

RECONCILING CUSTOMARY
OWNERSHIP AND DEVELOPMENT



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The role of the Central Land Council in Aboriginal land dealings

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A snapshot

The role of the Central Land Council in Aboriginal land dealings

In a part of the Northern Territory of Australia, Aboriginal traditional landowners conduct their land dealings through the Central Land Council. A legislative framework has established the structures and procedures that govern dealings in Aboriginal land. More specifically it covers how land use agreements are negotiated and enables the funds generated to be spent to advance long-term economic and social development. Although the particular circumstances of the Central Land Council are not seen in Pacific island countries, there are nevertheless important attributes of this intermediary that may appeal to countries in the Pacific region. Most notable is that its functions of advising and facilitating traditional landowners wishing to engage with the formal economy are separate from decision making about land use. The traditional landowners retain their decision-making powers.

Key lessons from this case study are that the institutional framework of the Central Land Council:

- » is an effective and workable model for enabling an intermediary body to assist customary landowners to engage in land dealings within the formal economy
- » can provide valuable benefits to the social, cultural and economic wellbeing of communities
- » enables landowners to retain control over how to allocate revenue received
- » is well placed to facilitate initiatives for community development
- » would need to be scaled down in its size and scope of services for most Pacific island contexts.

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Brief history of Aboriginal land rights

In 1963 seven clans of Yolgnu in the Gove Peninsular of the Northern Territory of Australia objected to the mining licence the Australian Government granted allowing bauxite to be extracted from their traditional land. They brought a Federal Court case, *Milirrpum & Others v. Nabalco Pty Ltd*¹, to establish ownership of the land in accordance with traditional Aboriginal law. In 1971 it was found that the Yolgnu traditional relationship to land could not be recognised as a proprietary right under Australian common law. Consequently they did not hold a right to control access and could not prevent—or permit—mining on their traditional land.

The Australian Government commissioned Justice Woodward to conduct an inquiry into appropriate ways to recognise Aboriginal land rights in the Northern Territory. In 1974 Woodward presented his final report. He found that a land base was essential to enable Aboriginal economic development and proposed procedures for claiming, holding and dealing with traditional Aboriginal land. The report strongly recommended that mining and other development on Aboriginal land should proceed only with the consent of the Aboriginal landowners. In his view ‘... to deny Aborigines the right to prevent mining on their own land is to deny the reality of their land rights’. The right to withhold consent should be over-ridden only if the Australian Government determined that the national interest required it.

Acting on Woodward’s recommendations, the first land rights legislation in Australia, the *Aboriginal Land Rights (Northern Territory) Act 1976*, was passed by the Australian Government. In broad terms the legislation provides structures and procedures for Aboriginal people to claim, hold and manage their traditional lands. Just as the control of access to land for mining or any other form of development was central to the origins of the legislation, the right to control access is central to the Act.

¹ *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141.

Aboriginal land trusts, land councils and land dealings

Under the Aboriginal Land Rights (Northern Territory) Act, Aboriginal land is owned by the group of Aboriginal people with primary spiritual responsibility for the land according to traditional Aboriginal law. The traditional owners hold a communal title that is inalienable; it can be surrendered to the Crown, but it cannot be sold or mortgaged. The title is held by a land trust, which acts purely as a land titleholding body and grants interests to third parties only under instructions from the traditional owners.

The traditional owners hold an almost absolute right to prevent unwanted development on their land. The Australian Government's right to override the wishes of the traditional owners regarding mining projects where the national interest requires it has never been exercised.

The primary decision to lease Aboriginal land for development is made by the traditional owners of the particular land under consideration. They must decide 'as a group', but the final decision may be made in accord with Aboriginal tradition or some other method determined by the owners. All decisions must be made on the basis of informed consent.

To assist traditional owners exercise their rights to claim and manage Aboriginal land, and to broadly advance the interests of Aboriginal people, Aboriginal land councils were established under the Act. The primary responsibilities of land councils include:

- » ascertaining and expressing the wishes of Aboriginal people living in the area of the land council as to the management of Aboriginal land in that area
- » protecting the interests of traditional owners of, and other Aboriginal people interested in, Aboriginal land in the area
- » consulting with the traditional owners of, and other Aboriginal people interested in, Aboriginal land in the area regarding any proposed use of that land
- » assisting Aboriginal people within the area of the land council to carry out commercial activities (including developing resources, providing tourist facilities and engaging in agricultural activities)
- » assisting in protecting sacred sites
- » assisting Aboriginal people to make traditional land claims.

Land councils do not make primary decisions about the use of Aboriginal land; they provide information and professional advice to the traditional landowners. If the traditional owners are willing to lease land for development, the land council will act on their instructions in negotiating an agreement with the third party proposing the development. The agreement will specify the terms and conditions for granting a lease over the traditional owner's land to enable the development to proceed.

Land councils hold important secondary decision-making powers in relation to granting a lease for development on Aboriginal land. Before directing the relevant land trust to grant the lease, the land council must be satisfied that, as a group, the traditional owners have given their informed consent—that is, the council must ensure that the group understands the nature and purpose of the grant, that the terms and conditions of the grant are reasonable, and that the group agrees to the terms and conditions. In arriving at its decision to direct the land trust, the land council must also have consulted with any Aboriginal communities or groups affected by the grant, to allow them to express their views.

The Act allows a land trust to:

- » lease Aboriginal land to any person for any purpose
- » grant a 99-year headlease over a township² or
- » grant a mining exploration licence on Aboriginal land.

A lease entitles a person to enter Aboriginal land and use the leased land. It is an offence to enter Aboriginal land without a legal entitlement to do so. Land councils have developed under the Act a permit system for people without a right of entry.

Royalty allocations

When a mining lease is granted over Aboriginal land, the mining company pays royalties on the value of the minerals extracted from the land to the Northern Territory Government and/or the Australian Government. The Australian Government then pays an amount of money equivalent to these royalties from consolidated revenue into the Aboriginal Benefits Account. This money is called ‘mining royalty equivalents’.

The Aboriginal Benefits Account distributes these funds in three ways:

- » as payments to traditional owners and other Aboriginal people living in areas affected by mining
- » as community grants for the benefit of Aboriginal people living in the Northern Territory
- » as funding for land councils.

² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwth), s. 19A. Recently the Act was amended to allow a 99-year lease to be granted to an entity approved by the federal Minister for Families, Housing, Community Services and Indigenous Affairs or the Northern Territory Chief Minister. While the traditional owners must consent to this grant, the approved entity has a right to sublease the land without the need for further consent (ss. 3AA, 3AAA, 19A(13)–(14)).

Originally the distribution formula under the Act was 30 per cent to traditional owners and other Aboriginal people living in areas affected by mining, 30 per cent to community grants and 40 per cent to land councils. These percentages represent a policy decision to create some equity between traditional owners and other Aboriginal people in the Northern Territory. It dampens 'windfall' gains by traditional owners and potentially disruptive economic imbalances. To some degree, it also dampens the financial incentive for traditional owners to give consent to mining developments.

As the result of an amendment in 2006, 30 per cent continues to be distributed to traditional owners and other Aboriginal people living in areas affected by mining, but land council funding is now determined by the federal Minister for Families, Housing, Community Services and Indigenous Affairs on a performance basis and budget estimates prepared by the land councils, and the remaining funds are spent at the direction of the minister for the benefit of Aboriginal people in the Northern Territory.

This change has taken away any structural incentive for land councils to advocate mining (or other potentially high-profit development) by removing the direct link between land council funding and royalty payments. But this incentive was always small because, if traditional owners found that the land council constantly gave pro-mining advice, the trust built between the two groups would break down. This trust is central to efficient land negotiations and appreciated by mining companies, which understand its breakdown would create a barrier to future mining developments.

The funds from the Aboriginal Benefits Account that are paid for the benefit of traditional owners and other Aboriginal people living in areas affected by mining are directed to land councils, where they are passed on to royalty-receiving associations. These associations also receive any negotiated royalties paid to the traditional owners by mining companies under the terms and conditions of a mining exploration licence. These payments are for the exclusive benefit of traditional owners and are additional to the royalties paid to the Northern Territory Government and/or the Australian Government.

The royalty-receiving associations typically invest a proportion of the funds and distribute the remainder to various subcommittees, which allocate the funds to community projects or individuals. Traditional owners' receipts from non-mining leases are dealt with in a similar way.

Central Land Council

REPRESENTATION, GEOGRAPHY AND DEMOGRAPHICS

There are four Aboriginal land councils in the Northern Territory established under the Aboriginal Land Rights (Northern Territory) Act: the Northern Land Council, the Central Land Council, the Tiwi Land Council and the Anindilayawa Land Council.

The Central Land Council (CLC) represents Aboriginal people in the arid southern half of the Northern Territory. Its area of responsibility covers almost 775 000 square kilometres of remote, rugged and often inaccessible country. The major economic activities are cattle breeding on large pastoral properties, tourism and mining. There are 18 000 Aboriginal people from 15 different Aboriginal language groups in the Central Australia region. These language groups are often sorted into three major language families—Arandic, Ngarrkic and Western Desert.

GOVERNANCE OF THE CENTRAL LAND COUNCIL

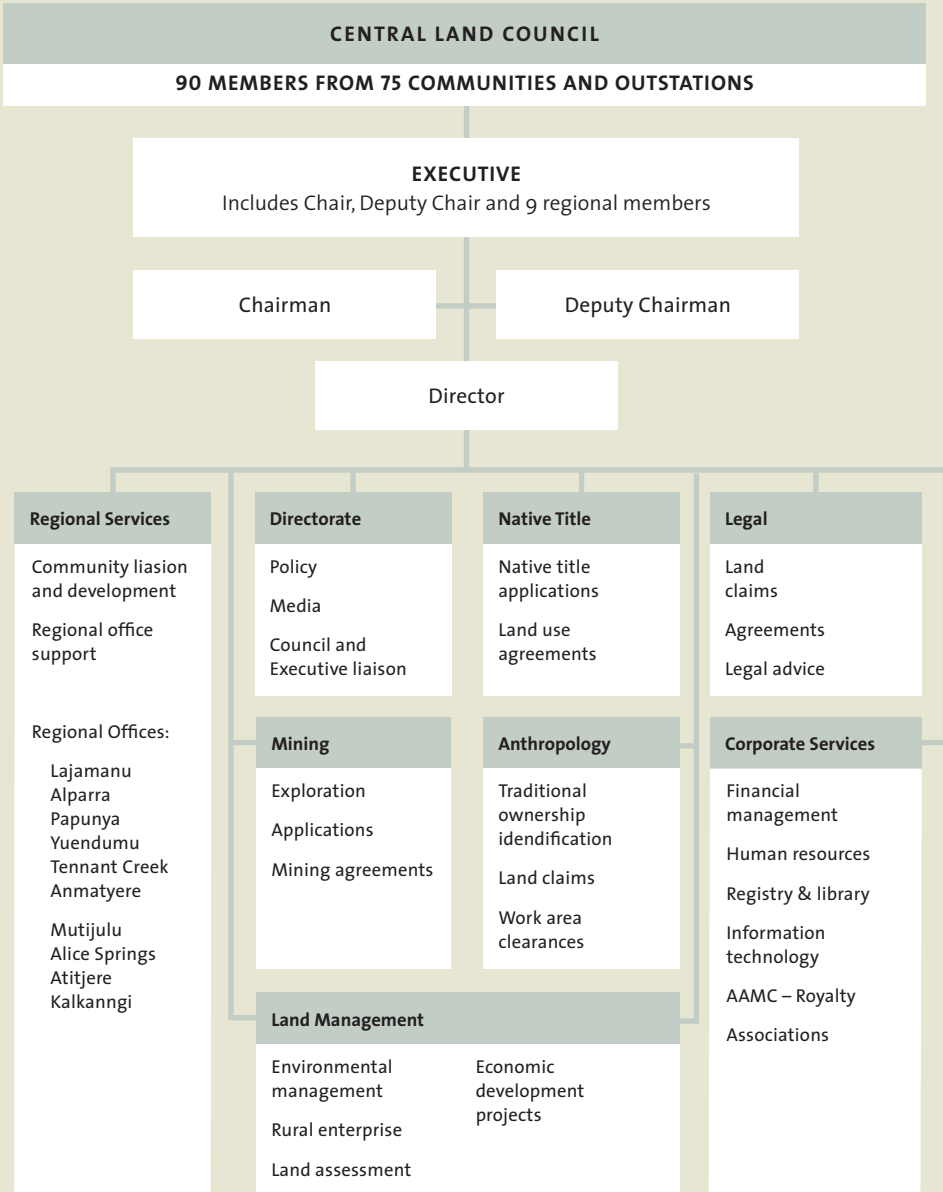
The CLC is a federal statutory authority under the Aboriginal Land Rights (Northern Territory) Act. It is governed by an elected council of 90 Aboriginal people, both men and women. The CLC area is divided into nine regions and the regional boundaries are based on the 15 language groups within the area. Elections for the council are held every three years and each region is represented by 10 delegates.

The 90 regional delegates elect the chair of the council, deputy chair and members of the Aboriginal Benefits Account Advisory Committee. The Australian Electoral Commission assists in conducting the election. The role of the Aboriginal Benefits Account Advisory Committee is to advise the federal Minister for Families, Housing, Community Services and Indigenous Affairs regarding payments to the Aboriginal Benefits Account. The 10 members of each regional delegation also elect one of their members to the Executive Committee of the council.

At the regional level, Aboriginal communities nominate their 10 delegates on a consensus basis. Apart from providing assistance to transport community members to nomination meetings, the CLC is not involved in what is essentially a community process, managed within family groups. The transparency and validity of the election and nomination processes have not been a contentious issue over the life of the CLC.

The full council meets three times a year and is the supreme policymaking forum of the CLC. The Executive Committee meets approximately monthly and holds extensive powers delegated by the council, making it the most active high-level forum. The day-to-day running of the CLC is managed by the Director, in consultation with the Executive Committee. The Director oversees about 120 staff engaged to carry out the CLC's responsibilities.

ORGANISATIONAL STRUCTURE OF THE CENTRAL LAND COUNCIL



Source: Central Land Council.

The CLC has a number of important sections that help to provide policy and legal advice to traditional owners about land dealings. These include:

- » **Legal Section**, which provides advice to traditional owners on granting leases and mining interests (exploration licences, mineral claims, mineral leases, etc.) and on their terms and conditions
- » **Mining Section**, which deals with exploration and mining applications, liaises with mining companies and assists traditional owners in drafting mining agreements
- » **Anthropology Section**, which assists in identifying traditional owners and assists traditional owners in protecting sacred sites
- » **Land Management Section**, which assists traditional owners in identifying, creating and managing opportunities for sustainable economic development on their land
- » **Community Development Unit**, which specifically assists traditional owners to create and manage community development projects for the benefit of Aboriginal people and communities
- » **Aboriginal Associations Management Centre**, which provides administrative support to royalty-receiving associations, which hold mining royalties for the benefit of affected areas.

Exploration and negotiating for consent

Exploration and mining on Aboriginal land are subject to both the Northern Territory Mining Act and the federal Aboriginal Land Rights (Northern Territory) Act. The federal Act prescribes the negotiations and processes leading to Aboriginal land use agreements for both the exploration and extraction of minerals.

A mining company wishing to explore for minerals on Aboriginal land within the CLC area must first apply to the Northern Territory Minister for Mines for an exploration licence under the Mining Act. The minister cannot grant a licence until the CLC has given its consent, acting on the instructions of the traditional owners of the affected land.

The process of negotiating for consent is initiated when a mining company submits a written application for a licence to the CLC. The application must provide detailed information, including an outline of the proposed exploration program, period of activity, techniques to be used, and the general effect on the land, including any potential environmental and social impacts. The application must also include estimates of the cost of exploration, the geological potential of the area and proposed payments for exploration activities.

When the CLC accepts the application an initial 12-month negotiation period commences. With mutual consent this may be extended by 12 or 24 months. Within this period the CLC must either grant or refuse to grant the exploration licence following consultations with the traditional owners.

The CLC is required to convene meetings with the traditional owners and to consult with other Aboriginal groups affected by the potential grant. The purpose of these meetings is to consider the exploration proposals and the terms and conditions of any agreement. The applicant is entitled to present its exploration proposals at the first of these meetings and to attend the first meeting where the terms and conditions of an agreement are discussed. Many meetings may be required, and the applicant's attendance at subsequent meetings depends on the consent of the traditional owners. The CLC notifies the applicant of the scheduled meetings and associated costs, which are born by the applicant.

In practice these meetings are generally held 'on country' and their number depends on the nature of the proposed activity. The Anthropology Section of the CLC plays a vital role in identifying traditional owners to ensure that all appropriate people are consulted. Meetings and discussions are conducted in accord with Aboriginal culture and may involve separate consultations with men, women and people with primary responsibility for various significant sites within the affected area.

The CLC bears the responsibility of ensuring that the traditional owners understand the nature of the agreement before they either accept or refuse consent to the licence. A meeting of the CLC delegates (or its Executive Committee) must be satisfied that the traditional owners understand the nature and purpose of the terms and conditions of the licence, that the terms and conditions are reasonable and that the traditional owners have agreed with the applicant to the terms and conditions.

The traditional owners may instruct the land council to not grant an exploration licence on some or all of an Aboriginal land trust area that is the subject of an application, which would effectively veto proposed mining on their land. In this event a five-year moratorium on negotiation commences, unless after two years the traditional owners decide to recommence negotiations in certain circumstances.

If consent is granted and ratified by the land council, it notifies the Northern Territory Minister for Mines. Before an exploration licence is granted under the Mining Act, the minister must also consent in writing to the grant and a formal deed of agreement must be signed by the applicant and the CLC.

Tanami Desert Gold Mines and Warlpiri Education and Training Trust

Within the CLC area of responsibility is the Tanami Desert, about 600 kilometres north-west of Alice Springs. It is the site of several gold mines. Over time, exploration and mining agreements have been negotiated between the traditional Aboriginal landowners, the Warlpiri people, and Newmont Tanami Pty Ltd (and its predecessors in title) relating to these mines.

In the exploration agreements, terms and conditions typically require compensation for land disturbance, best industry practice to minimise disturbance to the land and to the owners, development of the social, cultural and economic structures of the owners, access for the owners to use the land in accord with Warlpiri tradition, specification of proposed exploration work, work clearances to protect sacred and significant sites, payments for associated work clearance costs, notification of proposed access to land, and the establishment of liaison procedures between the CLC and the mining company to manage and monitor exploration activities in accord with the agreement.

The various mining agreements in the Tanami Desert were renegotiated and consolidated in 2003. The new consolidated agreement with Newmont Tanami Pty Ltd is for the life of the mines, with provision for further periodic renegotiations.

Mining operations are on a 'fly in – fly out' basis to minimise social disruption. The training given to mine employees contributes to their knowledge and understanding of the need to prevent damage to sites of cultural heritage and significance and helps to ensure cross-cultural awareness. To meet the environmental protection provisions, which reflect the wishes of the traditional owners, operations adhere to best practice initiatives in the mining industry. Among other things, they include minimal disturbance of the ground, no interference with natural water systems, the retention of natural vegetation as well as the rehabilitation of land, prevention of harm to wildlife, and monitoring and reporting on the natural environment and any impacts.

As part of the agreement Newmont endeavours to provide employment and training opportunities for Aboriginal people, especially those who live in the local region. Prevocational training and mentoring programs encourage young Aboriginal people into the industry and Newmont regularly consults the CLC about employment and contracting opportunities. A committee made up of representatives from the CLC, Newmont and the Warlpiri traditional landowners monitors the implementation of the agreement and meets about three times a year, with the cost of meetings funded by Newmont.

As part of the process of negotiating the consolidated agreement for the mines, the Warlpiri Education and Training Trust (WETT) was established and Newmont agreed to a significant increase in direct royalty payments, which are paid via the CLC directly to an Aboriginal corporation whose membership is restricted to the traditional owners. Newmont was satisfied that an increase in the royalty payments to the level requested was justified provided that the increase was directed to WETT and subject to the specific requirements identified in its trust deed. This created a synergy with the wishes of the traditional owners expressed at a Warlpiri Triangle Workshop, where a number of community members, particularly women, wanted to use royalty monies for educational purposes. The structure of WETT arose directly from these ideas, which were endorsed by traditional owners.

Kurra³ is the Warlpiri royalty-receiving association for two of the mines. It does not receive royalty-equivalent payments from the federal government, only the negotiated royalty payments from Newmont. It invests 50 per cent of all income and, after administrative costs, applies the balance on the instructions of its members. Kurra is also trustee for WETT, which receives 20 per cent of the negotiated income and the full increase in direct royalties under the consolidated mining agreement. Annual payments to WETT exceed \$1.2 million, although they vary and depend entirely on production and price. These payments are expected to continue for 5–20 years, depending on the life of the mines.

Newmont's connection with WETT is not limited to royalty payments. Representatives of Newmont are included on the WETT Advisory Committee, which also includes the Director of the CLC, education officials and other experts. Newmont is also considering funding an extra staff position in the CLC's Community Development Unit. This unit works with the trustee of WETT to develop programs that the Advisory Committee has recommended. It also coordinates consultations with Aboriginal communities in the area to map their educational and training needs.

The CLC is working with the Warlpiri community to develop longer term projects. Community consultations resulted in priority support for the development of an antenatal and early childhood centre, a youth and media project, a Warlpiri learning community, and a support program for secondary school students. Training support for the delivery of kidney dialysis is also being considered. These projects are now being developed with Warlpiri communities, the Advisory Committee and government agencies. The CLC intends to coordinate WETT projects and blend funds with existing government programs and services.

3 Kurra is a Warlpiri word with connotations of 'creative', 'spirit', 'future'.

Analysis of issues

THE RIGHTS OF TRADITIONAL OWNERS AND TRANSACTION COSTS TO THIRD PARTIES

The Aboriginal Land Rights (Northern Territory) Act provides the traditional owners of Aboriginal land considerable power to control development on their land and to negotiate the terms of land use agreements through land councils, such as the CLC. The right of traditional owners to withhold consent and the heavy transaction costs for miners have been criticised as acting as a disincentive and constraint on general economic development, particularly exploration and mining activity on Aboriginal land (Industry Commission 1991; Reeves 1988). Mining companies have indicated that it is more costly to negotiate exploration and mining agreements on Aboriginal land than on non-Aboriginal land (McKenna 1995, p. 303). To some degree, this is a necessary consequence of recognising Indigenous rights under the Act (Industry Commission 1991; Northern Territory Department of Mines and Energy 1984; Oxfam Community Aid 1999; Reeves 1988).⁴ If Indigenous peoples are to derive benefits from others using their traditional lands, there will be transaction costs associated with negotiating, agreeing terms and providing compensation for land use.

A fog of ideology shrouds much of the past analysis and debate over the Act's provisions and the extent of its transaction costs (Altman 1993; Industry Commission 1991; McKenna 1995, pp. 304, 307; Reeves 1988; Tasman Institute 1993). An ideological or political reluctance to accept that Aboriginal people should be given greater rights to control access to their land has characterised some positions. Advocates on both sides have been suspected of protecting vested interests. In large part the debate is becoming increasingly anachronistic.

During the last fifteen years [before 2005] the legal, policy and institutional environment within which decisions on mineral development take place in Australia has changed significantly. Particularly important ... have been the High Court's recognition of native title in *Mabo* and the consequent enactment of the Commonwealth Native Title Act 1993, and the development of 'corporate social responsibility' policies. The latter have led major mining companies to negotiate with Aboriginal traditional owners even in the absence of legal requirements to do so. There is now a broad policy consensus in Australia that mineral development should proceed with the agreement of, rather than over the opposition of, Aboriginal traditional owners. (O'Faircheallaigh 2006, p. 1)

This positive shift in attitude is fully supported by discussions with Newmont personnel during this case study. A senior lawyer, experienced in negotiating with the CLC under the Act, described the legislation as:

4 It has been argued that transaction costs are not operative disincentives to the formation of agreements (McKenna 1995, p. 305).

... clearly facilitating economic development and providing a well-structured framework for third parties. You know the rules; it works really well. Section 42 provides a whole process. CLC have a dedicated staff who have been there over a long period of time. That makes things easy. It is well funded to support its constituents.

This situation was contrasted with dealings with traditional owners outside the Act where things are less clear: 'it's difficult to know who you are dealing with; there are overlapping and competing claims' by traditional owners who are 'less well resourced'.

The overriding quality of the Act is its *clarity* of procedure. Another Newmont employee, who has many years of experience in negotiating exploration and mining agreements on Aboriginal land, identified the Act as providing 'certainty'. Negotiating the parameters of the mining agreement at the exploration stage 'to broadly map out the concepts' enabled the move from exploration to mining to occur 'reasonably seamlessly; its basic terms are predetermined'. It is 'easier than on land anywhere else. It is their [CLC's] responsibility to identify the traditional owners—to go out and see who the players are. I wouldn't like to contemplate a situation without the Land Council'.

Some frustration was expressed about the bureaucratic process of obtaining individual permits for the flow of Newmont mining staff into and out of the mine sites. But a satisfactory system has been worked out with the CLC. It was thought that 'in other places where Indigenous people' are involved 'an approach similar to the Act should be considered'.

SUSTAINABILITY, SUCCESSION AND RENEGOTIATION OF AGREEMENTS

Mining agreements signed by the CLC remain valid, even if the traditional owners have not been adequately consulted. The right to access and use the interest granted over Aboriginal land is specifically guaranteed. As already noted, it is the CLC's responsibility to identify the traditional owners of communally held land whose land title is held by a land trust. The sustainability, succession and renegotiation of agreements have not proved problematic.

SOCIAL AND ECONOMIC DEVELOPMENT THROUGH INNOVATIONS IN AGREEMENT-MAKING PROCESSES

The mechanisms and procedures of the Aboriginal Land Rights (Northern Territory) Act severely limit any innovative changes to the negotiation process itself. There is greater scope for creativity in terms of the substantive benefits derived from agreements and how they can be used to achieve sustainable social and economic outcomes. The CLC has been quite creative in using land use agreements as a catalyst to draw in external funding, expertise and experience to develop a deeper economic base on Aboriginal land.

The renegotiation described earlier illustrates how good social outcomes can come from the negotiation process. The potential to use negotiated royalty payments by Newmont in a constructive, sustainable way through WETT was an important factor in the CLC's negotiations to increase the level of these payments.

The CLC has created a strong link between land use revenues and innovative community development projects managed by Warlpiri traditional owners. WETT has become a vehicle to deliver tangible benefits in areas as diverse as community health, education, training and communications. Agreements are increasingly being used as more precise instruments for supporting the broad aim of building sustainable economic and social benefits. The CLC acts as an intermediary between its constituents and other stakeholders, to consult, coordinate negotiations, provide professional advice and draw in external funds to support community projects.

The Indigenous Pastoral Program also demonstrates the CLC's intermediary role. The CLC was instrumental in establishing the program with the aim of linking grazing licences to economic development on Aboriginal land. In negotiating agreements for grazing licences, the CLC often ensures that, as well as rent and monitoring rights, provision is made for local Aboriginal people to receive employment and training. The structures built on the land are often owned by the traditional landowners at the end of the lease, which provides the basis for a viable pastoral enterprise controlled and operated by traditional owners.

Applications for grazing licences are prioritised by the Indigenous Pastoral Program Steering Committee. A consultant, employed as part of the program, appraises the land, determines the viability of the applications and recommends options for traditional owners and pastoralists. The CLC arranges consultations between traditional owners, the applicant pastoralists and the consultant. The consultant has also trained Aboriginal people in corporate governance.

GENDER

The CLC consists predominately of men. The representation of women is gradually increasing, but remains in the order of 5 per cent. Women are better represented on the Executive Committee, with two women and eight men, currently elected.

Such formal representation does not adequately identify the active role Aboriginal women play in governance. In relation to land use agreements the Executive Committee's role is confined to ensuring that the traditional owners have given informed consent. In determining that consent, women play a key role. The CLC convenes separate meetings with the custodians of women's sites on the land under consideration. While it is frequently said that 'Men speak for country', women's voices are heard and respected in matters that pertain to them specifically and that concern general terms and conditions of agreements.

Women have been particularly active and effective in promoting more sustainable social and economic development financed by land use agreements. It was women in Warlpiri Triangle Meetings who spoke strongly about using royalties for education, acting as a catalyst to WETT. The WETT Aboriginal Sub-Committee comprises seven women and one man. The head of the Community Development Unit notes the consistent and effective role of Aboriginal women in the CLC area in broadening the perspective of the potential benefits that can be derived from Aboriginal land.

TRANSPARENCY AND ACCOUNTABILITY

The CLC reports annually to the federal Minister for Families, Housing, Community Services and Indigenous Affairs with fully audited financial reports. Given the substantial funds administered by the CLC and the exceptional scrutiny of the role of land councils, it is perhaps surprising that financial irregularities have not been a contentious issue for the CLC.

In negotiating land use agreements the CLC enters a potentially litigious area, particularly in the mining field. But this has very rarely been the case because of the transparent processes used. Newmont representatives noted that CLC appeared to have a very trusting relationship with traditional owners and acted as a 'fair broker', consistent with the protection of Aboriginal interests.

For the constituents of the CLC, accountability issues are more centred on transparency in controlling specific projects, using funds and identifying outcomes. This is illustrated by the Uluru Rent Money Project, funded by a significant increase in revenues for the lease of the Uluru-Kata Tjuta National Park negotiated by the CLC. Previous revenues had not left a substantial legacy for Anangu traditional owners. In 2005, the first year of the project, the council nominated three Anangu communities to benefit. The CLC ran a series of day-long community meetings and smaller discussion groups to identify community needs and priorities.

In 2006 broader consultations were held with the traditional owners. This marked the transition of effective ownership of the project from the council to Anangu. Central to the project is community involvement. At every stage—from identification of community needs to project development and implementation—Anangu are in control and direct how their funds are used. The traditional owners make specific decisions about project targets and have developed principles for the governance of the project (Box 1). The principles centre on identifying real needs, equity, transparency in how funds are used, good planning, consistency of purpose and lasting outcomes for their children.

The results of a survey to get Anangu views on the project indicate strong support for it (Box 2). To date rent money has been used to build a radio tower for a remote community, fund community members to receive dialysis in Alice Springs, and build a maintenance

workshop to develop skills and increase employment opportunities. The CLC has used the project to attract additional government funds to build a new community store and to obtain a grant (matching the input of rent money) to repair a church.

BOX 1 » ULURU RENT MONEY PROJECT: PRINCIPLES OF GOVERNANCE

- » Support projects where there is real need.
- » Share the money around—three communities supported each year.
- » Show clearly what the money is being spent on.
- » The project can't do everything.
- » The project is for bringing wide benefit to Anangu traditional owners.
- » Support projects that will last and keep going, not fall down—strong projects.
- » Anangu should stay in the places where projects are funded. Don't leave them and go somewhere else.
- » Provide support for homelands where people are living and for people who want to move back to their homelands.
- » Help Anangu for the future; help the young people.
- » Do good planning—have a good, clear concrete plan so you can build on it into the future. Plan for the long term so that young people will benefit.
- » Work under the Land Rights Act.

BOX 2 » ANANGU VIEWS ON THE ULURU RENT MONEY PROJECT

In 2007 the Community Development Unit of the CLC surveyed Anangu traditional owners about their views on the progress of the Uluru Rent Money Project. Some of their responses follow.

- » It's a good project; we can help each other. This is a better way with the money. Government can see we are doing good things with the money. This will keep the money safe and government will help more with projects.
- » I really like the project. CLC care, checking up on how things are going, making sure things are happening and people are using the money for what they said they would.
- » Anangu need to be in charge of projects, say what we want and then see the projects through. Get direct involvement from Anangu, not from outside; that way you get outcomes from the money that's around.
- » It's a good project and some people are getting things they want but, for people who are not getting something from this project, some people are sad.
- » In this project we get the money, decide how to use it ourselves and government can see we are using it.
- » This project is really good. It's giving Aboriginal people help. But this project can't do everything. Government's got to put in too.

DISPUTES

As previously noted, the Aboriginal Land Rights (Northern Territory) Act is federal legislation, and the Federal Court of Australia is the ultimate arbiter in any dispute arising out of a decision made under the legislation. Rarely have proceedings been instituted in the Federal Court between traditional owners, the Central Land Council and/or other parties.

In general, disputes are rare. Most disputes between traditional owners are dealt with through cultural processes and dialogue. Often CLC staff are not present when these disputes are resolved. Under the Act the CLC is bound to follow the instructions of traditional owners regarding land dealings. This limits the possibility of disputes between the CLC and traditional owners.

Relevance of the CLC model for the Pacific

The Aboriginal Land Rights (Northern Territory) Act and the basic functions of the CLC are able to be adapted for Pacific contexts. The central element underpinning the success of the CLC is that it is an intermediary *advisory* body between investors and landowners, with traditional landowners retaining the power to make decisions about their land. Traditional owners retain the right to consent to the development of resources on their land and are able to negotiate the terms and conditions of their economic development.

However, in the Pacific context the challenge is to scale down the CLC's structure while retaining its effectiveness. Beyond providing a stable corpus of legal expertise, the CLC's core functions of identifying the relevant traditional owners and confirming they have given informed consent to grant licences or leases over their land should be preserved in any adaptation. These functions not only protect the interests of the owners but also provide security for third parties. The CLC effectively serves as a corporate shield. It enables landowners to meet with third parties directly and to conduct their inside-business privately. It enables third parties to rely on the agreement and interest granted without any need to inquire into background processes.

Importantly for the Pacific, countries will need legislation that prescribes clear representative structures and procedures, together with pathways for negotiating land or marine use agreements and for distributing revenues. Such legislation maximises transparency and provides independent judicial review as an ultimate means of accountability.

Lessons

ESTABLISH AN INSTITUTIONAL FRAMEWORK THAT LEAVES LAND CONTROL AND OWNERSHIP WITH THE TRADITIONAL LANDOWNERS

LESSON 1

It is feasible to have an institutional framework where decision-making powers and control over land are retained by the traditional owners and an intermediary body is used to facilitate their engagement with the formal economy.

A key characteristic of the CLC is that it is an advisory body and does not mix its advisory role with decision-making powers. The CLC does not have authority to act on behalf of landowners in negotiating agreements. Instead, all decisions are made by landowners. The CLC's primary role is to facilitate negotiations, provide advice for the benefit of landowners, and ensure that all landowners are fully informed on the nature of the negotiations. Traditional owners are able to retain their cultural decision-making processes, including making decisions as a group.

ENSURE THE LEGISLATION AND RESOURCES ADEQUATELY SUPPORT A LAND COUNCIL ARRANGEMENT

LESSON 2

To duplicate a land council arrangement in the Pacific, the potential revenues from developing the land would need to be taken into account when developing its design and scope of services.

LESSON 3

Any legislation to establish a land council arrangement should be carefully designed to facilitate the particular types of land use agreements anticipated.

For funding, the CLC depends directly on mining royalties of about \$15 million a year. This arrangement is supported by the mineral prospectivity of the CLC area. In the absence of such prospectivity in the Pacific, an organisation the size of the CLC would not be feasible. Similarly, the highly detailed and prescriptive Aboriginal Land Rights (Northern Territory) Act is designed to facilitate land use agreements for mineral exploration and extraction. While the level of CLC funding may seem large, the majority of stakeholders accept that a well-resourced organisation is necessary for the success of land negotiations with the minerals sector.

CONSIDER THE VALUE OF SERVICES AN INTERMEDIARY BODY CAN PROVIDE

LESSON 4

An intermediary body can provide valuable services for landowners wishing to engage with the formal economy, with benefits for their social, cultural and economic wellbeing.

The CLC provides landowners with a range of valuable services. These include facilitating the negotiation of agreements, recording and identifying traditional owners, and providing professional advice and assistance in managing land for the social, cultural and economic benefit of the Indigenous communities. The services provided by the CLC have delivered good outcomes, with developments contributing to the economic and social welfare of communities, while protecting traditional and cultural interests.

LEAVE RESPONSIBILITY FOR MANAGING AND DISTRIBUTING RETURNS WITH THE LANDOWNERS

LESSON 5

By insulating the intermediary body from the proceeds of land use, landowners retain control over distributions, resulting in responsible reinvestments and community programs.

Importantly the CLC has not been granted the authority or power to decide how to distribute funds that accrue to landowners. Instead, proceeds are passed on to royalty-receiving associations, and these are under the control of the landowners. Typically some of the proceeds are reinvested, with the balance distributed to community projects or individuals.

MANDATE THAT REVENUES ARE USED FOR COMMUNITY DEVELOPMENT

LESSON 6

The intermediary body is well placed to provide additional services for community development.

The CLC was never provided with a statutory function to pursue community development as a specific objective, but a specialist unit was created within the CLC to coordinate consultations with Aboriginal communities on community development needs. This has been beneficial. However, there are concerns that the community development objectives fall outside the CLC's mandate. In the Pacific context, it might be preferable to have a statutory provision to promote the use of revenues for sustainable community development. Ultimate control over community development projects and the use of funds for such purposes should remain with the traditional owners.

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