *Issues Paper No 17*, April 1997. Available on Internet at <http://www.aiatsis.gov.au/ntpapers/ntip17.htm>

¹⁹ Sullivan, *Issues Paper No 17*, April 1997.

²⁰ ‘Something for Everyone on the Cape’: A Model for Regional Land-Use Agreements’, p 5.

²¹ Bob Wilson, ‘Miners lash out on Cape York zones’, *Courier Mail*, 20 February 1996, p 10; Brian Williams, ‘PM praises Cape pact’, *Courier Mail*, 6 February 1996, p 4.

²² Queensland. Department of Local Government, Cape York Regional Advisory Group, *Stage 2 Report*, p 148.

and in some cases on non-Aboriginal held land if enough political and moral pressure was exerted. Sullivan lists a number of drawbacks for all sides in this more orthodox approach:

- *it is very divisive, pitting developers and governments against indigenous interests*
- *it is too crude to be well adapted to the complexity of indigenous needs*
- *it tends to produce win/lose outcomes and does not distribute benefits fairly or in a culturally appropriate manner across a range of communities, or to different groups, genders, or ages within a community*
- *it does not lend itself to continuing indigenous involvement in management of land and sea resources*
- *it fosters inappropriate skills in indigenous communities rather than encouraging education for management and control*
- *from the start of a legal claim to the signing of a resource agreement it is costly for all sides to implement; and*
- *it introduces considerable uncertainty on all sides and results in piecemeal arrangements.*

There are, however, potential gains in regional agreements, which Sullivan lists as:

- *avoiding the costs of mounting native title or compensation claims or, for the developer and for government, the cost of opposing them*
- *as a result progress may be achieved in a shorter time*
- *both sides gain political credibility by showing their ability to put aside ideological oppositions for the sake of co-existence*
- *certain outcomes that it is difficult to put a value on or legislate for, such as complex conservation and hunting access arrangements, may be more easily negotiated than litigated*
- *the uncertainty about the extent of rights and their implementation that prevents all sides from considered planning can be reduced; and*
- *the potential for building into agreements continuing indigenous control may be better than winning judicial title but lacking planning, environmental and resource decision-making power.*²³

Rick Farley, Convenor of ATSIC's Resources Committee, was ardent in his support for the Agreement, claiming that there was something for everyone in it:

The cattlemen gain greater security from Native Title claims, from compulsory acquisition, and also in terms of improved tenure for their leases. Aboriginal people gain access to pastoral leases and a fund to purchase land with identified high cultural and natural values. The environmentalists gain protection for land

²³ Sullivan, *Issues Paper No 17*, April 1997.

*with high natural values and sustainable management of pastoral properties throughout the Cape.*²⁴

In his 1996 conference paper, Farley further outlined the advantages of agreements such as the Cape York model. Such agreements “offer a potentially quicker and cheaper route to certainty of outcomes than either the courts or a legislative approach”.²⁵ They can also form the basis of an enduring relationship between the parties concerned, which is ‘good business practice.’ Other advantages include:

- *They can assist the development of an independent economic base for Indigenous peoples. That is an important step towards greater self-determination and reduced welfare dependency.*
- *Native title rights remain protected under common law, but are not necessarily determined. If this is the case, no legal precedents are set in relation to native title (the intent of the Cape York agreement).*
- *Less cases are likely in the Native Title Tribunal and the courts.*
- *Reconciliation is assisted because there is no necessity for native title claims to proceed.*²⁶

Other observers have been more cautious. While affirming that regimes that meet the cultural, political and economic aspirations of indigenous people are essential elements in legally enforceable schemes through which they exercise rights of ownership, management and control of land and its resources, Maureen Tehan displays some caution with regard to negotiated agreements, saying that their emergence as the preferred method for resolving land based disputes between indigenous peoples and other land users poses some other problems. She says:

*In particular, the extent to which it heralds a new approach and its capacity to meet the often conflicting aspirations about the interested parties raises questions about the appropriateness of this method of balancing competing interests.*²⁷

²⁴ ‘Something for everyone on the Cape: a model for regional land-use agreements’, p 5.

²⁵ Farley, cited in Bryan Horrigan, ‘Native Title Overview: Commercial Dimensions and Ongoing Developments’, in Bryan Horrigan and Simon Young (eds), p 17.

²⁶ Farley, cited in Bryan Horrigan, ‘Native Title Overview: Commercial Dimensions and Ongoing Developments’, in Bryan Horrigan and Simon Young (eds), p 17.

²⁷ Maureen Tehan, ‘Indigenous Peoples, Access to Land and Negotiated Agreements: Experiences and Post-Mabo Possibilities for Environmental Management’, *Environmental Planning and Law Journal*, 14(2), April 1997, pp 114-135 at p 115.

5. THE ABORIGINAL PEOPLE AND THE AGREEMENT

All of Cape York Peninsula and its surrounding waters were an Aboriginal domain for tens of thousands of years before colonisation. Today, the majority of Cape York's population is still indigenous people. Although many Aboriginal and Torres Strait Islander communities have been displaced since the coming of Europeans, original clan estates are generally well-known and defined among the indigenous inhabitants. For the indigenous people, the Cape and its surrounding waters consisted of a mosaic of ancestral clan estates. The natural resources present formed the basis of both the local indigenous economy and culture, with Aboriginal and Torres Strait Islander cultural practices traditionally inseparable from the natural environment.²⁸

The Aboriginal people of Cape York Peninsula comprise 90 percent of the population outside the townships of Cooktown and Weipa. Along with the 3 Torres Strait Islander communities, there are 11 designated Aboriginal communities on Cape York. Their patterns are generally reflective of the past actions and policies of governments and European residents, but not always reflective of traditional groupings. While all of the 11 Aboriginal communities have unique histories and socio-cultural compositions, they differ in size, homogeneity, language use, economy, reliance on subsistence food hunting and gathering and other characteristics.

However, the present Aboriginal communities on Cape York also have many features in common. Most are the result of dispossession and forced relocation during and following the colonial period. All of the communities are home to people from more than one cultural group, and experience cultural tensions because of this. Communities have developed their own communal identities in addition to the constituent clan and language group identities. Most of them are economically poor, with the average household income on or below the poverty line and the average household size between 7 and 10. All receive considerable financial support services from the Commonwealth and Queensland governments. Levels of health, education, life expectancy, home ownership and employment are considerably lower than for other Queensland communities, and hospital admission rates are twice as high. All communities are currently undergoing a revival of interest in the resolution of traditional land affiliations.²⁹

Indigenous land use on the Cape York Peninsula includes:

²⁸ *Our Land our Future*, 1997, p 94.

²⁹ *Our Land our Future*, 1997, p 44.

- *the use of land for the urban areas by the 14 Aboriginal and Torres Strait Islander communities of Cape York Peninsula*
- *Deed of Grant in Trust lands and Aboriginal Land (13% of the study area)*
- *four Aboriginal-owned pastoral properties and one jointly managed property*
- *subsistence hunting, fishing, and gathering activities on and off current Aboriginal and Torres Strait Islander lands*
- *tourism and recreational fishing enterprises*
- *natural and cultural heritage management by Aboriginal and Torres Strait Islander elders and Community Rangers on indigenous land, National Parks, Marine Parks and elsewhere*
- *sacred and other cultural sites, named places, ceremonial grounds and hunting areas throughout Cape York Peninsula (the knowledge and maintenance of cultural sites and related beliefs are regarded by Aboriginal and Torres Strait Islander peoples as a form of land use).*³⁰

Maureen Tehan has argued that the incorporation of indigenous knowledge and practices in land management, based on specific cultural relationships to land, will only enhance the management and preservation of the natural environment. The role played by indigenous people in environmental management will be shaped by three major factors:

*First, Indigenous knowledge and its application to modern environmental management regimes is integrally linked with Indigenous peoples' particular relationships to land and the emergence of legal regimes for recognising and valuing that relationship; secondly, the focus on reserves as the basis for environmental management; and thirdly, the federal system of government in Australia including the relationship between the Commonwealth and State (and Territory) governments and the operation of international environmental instruments in the management of Australia's natural environment.*³¹

6. THE PASTORALISTS AND THE AGREEMENT

Geographically speaking, the major agricultural activity on the Cape York Peninsula is beef cattle grazing. Pastoral properties account for nearly 60 percent of the Cape York land area, with the first properties being established in the 1870s.

³⁰ *Our Land our Future*, 1997, p 47.

³¹ Tehan, p 114.

However, the number of people involved in the cattle industry on the Peninsula is relatively small. Agriculture and fishing only account for 6 percent of the employment on Cape York, and the 124 pastoral properties on Cape York only have a population of 690 people. This includes both Aboriginal and non-indigenous people. Cape York's pastoral community comprises widely separated homesteads, which are typically a small collection of buildings gathered adjacent to an airstrip, river or billabong.

On the pastoral properties, relatively small numbers of cattle are grazed on vast tracts (average size 83 000 hectares) of lease-hold land. According to 1993 figures from the Department of Primary Industries, there were approximately 130 000 head of cattle in Cook Shire and 40-50 000 in Carpentaria Shire, with livestock sales worth approximately \$9.3 million. The size of the area of native pasture land that cattle graze on is not known, but the total area covered by grazing leases is 8.3 million hectares. Between 1986/87 and 1992/93, the gross value of agricultural production (crops, livestock and fishing) in Cape York Peninsula has averaged \$13 million per year.³²

Significant changes of focus are underway in the cattle industry on Cape York. In 1996 Ian Perkins, a cattle management expert working with Cape York pastoralists to plan the industry's future, proposed "*changing the Cape York cattle herd from a primitive one, mainly turning off manufacturing beef for the USA, to one concentrating on live exports of better quality cattle to South-East Asia*"³³. In August 1996, after the dredging of the port of Karumba, live cattle were exported from Weipa for the first time in many years.

Although the Cattlemen's Union is a signatory to the Agreement, and their then President John Purcell said in May 1996 that "*Pastoralists in Cape York are still fully behind the principles in the agreement*"³⁴, the cattle interests on the Cape are not unanimous in their support. A United Graziers Association spokesman, Mark Phelps, has said that the agreement did not represent the majority of pastoralists in Cape York, and that he would continue to lobby the Government to withhold its approval. "*This agreement was made in secret and there are still grey areas in the agreement about native title*".³⁵

³² *Our Land our Future*:, 1997, p 45-46.

³³ Horstman, p 29.

³⁴ Marcus Priest, 'Graziers to talk sense', *Courier Mail*, 16 May 1996, p 2.

³⁵ Priest, p 2.

7. CYPLUS AND THE AGREEMENT

Conservation values of the Cape York Region were identified from work carried out during the first stage of CYPLUS (Cape York Peninsula Land Use Strategy). CYPLUS has as one of its strategies the “*resolution of pastoral lease tenure issues being undertaken within the context of the Cape York Land Use Heads of Agreement*”.³⁶ CYPLUS is a blueprint for sustainable land use and economic and social development on Cape York Peninsula. Development and implementation of

³⁶ *Our Land our Future*, Executive Summary, 1997, p 8.

the Strategy is a three stage process where:

- **Stage 1** involved data collection, issues identification and analysis of opportunities and constraints. This stage commenced in early 1992 and was completed in 1995.
- **Stage 2** has involved the development of a co-ordinated strategy for sustainable land use and economic and social development. This stage commenced in late 1995 and was completed with the publication of the Stage 2 Report in May 1997. This has been directed by and under the stewardship of the Cape York Regional Advisory Group (CYRAG).
- **Stage 3** will consist of implementation and evaluation.³⁷

The work carried out under the auspices of CYPLUS found a total of 126 sites with values of regional or greater conservation significance. Of these, 4 contained values significant at the international level, 14 at the national level and 108 at the regional level. The sites are widely distributed throughout the region and include a variety of geographical features, including “*coastal dunefields, deltas, mountain boulder landscapes, wetlands, bauxite cliffs, and a range of other scarps, outcrops, faults and fossil localities*”.

CYPLUS assessment of the wilderness resources of the Cape York Peninsula has shown it to be a region essentially undisturbed by civilisation, and containing outstanding examples of ongoing ecological and biological processes. The Peninsula is a key wilderness area, containing coastal, eastern Australian, heathland, rainforest, wetland and riparian ecosystems. The region is also unusual in that it contains whole river systems of high wilderness quality.³⁸

Under the criteria of the Australian Heritage Commission, who carried out a wilderness values assessment in the first stage of CYPLUS, it is evident that approximately 40 percent of Cape York Peninsula is of *very high* wilderness quality, while approximately 80 percent is of *high* quality.

Areas showing natural conservation values have been mapped, and places of conservation significance have been determined. Analysis has shown that features of natural conservation value are not restricted to one area of the Peninsula but are widespread throughout Cape York. The Australian Heritage Commission has determined that the Cape is one of Australia’s key conservation areas:

Its dunefields and deltaic fan deposits are among the best developed in the world, while the biogeographic and evolutionary relationships of plants and animals to the biota of New Guinea provides important insights into evolutionary processes.

³⁷ *Our Land our Future*, 1997, p 10.

³⁸ *Our Land our Future*, 1997, p 53.

In a national context, Cape York Peninsula is a key area for wilderness, heathland, rainforest, riparian and wetland conservation. It also contains some of Australia's highest concentrations of rare and threatened species as well as restricted endemics, and is rich in invertebrates, freshwater fish, mangroves, seagrass and orchids.³⁹

The Stage 2 Report of CYPLUS (the CYRAG report) has noted several concerns with regard to land tenure and pastoral leases on the Cape. These concerns include:

- *the existing lease system is too insecure and this is inhibiting development of the pastoral industry and the development of associated ventures, eg tourism and forestry*
- *much of the land is of importance for traditional purposes, but indigenous people have no rights of access*
- *significant parts of Cape York Peninsula have high conservation values and the existing tenure system does little to protect those values*
- *many existing lessees wish to remain on part of their lease when they retire, but the existing system does not facilitate this*
- *uncertainty over the future of Cape York (the now abandoned Conservation Zone, World Heritage listing, native title issues and CYPLUS) is slowing decisions on lease renewals and*
- *lack of information on natural and cultural values on properties to guide land management.⁴⁰*

8. THE FEDERAL GOVERNMENT AND THE AGREEMENT

On 5 February 1996 the then Prime Minister, Paul Keating, issued a press release welcoming the Agreement, deeming it a “*watershed in the reconciliation process and a major boost for environmental protection of one of our most pristine regions*”. The Agreement “*point[ed] the way ahead for resolving land use issues through negotiation and consultation, rather than by confrontation and suspicion*”. Keating declared that “*A Labor Government will support the agreement including, subject to consensus among the interested parties of the region, the establishment of a fund to facilitate the protection of areas of high conservation value including World Heritage*”.⁴¹

³⁹ Our Land our Future, 1997, pp 54-5.

⁴⁰ Our Land our Future, 1997, p 148.

⁴¹ P J Keating, ‘Cape York Agreement a triumph for reconciliation and the environment’, Press Release, 5 February 1996.

On 2 March 1996 the Keating government was defeated in the Federal elections. The federal coalition, however, had announced their support for the agreement, and offered a \$40 million package to further the process and to protect the natural and cultural values of the Cape, a commitment that they maintained after being elected to government.

When the Queensland government declined to ratify the agreement, the Federal Minister for the Environment, Senator Robert Hill issued a press release outlining the Federal Government's recognition of the "*difficulties and legal uncertainties*" faced by the Queensland Government in relation to the Section 21 native title aspects of the Cape York Heads of Agreement. However, Senator Hill simultaneously stated that the Federal Government was still committed to the Cape York agreement process and its belief that "*the concept of stakeholders joining together voluntarily to resolve land use issues is a positive development and may be an approach suitable for resolving land use issues in other parts of Australia*". He announced that the Federal government would continue to work with the stakeholders and the State Government "*to progress the agreement*".⁴²

8.1 THE 1998 CAPE YORK MANAGEMENT TRUST PLAN

On 16 February 1998, the Commonwealth and Queensland Governments announced, in a joint statement, the investment of up to \$40 million in the Cape York Management Trust Plan. The Plan was geared towards protecting Cape York Peninsula's "*outstanding environment and heritage values while providing new opportunities and greater certainty for people on the Cape and the region's pastoral industry*".⁴³

The Plan takes into account the information collected during the CYPLUS process, and recognises the importance of involving the local community in achieving best conservation outcomes. Therefore, the voluntary participation of pastoralists and Indigenous communities is vital.

Federal Environment Minister Senator Robert Hill said:

Key elements of the Plan include up to \$23 million for a voluntary property planning process, for the voluntary acquisition of properties that contain the highest conservation values and for working with the Indigenous communities to protect environmental and heritage values on their lands.

⁴² Robert Hill, *Media Release*, 'Cape York Heads of Agreement', 10 April 1996. On Internet at <http://www.environment.gov.au/portfolio/minister/env/96/mr10apr.html>.

⁴³ Senator Robert Hill, Minister for the Environment, Hon. J Anderson MP, Minister for Primary Industry and Energy, and Hon Di McCauley MLA, Minister for Local Government and Planning, *Joint Media Statement*, 16 February 1998.

Through the voluntary Property Planning process we hope to ensure that the Cape is managed in an ecologically sustainable way and that areas of conservation and cultural significance are protected.

We will also be making available expertise to pastoralists and other leaseholders on how they can improve the sustainable productivity of their land.⁴⁴.

Another feature of the Plan would be the acquisition of areas of high conservation value, although such acquisitions would be on a strictly voluntary basis, with no property holder being forced to sell their land or relinquish their lease. Indigenous communities will also be assisted to manage conservation and cultural values on their land, but agreements with Aboriginal communities will be both cooperative and voluntary.

Other key elements of the Plan include additional resources for the Cape York National Park and reserve system, funds for heritage site management, support for feral animal and weeds projects, a land rehabilitation project and a community grants component. Nearly \$2 million will be provided for measures to help protect the Cape's endangered animals and plants, including \$65,000 for two endangered species projects to help protect the Gouldian Finch and the Golden-shouldered Parrot. Also, \$350,000 will be contributed towards the proposed Cooktown Interpretative Centre, matching funding already offered by the Queensland government for the Centre.⁴⁵

However, the Plan was criticised immediately because of the lack of community consultation and also because of the perceived vagueness of the document explaining it. Cairns and Far North Queensland Environment Centre spokesman Gavan McFadzean said '*It's a document that doesn't confirm anything. It almost seems intentionally ambiguous*'. He added that the document did not support the Cape York Land Use Heads of Agreement and made no commitment to assessing the region's World Heritage values.⁴⁶

9. THE STATE GOVERNMENT AND THE AGREEMENT

On 10 April 1996 the Queensland Premier, Rob Borbridge, said that the State government would not sanction any land use agreements while it was fighting other claims in the High Court. Under Section 21 of the *Native Title Act 1993* (Cth), the

⁴⁴ Joint Media Statement, 16 February 1998.

⁴⁵ Joint Media Statement, 16 February 1998.

⁴⁶ Brian Williams, 'Split widens over Cape [York] trust plan', *Courier Mail*, 16 February 1998, p 8.

agreement of the Queensland government is required for ratification of a land use agreement, and this would not be forthcoming from the Premier while other parts of the State were in dispute.⁴⁷ Although the Premier had claimed, when the agreement was signed, that it could act as a “template” to other regional agreements, he said on 10 April that if his government sanctioned the deal, it would impact on land tenure in other parts of the State. Mr Borbidge said:

*I will not countenance entering into or endorsing any agreement that undermines security of land tenure for people on pastoral leases in Queensland. The fact is that the Queensland Government cannot sanction an agreement which impacts on land tenure on Cape York or anywhere else when we're fighting it in the High Court.*⁴⁸

Section 21 of the *Native Title Act* provides that native title holders may negotiate agreements with governments, on a local or regional basis, for the purpose of surrendering title or allowing economic development to proceed which may affect native title. Native title holders are also given a right to negotiate the terms of specific projects over their territory. However, the Act contains few mechanisms to facilitate and encourage negotiating strategies, with its focus being on using a tribunal process to arbitrate land claims and related land-use decisions in an expeditious manner.⁴⁹

Although Mr Borbidge had given the Agreement his in-principle support on 18 February 1996, he changed his position after Crown Law advice, and said that the agreement was a moral one which had no legal standing because it was not signed by the State Government, which in effect owns the land covered by the Agreement, as required under the *Native Title Act*:

*For it to be a Mabo-type agreement, it requires basically to be a deal or agreement between the Government and native title holders. We were not consulted ... it is an agreement between those various parties. The Government is not involved. [The Agreement] does not bind the Government. I am not in the business of placing at risk pastoral leases here on Cape York or anywhere else just because a few people thought it was a good idea.*⁵⁰

⁴⁷ David Shires, ‘Borbidge blocks Cape York pact’, *Australian Financial Review*, 11 April 1996, p 4.

⁴⁸ Scott Emerson and Lisa McLean, ‘Borbidge threatens Cape land agreement’, *Australian*, 11 April 1996, p 3.

⁴⁹ Richardson, Craig and Boer, Part 1, p 323.

⁵⁰ Elizabeth Meryment, ‘Borbidge, Hill split over Cape’, *Courier Mail*, 11 April 1996, p 1.

The State President of the National Party - Queensland, David Russell, has defended the Government for not sanctioning the agreement:

*The Cape York Heads of Agreement ... is not a private agreement. It seeks to commit the state government to certain courses of action, including expenditure of public money and limiting access to mineral resources. There is no reason at all why a government which is not party to negotiations should be bound by an agreement reached in such a manner. It would be profoundly undemocratic were it to agree to be bound.*⁵¹

10. THE AGREEMENT AS A MODEL

According to Rick Farley, convenor of the resources committee of the Council for Aboriginal Reconciliation, the Cape York experience provides guidelines for the conduct of other negotiations:

- 1) *parties must settle and prioritise their objectives prior to negotiation;*
- 2) *parties must consider whether the presence of a facilitator would help the process of negotiation;*
- 3) *parties must decide the identity and number of negotiators;*
- 4) *parties must address the question of adequate resources for the negotiation process and all parties to the negotiation;*
- 5) *parties must agree on a framework/protocol for negotiation;*
- 6) *parties must understand what is feasible for all parties;*
- 7) *parties must consider keeping wider stakeholders informed, not least so that industry and governmental support for the negotiation process and outcomes is maintained and potential problems are minimised;*
- 8) *the benefits to all parties must be defined clearly;*
- 9) *the inevitability of compromise must be accepted by all parties, provided that the 'bottom line' of each party's position is understood and accepted;*
- 10) *parties should settle an agreed strategy to deal with internal and external criticism and disputes during the negotiation process, with particular concern for each party's natural constituency.*⁵²

⁵¹ 'Pastoral and Native Title - Where to After Wik?', National Party of Australia - Queensland website, <http://www.npa.org.au/qld/cmwik/htm>.

⁵² Farley, cited in Bryan Horrigan, 'Native Title Overview: Commercial Dimensions and Ongoing Developments', in Bryan Horrigan and Simon Young (eds), p 17.

11. OVERSEAS AGREEMENTS

Like Australia, Canada is a resources-rich country with a significant indigenous population that has been displaced and otherwise markedly affected by the presence of Europeans seeking access to those resources. Canadian authorities have devised several types of land use agreements over the last quarter of a century. As Patrick Sullivan, a Research Fellow at the North Australia Research Unit, Australian National University, Darwin, has remarked, there has been a difference of emphasis between Canadian factors leading to agreements and those in Australia. In Canada the primary concern has been the protection and regulation of the northern environment, but in Australia it is mainly regulation of resource extraction and commercial use of the land, with conservation as another factor of increasing importance.⁵³

While a negotiated regional agreement can provide a more effective and sustainable strategy for community control and management of the environment, and provide a basis for economic development, not all Canadian regional agreements appear to be appropriate models. For example, the 1975 *James Bay and Northern Quebec Agreement* (JBNQA) simply stripped the Cree and Inuit of much of their native land title to clear the way for expanded resource development. While the 19,000 Cree, Inuit and Naskapi of northern Quebec were given over \$230 million in compensation, over 14 000 square kilometres of territory, and exclusive hunting and trapping rights over another 150 000 square kilometres, this agreement was negotiated before concepts such as native self-determination and sovereignty were regarded as significant in the formulation of land use agreements. The Agreement has been recognised at the international level as not being sufficient in itself to provide for the right of the affected indigenous peoples to self-determination. In a February 1992 decision of the International Water Tribunal, the Tribunal commented: "*The jury recognises the James Bay and Northern Quebec Agreement, but it doubts whether such a contract adequately reflects the aspirations of the Crees to self-determination and control over resources*".⁵⁴

More recent Canadian agreements have attached greater weight on environmental participation and established a stronger framework for community self-government. This change in emphasis may eventually prove to be an effective control and limitation to development on indigenous land that the inhabitants consider inappropriate.

⁵³ Sullivan, *Issues Paper No. 17*, April 1997.

⁵⁴ Cited in Matthew Coon-Come, 'The right to self determination of native and indigenous peoples: the case of the Cree Nation', Paper originally delivered at the conference *Rethinking Culture* held at the University of Montreal on 3-5 April 1992 and now on Internet <http://elias.ens.fr/surfaces/vol 2/coon-com.html>

The Nunavut Agreement of 1993 falls into another category, and is the first comprehensive land claims agreement that extends indigenous self-government over a vast region. The proposed new Nunavut territory covers much of the central and eastern parts of the Northwest Territories in Canada, including Baffin and Ellesmere Islands and the surrounding regions and stretching almost to the North Pole. The new territory will be the homeland for the Inuit, the original inhabitants of the region, who make up around 85 percent of the region's 20 000 population. While the agreement contains a clause that extinguishes Inuit title and rights to traditional lands and water in exchange for financial compensation, and prevents the Inuit from taking any legal action against the government, the political control of the region will be devolved to the Inuit from 1 April 1999. When Nunavut is partitioned from the Northwest Territories on that date, Canada's third territory will come into being. Nunavut will have its own legislature, whose representatives will be elected from a population of which Inuit are clearly the majority. It is likely that Inuit concerns will dominate the government agenda, mitigating the losses resulting from the extinguishment clause.⁵⁵

Richardson, Craig and Boer have described Canadian regional agreements as follows:

*The Canadian regional agreements involve the exchange of indeterminate native title rights for a clear legislatively-defined land tenure regime. Under this regime, indigenous peoples enjoy a gradation of land rights, relating to land, land use and marine resources. These range from absolute freehold title to surface and sub-surface resources in a core area, to usufructuary rights, such as for hunting and fishing, in other areas; and rights over a larger area to participate in the management of land, through participation on regional planning and development control bodies. In addition to these tenurial rights, indigenous peoples have received a package of social and economic benefits which provide them with the necessary funds and skills to establish and service their own community infrastructure.*⁵⁶

In Canada, regional agreements are seen as a long-term strategy for indigenous communities in that it puts their interests within a stronger legal framework, and recognises that their needs cannot be met in hastily arrived-at settlements finalised because of imminent external development proposals coming from outside the indigenous communities. Indigenous peoples have pursued regional agreements,

⁵⁵ Kevin R Gray, 'The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: the Uncharted Path to Effective Self-Government', *University of Toronto Faculty of Law Review*, 52(2) Spring 1994. Also on Internet at <http://www.law-lib.utoronto.ca/law-review/utlr52-2/gray.htm>

⁵⁶ Richardson, Craig, and Boer, Part 1, pp 320-21.

according to Richardson, Craig and Boer, in order to:

- define a new legal and political relationship between themselves and Canadian governments (the federal government and the relevant provincial governments);
- establish a clear framework concerning access to and use of land and resources that accommodates the needs of indigenous peoples and other interests;
- preserve and enhance the cultural and social well-being of indigenous societies; and
- 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.

The terms of the agreements generally are that the indigenous inhabitants renounce all their claims of native title to the territory in question, and in return receive:

- fee simple title to relatively small portions of land traditionally used and unoccupied;
- usufructuary rights to hunt, fish and trap wildlife over a larger area of surrounding land;
- rights to advise government authorities, or share in the making of decisions, regarding environmental management and wildlife conservation in the regulation of non-renewable resource development;
- financial compensation for past, unauthorised use of this land and in consideration for land given up.

Richardson, Craig and Boer suggest a number of principles that may be applicable to Australian conditions:

- a regional agreement should be negotiated on the basis of the social and economic needs of indigenous peoples, in addition, or as an alternative, to traditional associations with land. If regional agreements are negotiated simply on the basis of traditional associations, then many indigenous peoples who have long been dispossessed from their lands will continue to be dispossessed and marginalised.
- an agreement should recognise and affirm existing native rights, as well as allow for native rights to be adequately defined and renewed over time.
- claims negotiations should proceed according to an agreed check-list of objectives and principles.
- negotiations should normally involve both federal and state governments. However, the federal government has the power, and should be prepared, to negotiate solely with indigenous communities if a state government is unwilling to co-operate.

- in areas not covered by a regional agreement but nevertheless containing specific sites of importance to indigenous communities, all development activity such as pastoral and mining exploration should be subject to the rights of the affected indigenous communities, continued access to the area and appointment of indigenous representatives to monitor the development work.⁵⁷

⁵⁷ Richardson, Craig and Boer, Part 1, p 324.

BIBLIOGRAPHY

MONOGRAPHS

- Australia. Department of Environment, *Natural Heritage Trust*, AGPS, Canberra, 1998.
- Horrigan B and Young S, (eds), *Commercial Implications of Native Title*, Federation Press, Brisbane, 1997.
- Queensland, Department of Local Government, Cape York Regional Advisory Group, *Our Land our Future: Cape York Peninsula Land Use Strategy: a strategy for sustainable land use and economic and social development: Stage 2 Report*, May 1997.
- Stanley J and Campbell K, *Current Administrative Structures on Cape York Peninsula*, Cape York Peninsula Land Use Strategy, Office of the Co-ordinator General of Queensland, Brisbane, and Department of the Environment, Sport and Territories, Canberra, 1995. Also available at
http://www.erin.gov.au/states/cyp_on_1/reports/lup/admin.html
- Love M, *Lighting the Wik of Change*, No 14, Issues Papers Series, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, March 1997.

CHAPTERS

- Horrigan B, 'Native Title Overview: Commercial Dimensions and Ongoing Developments', in Bryan Horrigan and Simon Young, (eds), *Commercial Implications of Native Title*, Federation Press, Brisbane, 1997, pp 2-28.
- Farley R, 'Regional Agreements as Alternatives to Mediation - What is the Commercial Impact of the Historic Cape York Agreement?' Conference Paper, *Native Title: Commercial Realities of the Coalition's Change Agenda*, Darwin, 27 August 1996, pp 4-7, cited in Bryan Horrigan, 'Native Title Overview: Commercial Dimensions and Ongoing Developments', in Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title*, Federation Press, Brisbane, 1997.
- Lane M and Chase A, 'Resource Development on Cape York Peninsula: Marginalisation and Denial of Indigenous Perspectives', *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia*, edited by R Howitt, J Connell & P Hirsch, Melbourne, Oxford University Press, 1997.

JOURNAL ARTICLES

- Australian Institute of Aboriginal and Torres Strait Islander Studies, *Native Title Newsletter*, No 3, June 1997.
- — ‘CapeYork regional agreement sets example for others’, *ATSIC News*, Autumn 1996, pp 5-6.
- ‘Chairperson Welcomes Announcement of Cape York Land-Use Agreement’, *Torres News*, 9-15 February 1996, p 5.
- Coon-Come M, ‘The right to self determination of native and indigenous peoples: the case of the Cree Nation’, Paper originally delivered at the conference *Rethinking Culture* held at the University of Montreal on 3-5 April 1992 and now on Internet <http://elias.ens.fr/surfaces/vol 2/coon-com.html>
- Dodson P, ‘Reconciliation at the crossroads’, Address to the National Press Club, April 1996. Also on Internet at <http://www.austlii.edu.au/do2/disp.pl/au/special/rsjlibrary/car/dodson.html>
- Gray K R, ‘The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: the Uncharted Path to Effective Self-Government’, *University of Toronto Faculty of Law Review*, 52(2) Spring 1994. Also on Internet at <http://www.law-lib.utoronto.ca/law-review/utlr 52-2/gray.htm>
- Horstman M, ‘Black Shadows, White Shadows, Grey Shadows: Does The Cape York Regional Agreement Provide a Model for the Reconciliation Process?’ *Arena Magazine*, No 22, April- May 1996, pp 26-31.
- Mason B, ‘Cape York alliance to defy Borbridge’, *Green Left Weekly Home Page*, <http://www.peg.apc.org/~stan/227/227p2b.htm>
- Pearson N, ‘Cape York Peninsula: the Land Needs its People’, *Arena Magazine*, No 19, October-November 1995, pp 39-41.
- —‘Something for Everyone on the Cape: A Model for Regional Land-Use Agreements’, *Walking Together*, May 1996, p 5. Also on Internet at <http://www.austlii.edu.au/special/rsjlibrary/car/wtno15-may96/>
- Richardson B J, Craig D and Boer B, ‘Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential Application to Australia - Part 1’, *Environmental and Planning Law Journal*, 11(4), August 1994, pp 320-43.
- Richardson B J, Craig D and Boer B, ‘Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential

Application to Australia - Part 2, *Environmental and Planning Law Journal*, 11(5), October 1994, pp 357-81.

- Sullivan P, 'Regional Agreements in Australia: an Overview Paper', Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Titles Research Unit, *Issues Paper* No 17, April 1997. Available on Internet at <http://www.aiatsis.gov.au/ntpapers/ntip17.htm>
- Tehan M, 'Indigenous Peoples, Access to Land and Negotiated Agreements: Experiences and Post-Mabo Possibilities for Environmental Management', *Environmental Planning and Law Journal*, 14(2), April 1997, pp 114-134.

NEWSPAPER ARTICLES

- Emerson S and McLean L, 'Borbridge threatens Cape land agreement', *Australian*, 11 April 1996, p 3.
- Haslem B, 'Greenie wooing' by Goss irks cattlemen', *Australian*, 15 July 1995, Property Section p 6.
- Menzies C, 'Cape York alliance angry at Premier', *Australian Financial Review*, 22 May 1996, p 43;
- Meryment E, 'Borbridge, Hill split over Cape', *Courier Mail*, 11 April 1996, p 1.
- Priest M, 'Graziers to talk sense', *Courier Mail*, 16 May 1996, p 2.
- Shires D, 'Borbridge blocks Cape York pact', *Australian Financial Review*, 11 April 1996, p 4.
- Williams B, 'Government will not make Cape graziers sell', *Courier Mail*, 25 May 1996, p3;
- Williams B, 'PM praises Cape pact', *Courier Mail*, 6 February 1996, p 4.
- Williams B, 'Shades of green', *Courier Mail*, 20 July 1996, p 25.
- Williams B, 'Split widens over Cape [York] trust plan', *Courier Mail*, 16 February 1998, p 8.
- Wilson B, 'Miners lash out on Cape York zones', *Courier Mail*, 20 February 1996, p 10

PARTY AND MINISTERIAL STATEMENTS AND PRESS RELEASES

- Hill R, *Media Release*, ‘Cape York Heads of Agreement’, 10 April 1996. On Internet at <http://www.environment.gov.au/portfolio/minister/env/96/mr10apr.html>.
- ‘Pastoral and Native Title - Where to After Wik?’, National Party of Australia - Queensland website, <http://www.npa.org.au/qld/cmwik/htm>
- Keating P J, ‘Cape York Agreement a triumph for reconciliation and the environment’, Press Release, 5 February 1996.
- Hill Sen R, Minister for the Environment, Hon J Anderson MP, Minister for Primary Industry and Energy, and Hon Di McCauley MLA, Minister for Local Government and Planning, ‘\$40 million in Federal funding for Cape York plan’ *Joint Media Statement*, 16 February 1998.
- Littleproud Hon B G, Minister for Environment, ‘\$40 million Cape York trust plan a boon for region’, *Ministerial Media Statement*, 16 February 1998.

APPENDIX A - HEADS OF AGREEMENT

HEADS OF AGREEMENT

THIS AGREEMENT
is made on the fifth day of February 1996

BETWEEN the CAPE YORK LAND COUNCIL ("CYLC") and the PENINSULA REGIONAL COUNCIL of the ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION ("ATSIC"), representing traditional Aboriginal owners on Cape York Peninsula,

AND the CATTLEMEN'S UNION OF AUSTRALIA INC ("CU"), representing pastoralists on Cape York Peninsula.

AND the AUSTRALIAN CONSERVATION FOUNDATION ("ACF") and THE WILDERNESS SOCIETY ("TWS"), representing environmental interests in land use on Cape York Peninsula.



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1. The CU, ACF and TWS acknowledge and affirm that the Aboriginal people, represented by the CYLC, and the Peninsula Regional Council of ATSIC, are the original inhabitants of Cape York Peninsula who are entitled by their traditional law to their traditional customs and culture, including access to areas of traditional significance.
 2. The Aboriginal people of Cape York Peninsula, the ACF and TWS acknowledge and affirm that pastoralists of Cape York Peninsula (including non CU members) are significant landholders who have existing legal rights and concerns related to their industry and lifestyle.
 3. The parties acknowledge that there exist on Cape York Peninsula areas of significant conservation and heritage value encompassing environmental, historical and cultural features, the protection of which is the responsibility of State and Federal Governments in conjunction with the parties.
 4. The parties maintain their respective positions on the East Coast Wilderness Zone but shall encourage negotiations between pastoralists in the Zone and the State Government on its creation. If the negotiations prove unsuccessful, the parties undertake to meet again to discuss the matter.
 5. All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interests in the area.
 6. Subject to clause 5, all parties are committed to the development of a sustainable cattle industry on Cape York Peninsula.
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7. The parties are committed to jointly approach the State Government to secure upgraded lease tenure for pastoral properties and restructure lease boundaries under the existing provisions of the Queensland Land Act. As a necessary prerequisite for this process, a property management plan shall be developed for each property consistent with clause 5, in consultation with existing landholders. The parties agree to encourage leaseholders to make necessary applications to the State Government for these purposes.
8. The CU and CYLC agree to make joint approaches to secure investment for development of the cattle industry through the Indigenous Land Corporation, the Rural Adjustment Scheme, and other sources.
9. The Aboriginal people agree to exercise any native title rights in a way that will not interfere with the rights of pastoralists.
10. Pastoralists agree to continuing rights of access for traditional owners to pastoral properties for traditional purposes. These rights are:
- right to hunt, fish and camp;
 - access to sites of significance;
 - access for ceremonies under traditional law;
 - protection and conservation of cultural heritage.
11. These rights shall be attached to the lease title and shall be consistent with a detailed code of conduct to be developed between pastoralists and traditional owners. The code of conduct shall ensure leaseholders are protected from public liability claims arising from the exercise of access rights.

12. The code of conduct for access shall be a minimum to apply to the region, but there shall also be provision for additional features to be negotiated between traditional owners and individual landholders.
 13. The parties agree that areas of high conservation and cultural value shall be identified by a regional assessment process according to objective national and international criteria. There shall be an independent review acceptable to all parties in the case of dispute as to whether the values are consistent with the criteria. Where such areas are identified, the landholder shall enter into appropriate agreements to protect the area under State or Commonwealth provisions which may include World Heritage listing. As part of such agreements, funds shall be provided for management of the area, monitoring of agreements and equitable economic and social adjustment.
 14. There shall be no compulsory acquisition of private leasehold or freehold land, without prior negotiation with the landowner, and unless all reasonable avenues of negotiation, including the agreements detailed in clause 13, are exhausted.
 15. The purchase of land for the protection and management of cultural and environmental values shall only take place as land becomes available commercially.
 16. The parties support the establishment of a fund for the purpose of purchasing land with identified high environmental and cultural values by the Commonwealth Government. The fund also shall contain funds for effective management of land purchased by the fund.
 17. Land purchased through the fund shall be assessed for World Heritage values.

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18. The management regime to apply to land purchased through the fund shall be negotiated between the Commonwealth and State Governments and traditional owners and shall be based on culturally and ecologically sustainable use of the land's resources to achieve Aboriginal economic viability. Negotiations will involve relevant community organisations and traditional owners on a sub-regional basis, and particularly in the following sub-regions:
- Kowanyama
 - Pormpuraaw
 - Aurukun
 - Napranum
 - Old Mapoon
 - Northern Peninsula
 - Lockhart River
 - Coen
 - Laura
 - Cooktown
 - Hope Vale
 - Wujal Wujal
19. The nomination for World Heritage listing of any land on Cape York Peninsula shall proceed only where there is a management arrangement which is negotiated with all landholders who may be affected directly by such listing.
20. The parties shall approach the Commonwealth and the State to become parties to this agreement process.
21. The parties are committed to pursuing agreements with the mining and tourism industries and with other industries with interests in Cape York Peninsula.

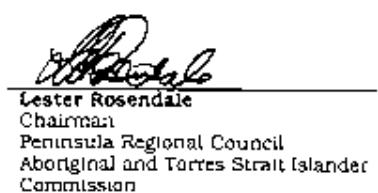
REPRESENTING TRADITIONAL ABORIGINAL OWNERS ON
CAPE YORK PENINSULA



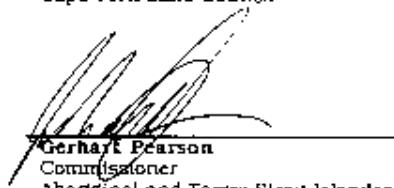
Noel Pearson
Executive Director
Cape York Land Council



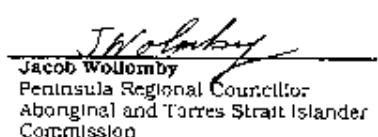
Gladys Tybingoompa
Deputy Chairperson
Cape York Land Council



Lester Rosendale
Chairman
Peninsula Regional Council
Aboriginal and Torres Strait Islander
Commission



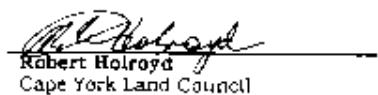
Gerhart Pearson
Commissioner
Aboriginal and Torres Strait Islander
Commission



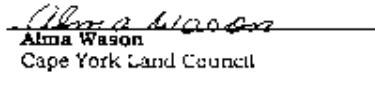
Jacob Wollomby
Peninsula Regional Councillor
Aboriginal and Torres Strait Islander
Commission



Robinson Salee
Cape York Land Council



Robert Holroyd
Cape York Land Council



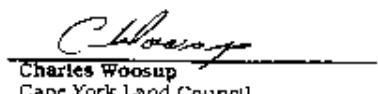
Alma Wason
Cape York Land Council



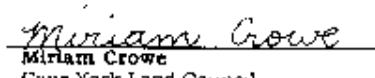
Jonathan Korkathain
Cape York Land Council



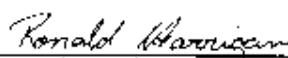
Sunlight Bassini
Cape York Land Council



Charles Woosup
Cape York Land Council



Miriam Crowe
Cape York Land Council



Ronnie Harrigan
Cape York Land Council



Edna Mark
Cape York Land Council



Michael Savo
Cape York Land Council



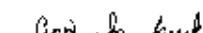
Richard Aken
Cape York Land Council



Joanne Bambi
Cape York Land Council



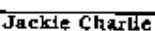
Margaret Frighty
Cape York Land Council



Ann Creek
Cape York Land Council



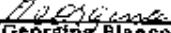
Larry Greenwool
Cape York Land Council



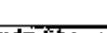
Jackie Charlie
Cape York Land Council



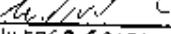
May Ballie
Cape York Land Council



Georgina Blanco
Cape York Land Council



Judy Shaun
Cape York Land Council



HILDEGARD GORDON
APUNIPIMA HEALTH BOARD

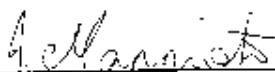
REPRESENTING PASTORALISTS ON CAPE YORK PENINSULA



John Purcell
President, Cattlemen's Union of Australia.

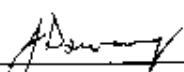


John Bock
Deputy Chairman, Peninsula Branch, Cattlemen's Union of Australia



Joy Marriott
Councillor, Cattlemen's Union of Australia

REPRESENTING ENVIRONMENTAL INTERESTS IN LAND USE ON CAPE YORK PENINSULA

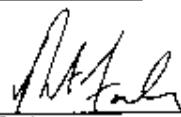


Jim Downey
Australian Conservation Foundation



Greg Sargent
The Wilderness Society Incorporated

WITNESSES TO THE SIGNING OF THIS AGREEMENT



Rick Farley
Chairman, Resources Committee, Council for Aboriginal Reconciliation

David Epworth
Cape York Land Council

David Byrne
Deputy Director, Cape York Land Council

Lew Griffiths
Cape York Land Council

Clive Quartermaine
Pastoralist, Cape York Peninsula