Property Rights of Wik People to Timber Resources on Cape York Peninsula, Australia

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Wik people on Cape York Peninsula have expressed interest in forestry as a means to generate local income and employment; however, their legal rights to timber resources has not previously been methodically analysed. Within an 841,500 ha portion of traditional Wik lands, defined by the Aurukun Shire lease and part of Mining Lease 7024 in Cook Shire, there are four land tenure-title combinations on which the rights of Wik people to timber varies. Their timber rights are most comprehensive on native title land on Aurukun Shire lease, where commercial timber harvesting could be undertaken without a permit from or payment of royalties to government. On parts of Aurukun Shire lease where there are no other titles or interests, Wik people must apply to the Queensland Department of Primary Industries - Forestry for a commercial harvesting permit and could be directed to pay royalties for harvested timber. On mining leases in Aurukun Shire lease land and in adjoining Cook Shire, the rights of Wik people to timber are least comprehensive. In addition to the need for permits and the potential that royalties would be payable to government, the rights of Wik people are also subject to the rights and obligations of mining companies. Under the *Aboriginal Lands Act 1991*, Aurukun Shire lease land will be transferred to Aboriginal freehold at an undetermined future point in time. If timber rights are transferred with the land, Wik people will have the same comprehensive rights to timber over all of Aurukun Shire as they presently do on native title land, with the exception that these rights are still subordinate to those of the mining company holding the mining lease within Aurukun Shire. Future court rulings, legislation, and issuing of leases within traditional Wik lands can alter the property rights Wik people have over timber resources.

1. INTRODUCTION

Over many decades, a combination of generally well-intentioned but misdirected government policies and a lack of meaningful employment opportunities have created a cycle of boredom,

alcohol abuse and violence in indigenous communities on Cape York Peninsula (CYP) in far north Queensland, Australia (Department of the Premier and Cabinet 2000; Pearson 2000). Today, these communities are typified by populations with low personal and community independence and self-esteem, low education and skill levels, low incomes, high incidences of preventable diseases, and life expectancies that are 20 years below the Australian average (Balkanu c1999). While racism and trauma associated with dispossession are important explanations of the predicament of indigenous people on CYP, it is passive welfare that is blamed for the rapid decline of these communities into social crisis since the 1970s (Pearson 2000). Facing such social disfunctionality, non-indigenous Australians would probably choose to migrate to another region. However, indigenous Australians, including those on CYP, choose to continue living in remote communities because they wish to live on their traditional lands (Manning 1997). This presents Australian governments with a policy choice: maintain remote indigenous communities on welfare payments or seek and support ideas to overcome the lack of economic opportunities. The latter has been the preferred option of both the Queensland and Federal Government, confirmed in recent years for the CYP region by policy initiatives such as the *Cape York Peninsula Land Use Strategy* (CYRAG 1997) and *Cape York Partnerships* (Department of the Premier and Cabinet 2000).

Aurukun, on the western coast of CYP, is officially home to about 900 people, including 800 Wik, Wik-Way and Kugu people[1] (referred to hereafter as Wik people) (ABS 2002). Like other indigenous communities on CYP, Aurukun has experienced serious social problems over the last few decades. Recently however, the tide of social ill has begun to turn. Wik people have placed restrictions on the sale of alcohol in Aurukun and elders aspire to increase the economic independence and self-reliance of their people. Balkanu Cape York Development Corporation (Balkanu) representatives of Wik people in Aurukun Shire have identified the timber resources in the vicinity of Aurukun as one potential engine with which to drive the elders' vision. A large proportion of this forest is on mining lease tenure, which is destined to be cleared as bauxite mining proceeds on CYP.

Balkanu has invited the author to undertake an assessment of forestry opportunities for Wik people within a study region outlined in Figure 1, which encompasses Aurukun Shire lease

[1] Because of inadequacies in the national census methodology, this is likely to be an underestimate of the true population of indigenous Australians in Aurukun. It has been suggested that the actual population of the town exceeds 1000.

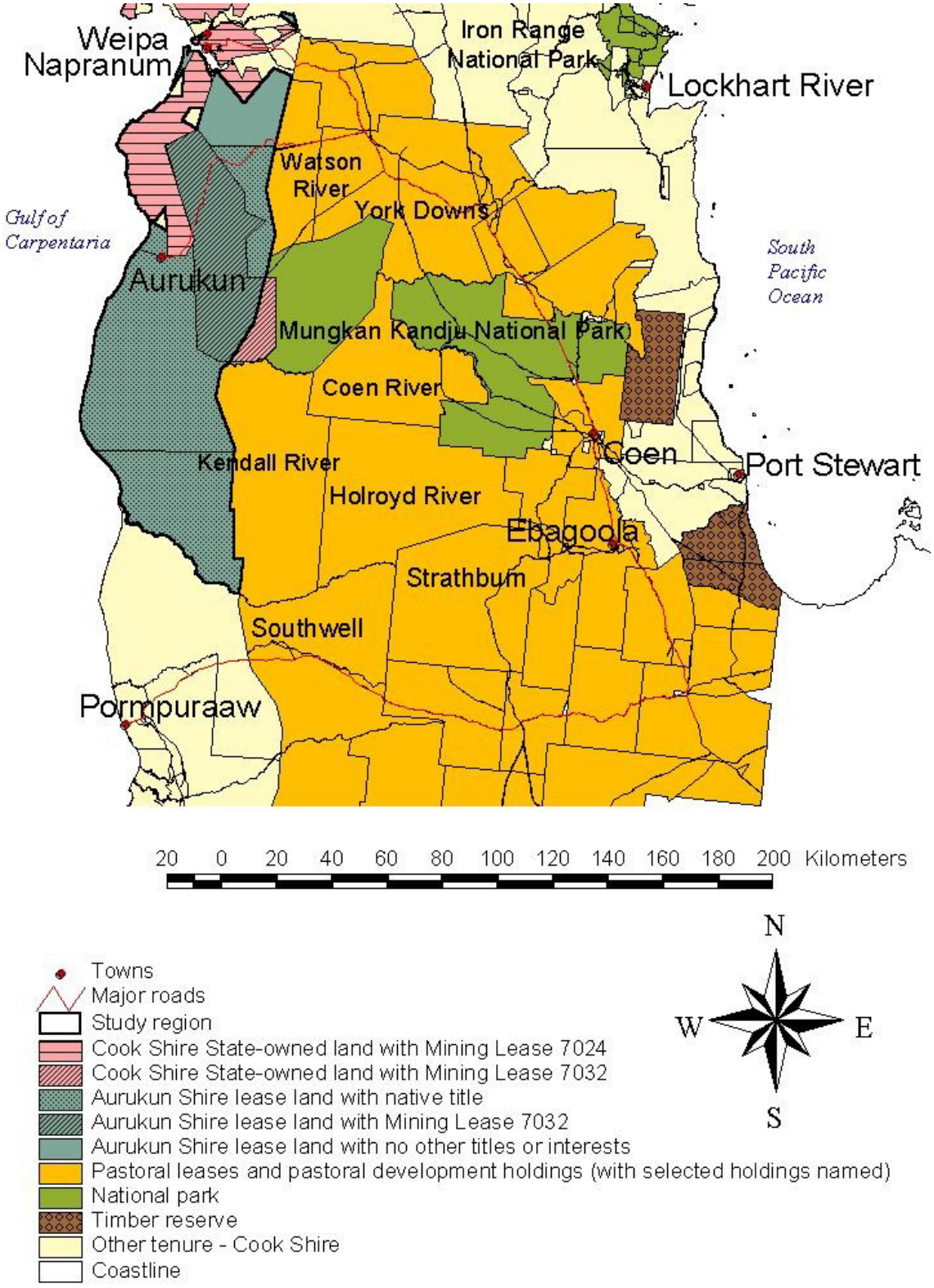
land, and that part of Mining Lease 7024 in Cook Shire that adjoins the north western boundary of Aurukun Shire. As reported in Table 1, there are four land tenure-title combinations in this region, which together include 420,000 ha of the tall Darwin stringybark (*Eucalyptus tetrodonta*) forest types that have been identified by the Queensland Department of Primary Industries – Forestry (DPI Forestry) as having commercial timber production potential (Wannan 1995). A timber inventory by the author suggests that average 'compulsory sawlog'[2] volumes in these forest types are between about 3 m^3/ha and 7 m^3/ha. In his PhD thesis, the author is assessing the potential for forestry in Aurukun to be social welfare improving in terms of employment and income generation, and reduced welfare dependency of Wik people, subject to particular cultural and environmental constraints.

The property rights Wik people have over timber resources will have a major impact on their opportunities to establish a forestry industry, and therefore opportunities to generate social benefits. The size of the industry, potential profitability and ability to raise capital will depend on factors such as: whether permits are necessary for commercial harvesting; whether royalties for harvested timber are payable to government; the regulations on timber harvesting; and the duration, exclusivity, transferability and divisibility of rights to timber. However, the legal rights of Wik people to timber resources have not previously been analysed methodically. The purpose of this paper is to discuss the characteristics (comprehensiveness, exclusivity, duration, transferability and divisibility) of property rights of Wik people to timber resources.

The paper begins by describing the methods of this research into property rights. The property rights of indigenous Australians since European settlement are then reviewed. Next rights conferred by native title in Australia are discussed generally, with particular emphasis on rights to flora, fauna, minerals and petroleum. The characteristics of property rights of Wik people to timber resources in the study area are then analysed.

[2] DPI Forestry defines a compulsory sawlog to be a log with a minimum small-end diameter of 30 cm, greater than or equal to 2.4 m in length and with little defect (DPI Forest Service 1994).

Figure 1. Land tenure on central Cape York Peninsula, far north Queensland, Australia



Source: Generated by the author in ArcView geographic information system software. Spatial data provided by the Queensland Department of Natural Resources and Mines.

Table 1. Area of commercially important forest types by land tenure-title combination within the study region

Land tenure-title combination	Total area (ha)	Area of commercially important forest types (ha)
Aurukun Shire lease with no other titles or interests	69,900	9,700
Aurukun Shire lease with Mining Lease 7032	165,200	138,600
Aurukun Shire lease with native title	503,000	180,200
Cook Shire with Mining Lease 7024	103,400	91,700
Total	841,500	420,200

Note: Areas have been rounded to the nearest 100 ha.

Source: Areas estimated by the author using ArcView geographical information system software. Spatial data provided by the Queensland Department of Natural Resources and Mines.

2. METHOD OF RESEARCHING THE PROPERTY RIGHTS OF WIK PEOPLE TO TIMBER RESOURCES

The property rights of Wik people are dependent upon the legal interpretation of numerous pieces of Queensland and Federal Government legislation, past and pending native title court rulings, and continuing negotiations between representatives of Wik people and the Queensland Government. The author is not trained in law, although he has reviewed legislation and court rulings that will or may affect forestry activities in Aurukun. Wherever possible, government experts in land tenure and property rights issues have been consulted during the preparation of this paper. However, government officers responsible for administering various Queensland and Federal Government Acts do not wish to be construed as providing legal advice, are reluctant to provide interpretations of particular Acts and requested to remain anonymous. It was suggested that an interdepartmental government working group with legal advice would have to be established before an official government response regarding the rights of Wik people to timber resources could be formulated. Several government officers suggested the author contract a lawyer to undertake the review of Wik property rights to timber.

This paper is based on the author's understanding of relevant legislation and court rulings. It should not be regarded as legal advice. Given the complexity of native title, Wik people should consider obtaining professional legal advice before establishing any commercial industry utilising timber resources. Discussions with government, mining leaseholders and potentially other stakeholders (e.g. environmental) may also be beneficial in minimising the potential for future conflict over forest management.

3. EVOLUTION OF RIGHTS OF INDIGENOUS AUSTRALIANS SINCE 1770

When Captain Cook 'discovered' and lay claim to Australia for the British Crown in 1770, he declared the land *terra nullius*. This was possible despite Cook's own encounters with indigenous Australians because, at that time, the doctrine of *terra nullius* also applied when the indigenous inhabitants were considered 'backward' (Butt and Eagleson 1998). The British Crown effectively acquired the 'radical'[3] or ultimate title to all of Australia. Crown ownership of all land to the exclusion of all others was confirmed by High Court judgements in 1959, 1969, 1975 and 1988[4] (Butt and Eagleson 1998). Indigenous Australians had their traditional property rights to land and resources stripped from them, and defending their lands was unlawful. '[S]ince the inhabitants were regarded as primitive, there was assumed to be no local law already in existence; so the law of England became the law of the territory' (Butt and Eagleson 1998, p. 22). This allowed all other forms of tenure to land to be imposed over the traditional lands of native Australians. The colonists, therefore, had legal justification for exploiting the resources of indigenous peoples, and even for removing them from their lands (Dodson 1994a).

The lack of indigenous rights in Australia continued into the 1960s when the mining boom of that time brought industry into remote parts of Australia where relatively intact indigenous cultures were encountered. This period also coincided with a reinvigoration of the fight of indigenous Australians for social and land rights, which closely followed the civil rights movement in the United States. In 1967, Australian Aborigines and Torres Strait Islanders were granted Australian citizenship, which conferred the right to own land and the right to

[3] Radical title, in English law, is the title the Crown takes as political sovereign and underlies all titles granted by the Crown. It was not until the High Court judgement in *Mabo v State of Queensland (No 2) 1992* that indigenous Australians were legally recognised as the original inhabitants of Australia and, therefore, the Crown's radical title did not give absolute and exclusive ownership of land to the Crown.

[4] None of these cases dealt specifically with the merits of an Aboriginal claim to traditional lands.

vote. In 1968, the people of Yirrkala on Gove Peninsula in the Northern Territory became the first indigenous Australians to take their fight for property rights to their traditional lands to court (Dodson 1994b; Butt and Eagleson 1998); however, the 1971 Northern Territory Supreme Court judgement went against the claimants on the basis that the land was *terra nullius*. Nevertheless, the fight for land rights on the Gove Peninsula marked the beginning of a new era of land rights activism and assertion of indigenous rights generally in Australia.

Limited reinstatement of land rights to indigenous Australians took place between 1966 and 1974 in South Australia, Western Australia and New South Wales, where land was leased to indigenous communities through land trusts, although these did not confer title to land (Peterson 1981). The *Aboriginal Land Rights (Northern Territory) Act 1976* is regarded by experts in indigenous affairs to be the first granting of substantial land rights to indigenous people in Australia (Peterson 1981). Under this *Act*, lands in the Northern Territory already occupied by indigenous people were immediately placed into a land trust holding the land title as inalienable freehold. Only the Commonwealth Government has the power to acquire the land or overrule the decisions of traditional owners, and then only if it can be demonstrated to be in the national interest. However, while progress had been made in the Northern Territory, indigenous Australians continued to struggle to have their property rights to land and natural resources recognised elsewhere in Australia.

Nowhere was the struggle for Aboriginal land rights more thoroughly opposed than in Queensland, which in 1981 was regarded as the only State in which Aborigines had no immediate prospect of any form of land rights (Peterson 1981). In the 1989 Queensland State election, the Goss Labour Government came into power, heralding the first electoral defeat for the incumbent National Party for almost 30 years. Queensland entered a period of social, environmental and indigenous land rights reform. In 1991, the Queensland Parliament passed new legislation relating to Aboriginal rights to former Aboriginal Reserve land in Queensland. The *Aboriginal Land Act 1991* and the *Torres Strait Land Act 1991* created a land claim process for the transferring and granting of land to Aboriginal land trusts. Land that is required to be transferred to Aboriginal freehold at an undetermined future point in time under the *Acts* includes:

- Aboriginal or Torres Strait Islander reserve land;
- land in a deed of grant in trust (DOGIT) for Aboriginal or Torres Strait Islander people;

- Aurukun Shire lease land;
- Mornington Island lease land; and
- land declared by a regulation to be transferable land. (The *Aboriginal Land Act 1991* and the *Torres Strait Land Act 1991* specify what land may be declared available for transfer.)

The last decade of the 20th century marked a fundamental shift in the recognition of property rights of indigenous Australians to land. The landmark High Court ruling in *Mabo v State of Queensland (No 2) 1992* legally recognised indigenous Australians as the first inhabitants of Australia and introduced native title to Australian law. Another important High Court judgement was delivered in the *Wik Peoples v State of Queensland and Others 1996* case, where it was declared that native title could coexist with pastoral leases. Two pieces of Commonwealth legislation, the *Native Title Act 1993* and the *Native Title Amendment Act 1998*, established a process by which indigenous Australians could obtain native title, and reduced uncertainty arising from the Wik case, respectively.

4. RIGHTS CONFERRED BY NATIVE TITLE IN AUSTRALIA

Together, the Mabo and Wik Cases, and the *Native Title Act 1993* and *Native Title Amendment Act 1998*, established a framework for the application for native title, determining the exclusive existence or co-existence of native title on particular land tenures, protecting native title, and specifying procedures for negotiating future land uses that may affect native title. However, no *Act* or court ruling has specified exactly what rights are conferred by native title. Instead, it has been left for the detail of native title rights to be determined on a case-by-case basis, depending on the local law and custom of each indigenous community claiming native title. For example, one group's entitlement may be to traverse the land for periodic gathering or harvest of bush foods, while another group's rights may be exclusive and constant occupation and use of the land (Brennan 1998).

The Mabo decision does make it clear, however, that Aboriginal tradition is not a fixation of the past. As Justices Deane and Gaudron concluded, provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land (Bennett 1996). For example, the use of present day tools in harvesting plants and animals, including firearms, boats and nets made of present-day materials, still comprise the exercise

of a traditional right, albeit in a modern way (Sweeney 1993). As Bennett (1996, p. 7) explained, it is not the tools used at the time of European settlement for undertaking particular activities that separates native title hunting, fishing and gathering from other forms of the same activities. 'Rather it is the knowledge of what and what not to hunt, fish or gather; when and when not to hunt fish or gather it; where and where not to hunt fish or gather it; who should and who should not hunt fish or gather it; and how to find it'. Traditional knowledge also places limits on the human predation of some species.

The Wik case determined that where native title rights are found to co-exist with the rights of the lessee on a pastoral lease, the only native title rights that can coexist are those that are not inconsistent with the rights of the pastoralist. 'It may be, for example, that rights to visit sacred sites, hold ceremonies and collect native foods will not be seen as inconsistent with the pastoralists' rights' (ATSIC 1997, p. 3). Where there is any inconsistency with the pastoralist's rights, the pastoralist's rights override native title (ATSIC 1997). The native title holder cannot, for example: exclude the holder of the pastoral lease from the area or use of the area; interfere with the ability of the pastoralists livestock to take advantage of the pasture or water sources on the lease; interfere with pastoralist's privacy on the homestead; or impede the pastoralist's right to build improvements on the land, such as fences, gates and windmills (ATSIC 1997).

4.1 Rights to Flora, Fauna, Minerals and Petroleum Conferred by Native Title in Australia

There remains much uncertainty about whether native title in Australia includes rights to natural resources other than land, such as minerals, fauna and timber, including non-traditional uses of those resources. After killing and consuming two crocodiles with other members of his traditional group, Murrandoo Yanner was charged with the offence of taking fauna without a licence or other lawful authority to do so under Queensland's *Fauna Conservation Act 1974*, since replaced by the *Nature Conservation Act 1992*. The resulting *Yanner v Eaton* case went all the way to the High Court of Australia, where it was judged on 7 October 1999 that the Queensland legislation did not extinguish the right of legitimate native title holders to hunt game in the areas in which native title is held by that group or individual (Horrigan and Young 1999). The *Nature Conservation Act 1992* states, with

limited exceptions, 'all protected animals[5] are the property of the State', which was interpreted by the High Court as conferring something less than comprehensive and exclusive ownership of the resource onto the State. Horrigan and Young (1999) asserted that the implications of this judgement are unlikely to be limited to native title hunting rights and that other natural resources that are believed to be comprehensively and exclusively the property of the Crown, such as minerals and timber (e.g. on lands under the *Forestry Act 1959* in Queensland), should at least be investigated in the light of the Yanner decision.

Yanner v Eaton 1999 was a case about native title hunting rights. Crocodiles had, since time immemorial, been hunted and consumed by Murrandoo Yanner's clan. But, what about rights to resources that had not traditionally been exploited, and rights to large-scale (commercial) exploitation of resources that had only traditionally been exploited on a small (non-commercial) scale? With regards to ownership of minerals and petroleum, the present position of the Western Australian, the Northern Territory and Queensland Governments is that these resources are comprehensively and exclusively the property of the Crown (Sheiner 2001). In 2002, this position was upheld by the High Court in the *Western Australia v Ward* (Mirruwung Gajerrong) case, on appeal from the Federal Court. The High Court ruled that evidence from the indigenous claimants did not demonstrate a native title right to ownership or the right to use (e.g. extract and process) minerals and petroleum (Strelein 2002). 'The justices seemed to suggest there would be no native title right because native title holders had not demonstrated laws and customs related to the use of minerals. This reasoning seems to reflect a 'frozen in time' approach to the laws and customs of indigenous people' (Strelein 2002, p. 7). This reasoning was described by Cape York Peninsula indigenous leader and lawyer, Noel Pearson, as a 'great travesty [of justice] for Australia' (Pearson 2002).

> It is not the High Court's ruling that partial extinguishment of native title is possible in Australian law, nor that native-title holders do not own the petroleum or minerals on their traditional lands, that is so disappointing about this decision - it is their anthropological rather than common law conception of native title (Pearson 2002).

Pearson (2003) asserted that the High Court Mirruwung Gajerrong judgement was not only at odds with the Federal Court's earlier judgements in the case, but also with the implied

[5] Defined by the *Nature Conservation Act 1992* as an animal prescribed under this *Act* as threatened, rare or common wildlife.

meaning of native title in the High Court's *Mabo v State of Queensland 1992* judgement, and the intentions of Federal Parliament in the drafting of the *Native Title Act 1993* and the *Native Title Amendment Act 1998*. The confusion over rights conferred by native title appears to have its origin in a key phrase in Justice Brennan's judgment in Mabo (and carried into the *Native Title Act 1993*), to the effect that *native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory*. Pearson (2002) remarked that this phrase is correct in describing the internal dimension of communal native title (the rights of particular members of the community within that community) but misleading if it is taken as describing its external dimension (the rights held by the community as against the world).

> Practitioners and judges have taken from this passage - strictly correct, but only half accurate - the concept that native title is constituted by traditional laws and customs … The correct concept was established when the first native title cases in the English common law tradition were decided in the United States in the 1820s. The Supreme Court [of the United States] accorded the 'Indians' the right to possession, based upon their occupation of land - consistent with the common law. The only relevance that the traditional laws and customs of the 'Indians' had was in governing the allocation of rights, interests and duties within their tribe … Therefore, properly understood, the possession of the indigenous peoples of Australia at the time of sovereignty included ownership of the fullest beneficial title to the land, which included ownership of all of the subsurface petroleum and minerals (with the probable exception of those precious metals that remained in the prerogative of the Crown). This title was, after Mabo, susceptible to extinguishment by valid act of the legislature … The proper task of the common law courts today, therefore, is to start from the position of their original, unimpaired possession at the time of sovereignty (Pearson 2002).

Meyers (2000) observed that the Federal Trial Court and Full Federal Court judgements in the Mirruwung Gajerrong case agreed that where native title in Australia includes the right of occupation (determined on a case by case basis), this creates an interest in land or possessory native title[6]. This is distinct from native title rights (such as the right to hunt and fish). Possessory native title should confer a generally unencumbered right to manage and determine uses of the land as native title holders see fit to support their economic and cultural development, as well as diminished sovereign rights to manage the land, in the same manner as holders of non-Aboriginal freehold title in Australia (Meyers 2000). Meyers explained:

[6] The High Court's judgement in 2002 did not reject this argument (Strelein 2002).

> native title holders asserting exclusive possession to the land need not specifically prove each and every beneficial use associated with the land. Rather, the prescript announced in *Mabo (No 2)* that native title is given its meaning by the traditions and customs observed by the claimants, means that *in a case of exclusive possession, those customary and traditional uses of the land define the area under claim, not the extent of the rights associated with exclusive occupancy of the land* (Meyers 2000, p. 6, original emphasis).

To date, no Australian native title claimants have been successful in obtaining rights to minerals and petroleum resources, or rights to commercially harvest fishery and timber resources. Indigenous rights to benefit economically from these resources will certainly continue to be fought over in Australia's courts.

5. PROPERTY RIGHTS OF WIK PEOPLE TO TIMBER RESOURCES

The characteristics of property rights that Wik people hold over timber resources differ between the tenure-title combinations within the study region. There are currently four distinct combinations of land tenure and title within the study region and the *Aboriginal Lands Act 1991* established a process by which Aurukun Shire lease land will, at an undefined future point in time, become Aboriginal freehold. The latter also has implications for the property rights of Wik people to timber resources.

5.1 Property Rights of Wik People to Timber Resources on Aurukun Shire Lease Land With no Other Titles or Interests

Aurukun Shire was established by the *Local Government (Aboriginal Lands) Act 1978* as a 50-year lease to Aurukun Shire Council. The *Act* describes the Council of Aurukun Shire as the trustee of the lands for all people residing in the Shire. Under the *Act*, the Council of the Shire of Aurukun has all the functions, powers, duties and obligations of any ordinary local government authority in Australia. The lease still stands.

Rights of Aurukun Shire Council and the Wik people to natural resources in Aurukun Shire are specified in sections 29 to 31 of the *Local Government (Aboriginal Lands) Act 1978*. Section 29 states:

[n]otwithstanding the provisions of any Act an Aborigine who lawfully resides in the Shire of Aurukun … :

(a) may capture, have in possession, and kill within the Shire any specimen of native fauna and consume the same to the extent necessary for the sustenance of himself and members of his family or household;
(b) may gather, dig and remove forest products, quarry material and similar material within the State to the extent that he requires the same for his domestic use'.

Under Section 30, rights to all gold and minerals within the meaning of the *Mining Act 1968-1976* and all minerals on or below the surface are held by the Crown. The same applies to petroleum, as defined by the *Petroleum Act 1923-1976*. The Crown retains free right of access to these resources and all rights of way for pipelines and conveyors for taking the resources from the land. All quarry materials are also owned by the Crown.

Section 31 specifies timber rights in Aurukun Shire. All forest products and quarry material within the meaning of the *Forestry Act 1959-1976* are reserved for the Crown, as if the Shire was a Crown holding within the meaning of that *Act*. 'Notwithstanding the provisions of the *Forestry Act 1959-1976* the Council of the Shire of Aurukun … may authorize the gathering, digging and removal of forest products and quarry material on or in the demised land for the purpose of improving the demised land or of using the same on the demised land and the same may be gathered, dug and removed to the extent duly authorized without the payment of royalty in respect thereof'.

Section 23 of the *Local Government (Aboriginal Lands) Act 1978* permits persons to enter, be in, and reside in Aurukun Shire where they are exercising a function or power of any Act, hold a lease, license, permit or other authority issued under any Act that authorizes entry to Aurukun Shire, and any persons assisting or acting under the direction or control of any persons so authorised. The *Forestry Act 1959* gives the chief executive of the DPI Forestry the power to authorise persons to enter and extract forest products and quarry materials from the forests Aurukun Shire. Therefore, Wik people do not have the right to exclude others from timber within Aurukun Shire where there are no other titles or interests.

According to Section 32, Aurukun Shire Council is not empowered to:

(a) sublet the demised land or any part of it to create any interest in the demised land;
(b) sell or otherwise dispose of land;
(c) grant any license to occupy or any other right to exclusive possession in the Shire;
(d) mortgage or otherwise charge the interest in the demised land held by it under the lease;
(e) subdivide or agree to the subdivision of the land in the Shire; and
(f) acquire or hold interest in land other than the land gazetted as Aurukun Shire.

The native title ruling in 2000 has limited the area on Aurukun Shire lease land where there are no other titles or interests to a small area around Aurukun town and the northern part of Aurukun Shire (see Figure 1). There is no practical or legal precedent for commercial timber harvesting on indigenous land tenures in Queensland. A permit could be sought from DPI Forestry to undertake commercial sawmilling (Crevatin 2000). DPI Forestry have indicated that permission is likely to be granted, but that royalties are legally payable to the Queensland government. The issue of royalty payments for forest products harvested from indigenous land tenures has not been resolved. While ownership of forest products on these lands by the State of Queensland is established by the *Forestry Act 1959* and other Acts, the *Forestry Act 1959* is less definitive about royalty payments for timber products harvested from indigenous land tenures (Taylor 2003). It was indicated that the requirement to pay royalties could be waived in the case of Aurukun Shire, or charged at a lower rate than currently charged elsewhere in the State (Crevatin 2000). Timber harvesting on Aurukun Shire lease land with no other titles or interests would be subject to environmental and other legislation that affects such activities on State-owned land elsewhere in the State, such as the *Forestry Act 1959*, the *Timber Utilisation and Marketing Act 1987*, the *Environmental Protection Act 1992*, the *Nature Conservation Act 1992*, the *Land Act 1994*, and the *Integrated Planning Act 1997*. The Code of Practice for Native Forest Timber Production on State-owned land (Environmental Protection Agency 2002) would also apply to harvesting operations.

5.2 Property Rights of Wik People to Timber Resources on Mining Lease 7032 Within Aurukun Shire and Mining Lease 7024 Within Cook Shire

The *Mineral Resources Act 1989* clearly states in Section 1.11 that 'the grant of a prospecting permit, mining claim, exploration permit, mineral development license, or mining lease…

does not create an estate or interest in land'. In other words, title to land, whether it be freehold, leasehold or any other form of land tenure, is not transferred to the mineral title holder (Hardy *et al.* 1995)[7]. According to Coe (2003), both the gazettal notice of the Special Bauxite Mining Lease 7024 to Comalco Pty. Ltd. in the Queensland Government Gazette 16 January 1965, and the Register of Land Title in Queensland – the Basic Land Information Network (BLIN) - have no reference to the background land tenure for Mining Lease 7024 in Cook Shire. Therefore, the land is most likely to be unallocated State land, although Coe conceded that it could be Aboriginal Reserve. The background land tenure for that part of Mining Lease 7032 within Aurukun Shire is Aurukun Shire lease.

The *Mining Act 1898-1965* and *Mining Act 1968-1986* (now superseded by the *Mineral Resources Act 1989*), were often inadequate for the large operations that companies were interested in establishing for mineral exploration and extraction within Cape York Peninsula (Hardy *et al.* 1995). Consequently, the establishment of Mining Leases 7024 and 7032 were facilitated by special mineral development Acts, the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957*, and the *Aurukun Associates Agreement Act 1975*, respectively. These were entered into as agreements between the mining company and the government. The conditions on royalty payments, extent of mining lease and length of the term of the lease were individually stipulated within each *Act*. If the terms and conditions of these *Acts* differ from the *Mineral Resources Act 1989*, then the special agreement *Acts* prevail to the extent of the inconsistency (Hardy *et al.* 1995). Determining whom holds the rights to manage, harvest and sell timber resources on these Mining Leases requires reference to the special mineral development *Acts*.

The *Aurukun Associates Act 1975* is an agreement between the Queensland Government and Tipperary Corporation, Billiton Aluminium Australia B.V. and Aluminium Pechiney Holdings Pty Ltd. In the Schedule, Part III, Section 2 of the *Act*, lessees are given the right to 'disturb those parts of the surface of the [Aurukun] Reserve included in the said Special Bauxite Mining Lease to the extent necessary to enable them to exercise all the rights and powers granted to them pursuant to this agreement subject always to the terms of the agreement entered into between the Director as trustee of the Reserve and the companies'.

[7] Mining titles only transfer rights to extract and sell or process the minerals, and the right to use and occupy land (under particular conditions) in order to realise extraction of the minerals.

It appears that the granting of surface rights to the mining companies was intentionally limited by the Queensland Government. For example, Part III, Section 20 of the *Aurukun Associates Act 1975* states that the Director of the Department of Aboriginal and Islander Advancement (now Department of Aboriginal and Torres Strait Islander Policy) is authorised to permit persons to depasture stock and hunt game on the mining lease, so long as these activities do not interfere with the rights and obligations of the companies under the *Aurukun Associates Act 1975*. In Part III, Section 25, the mining company is permitted to utilise timber on the lease for construction, erection and maintenance of plant buildings, roads and other works necessary to directly or indirectly carry out their operations, without payment of a royalty to the Queensland Government, subject to permission from the Director of the Department of Aboriginal and Torres Strait Islander Policy and the Conservator of the Forests (DPI Forestry). Schedule 3 of the *Act* states that the companies shall 'not disturb any natural timber on the Reserve without the prior approval of the Director and the Conservator of the Forests', nor 'damage any Leichhardt Pines or seedlings or other good stands of timber used by the Mission[8] and the Aborigines as a source of lumber'.

Section 24 of the Schedule in the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* states that Comalco Pty Ltd is entitled to utilise timber on the lease for construction, erection and maintenance of plant buildings, roads and other works necessary to directly or indirectly carry out their operations, without payment of a royalty to the Queensland Government. However, nowhere does the *Act* transfer rights to the timber from the Crown to the lessees. Indeed, the Legislative Assembly of Queensland Public Works Committee (1997) asserted that local indigenous people on DOGIT lands can sell timber on land covered by Comalco and Alcan mining leases to the highest bidder, provided lessees do not wish to use the timber on their lease.

Subject to the rights granted to the lessees in the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* and *Aurukun Associates Agreement Act 1975*, and to Aurukun Shire Council and Wik people in the *Aurukun Associates Agreement Act 1975*, control of access to timber resources on mining leases 7032 and 7024 is vested with the Crown, as administered by DPI Forestry under the authority of the *Forestry Act 1959*. That *Act* states that royalties are payable to the Queensland government for timber harvested; however, the

[8] From its founding in 1904, until 1978, Aurukun was a Christian Missionary settlement administered initially by the Moravian, then the Presbyterian and finally the Uniting Church.

Forest Policy Group within the Department of State Development asserted that the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957*, *Forestry Act 1959*, *Aurukun Associates Agreement Act 1975*, and *Mineral Resources Act 1989*, provide for the Minister for Primary Industries to make a ruling about whether royalties are payable and the level of any royalty payable (Taylor 2003).

Comalco Pty. Ltd. and personnel at the DPI Forestry regional office in Atherton are aware that Wik people harvest timbers from Mining Lease 7024 in Cook Shire for local domestic use, despite holding no legal rights to these timber resources. Rights to the timber are vested with the Crown, with limited provisions for utilisation held by Comalco Pty. Ltd. The characteristics of property rights that Wik people have to timber resources on Mining Lease 7032 are equivalent to those on land in Aurukun Shire where there are no other titles or interests, with one exception: any activities cannot interfere with the rights and obligations of the mining companies. It is unclear what, if any, restrictions the mining companies holding Mining Leases 7024 and 7032 may place on forestry activities within their leases.

A high proportion of mining lease land is covered by commercially important forest types. All environmental and other legislation and the Code of Practice for Native Forest Timber Production on State-owned land, which is applicable to forestry operations on Aurukun Shire lease land, would generally also apply to forestry operations on mining leases. However, the intention of granting special bauxite mining leases within the study area is for all land under the lease to be cleared of vegetation and mined. Therefore, there may be grounds for regulations or restrictions imposed by particular environmental legislation to be relaxed on the mining leases within the study region. The Department of State Development has indicated that it will support this argument for proposed forestry operations on bauxite mining leases on CYP (Taylor 2003). Nevertheless, it is likely that the longer the period of time between harvesting and subsequent clearing for mining, the fewer the number of regulations and restrictions that will be waived (Taylor 2003).

5.3 Property Rights of Wik People to Timber Resources on Native Title Land Within Aurukun Shire

The *Wik Peoples v State of Queensland* Federal Court ruling on 3 October 2000, granted Wik peoples native title over Part A, a relatively small area (approximately 6,000 km^2), of their 21,000 km^2 claim (Pryor 2000, p. 5), which is confined to areas that have only ever been unallocated State land or land under forms of title granted for the benefit of Aboriginal people. The Part A native title determination is illustrated in Figure 2. The area where native title has been granted is shaded. Comparison with Figure 1 indicates that the granted area extends south of the study area.

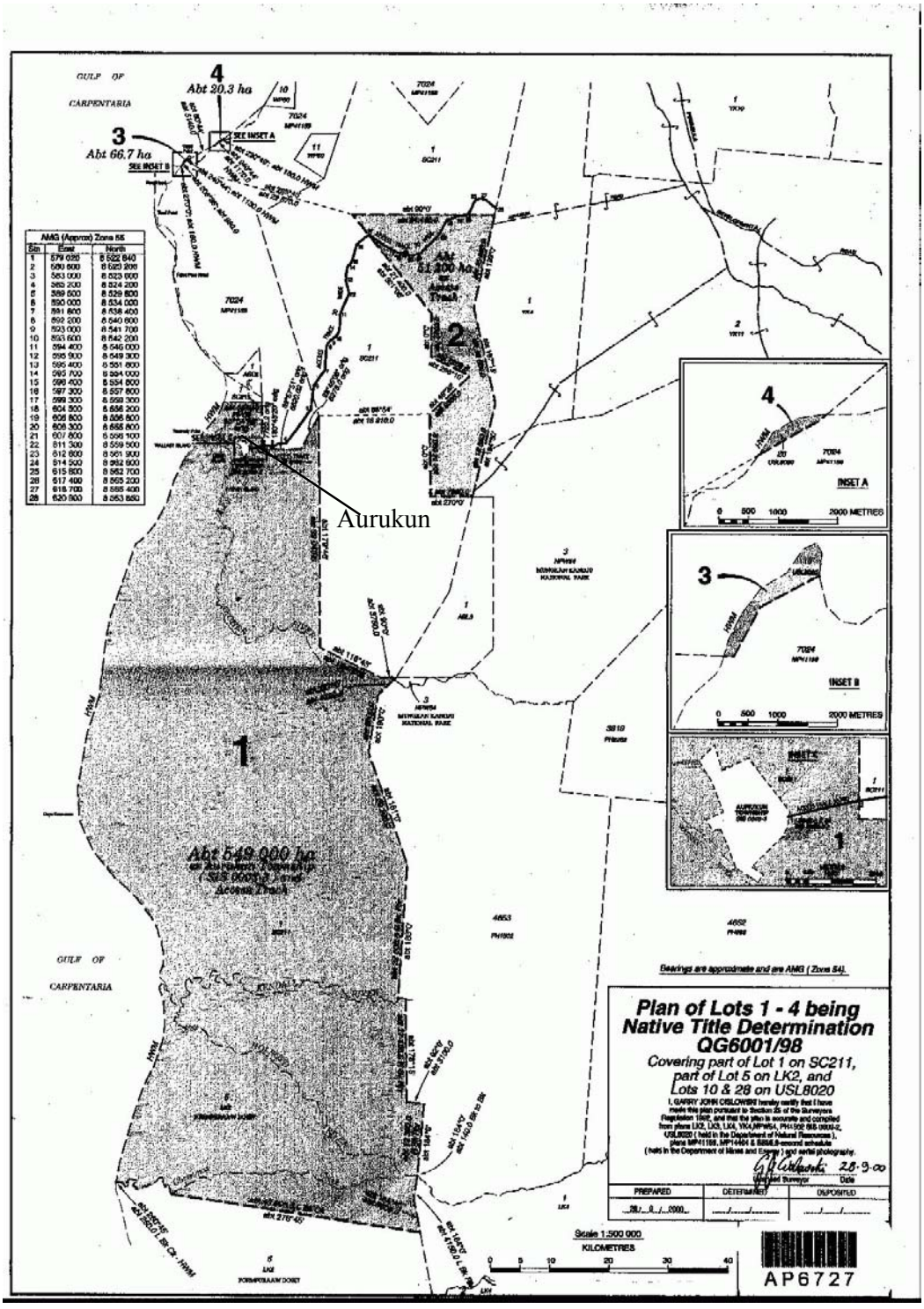
The lands in Part B of the claim include land under seven pastoral leases and four mining titles. Native title over Part B land is still being negotiated between Wik people, the Queensland government, and mining and pastoral stakeholders. When native title rights over Part B of the Wik peoples' claim are resolved, the rights conferred will not necessarily be the same as had been granted over Part A.

Justice Drummond ruled in Order 3 of Part A of the Wik native title claim, that (Federal Court of Australia 2000):

> The nature and extent of the native title rights and interests in relation to the determination area are that, subject to Orders 4 and 5[9], they confer possession, occupation, use and enjoyment of the determination area on the native title holders and, in particular, include rights, duties and responsibilities to do the following:
>
> (f) take, use and enjoy the natural resources from the determination area for the purposes of:
>
> (i) manufacturing artefacts, objects and other products;
> (ii) disposing of those natural resources and manufactured items, by trade, exchange or gift save that the right of disposal of natural resources taken from the waterways (as that term is defined in the *Fisheries Act 1994* (Qld) as at the date of this determination) of the determination area is only a right to do so for non-commercial purposes …

[9] Orders 4 and 5 specify that management must be in accordance with State and Commonwealth laws, and traditional laws and customs, and include a clause about tidal and flowing waters.

Figure 2. Part A of the Wik native title claim



Source: Federal Court of Australia (2000).

Order 3 defined *natural resources* as (Federal Court of Australia 2000):

> (a) plant, animal, fish, bird, amphibian, reptile, insect life, and any other flora and fauna, and shells and forest products found on, or in the lands and waters of the determination area from time to time, and water, flints, clays, soil, sand, gravel and rock on or below the surface of the determination area and all other matter comprising the determination area;
>
> but does not include:
>
> (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum Act 1923* (Qld);
>
> [where]
> 'fauna' has the meaning attributed to it in the *Fauna Conservation Act 1974* (Qld);
> 'fish' has the meaning attributed to it in the *Fisheries Act 1994* (Qld);
> 'forest products' has the meaning attributed to it in the *Forestry Act 1959* (Qld).

Order 3 also conferred the right upon native title holders to 'determine as between native title holders what are the particular native title rights and interests that are held by particular native title holders in relation to particular parts of the determination area'. Order 8 stated that 'subject to Orders 4 and 5, [the native title rights and interests confer] possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others, except those having rights and interests identified in Order 6'. No rights and interests identified in Order 6 appear to degrade the Wik peoples' exclusive right to the timber in Part A of the determination.

The characteristics of property rights of Wik people to timber over Part A of their native title land claim are more comprehensive than those conferred by the Aurukun Shire lease. For instance, the native title ruling has granted possessory native title. Section 45 of the *Forestry Act 1959* includes a provision that forest products are the absolute property of the Crown 'unless and until the contrary is proved'. The native title judgement appears to have proved the contrary and conferred a right to Wik people to conduct commercial forestry within this part of the study area without a permit from or payment of royalties to DPI Forestry. Consistent with the Federal Trial Court's and Full Federal Court's interpretation of rights conferred by possessory native title in the Mirruwung Gajerrong case, the Part A judgement

has given Wik people the right to manufacture artefacts, objects and other products out of 'natural resources' taken from the land, and given Wik people the right to dispose such manufactured items through trade, exchange or gift. Therefore, Wik people have rights to a more comprehensive range of the economic benefits that can be extracted from the timber resource. The native title ruling has conferred the rights to exclude others from timber resources and divide timber resources among native title holders (according to tradition and custom) on Wik people. Forestry activities are subject to environmental and other legislation that applies to forestry on private lands, such as, the *Timber Utilisation and Marketing Act 1987*, the *Environmental Protection Act 1992*, the *Nature Conservation Act 1992*, the *Integrated Planning Act 1997*and the *Vegetation Management Act 1999*. Operations will also be subject to the Code of Practice for Native Forest Timber Production on private lands when it is complete.

5.4 Property Rights of Wik People to Timber Resources on Aboriginal Freehold

Under the *Aboriginal Land Act 1991*, Aurukun Shire lease land will be converted to Aboriginal freehold at an undefined future point in time. When transferred, the land becomes 'claimable' under the *Act*. Wik people can decide whether they would like the land declared non-claimable. If Wik people choose to leave the land as claimable, 'groups' of Wik people (e.g. clan groups) can submit claims to freehold specific areas of the transferred land on the basis of 'traditional affiliation' and 'historical association'. The claim is referred to the Land Tribunal, which makes recommendation about the claim to the Minister administering the *Aboriginal Land Act 1991*.

Upon transfer of the title to land under the *Aboriginal Land Act 1991* , a 'land trust' under that *Act* automatically arises. This land trust is a corporate body with a chairperson and a corporate seal with the grantees as members of the land trust, which acts as trustees for Aboriginal or Torres Strait Islander people and their ancestors[10] and descendants. The land trust becomes the Aboriginal freehold title holder of the land and has similar rights and responsibilities as other freehold title holders in Queensland (NRM 2002). This includes the exclusion of others from the land (tresspassers), the exclusion of others from benefiting from

[10] In the culture of many Australian indigenous clans, people are considered to be born from the land and to return to the land at death. The spirits of ancestors reside in their traditional lands and traditional land management obligations and practices guarantee their continued existence.

the land and the right to lease the land (NRM 2002). The grantees do not have to pay local government rates on the land unless the land is outside Aboriginal and Torres Strait Islander local government areas and is being used for commercial or residential purposes. However, two restrictions are placed on Aboriginal freehold title holders that other freehold title holders in Queensland do not face:

- the land can never be transferred (although it can be surrendered to government); and
- a lease to a non-Aboriginal or non-Torres Strait Islander person, group or corporation for longer than 10 years requires the approval of the Minister for Natural Resources. This does not apply to a non-indigenous person who is the spouse of an indigenous person.

As for all other freehold land in the State, the Aboriginal freehold title reserves to the State the rights to all minerals and petroleum on or below the land surface. That means that the Government retains the rights to grant mining leases to companies to exploit the minerals or petroleum, as well as the rights of entry to mine those resources., Section 43 of the *Aboriginal Land Act 1991* provides for the reservation of forest products (and quarry materials) to the Crown, if the Crown desires.

If rights to timber are transferred with the land title, then Wik people would have the same rights to harvest the timber resource as any other freehold property landowner. Subject to particular environmental legislation, such as the *Nature Conservation Act 1992*, the *Environmental Protection Act 1992* and the *Vegetation Management Act 1999*, harvesting timber on rural lands in Queensland is presently an 'as of right use' (Ridgway 2003). No royalties would be payable to the Queensland government for harvested timber. Assuming the Queensland Government transfers the rights to timber with the land title, the characteristics of property rights of Wik people to timber resources would be similar to those conferred under Part A of the Wik native title claim. The difference is that, under Section 33 of the *Aboriginal Land Act 1991*, existing interests in the land continue in force. Therefore, for example, the granting of Aboriginal freehold over Aurukun Shire lease land or Crown land with existing mining leases would not diminish the mining lease holder's right to demand that forestry activities must not interfere with their rights and obligations.

6. DISCUSSION

The bundle of rights Wik people have to timber resources within the study region differs according to the tenure-title combination of a given area of land. Furthermore, the property rights of Wik people to timber resources are potentially fluid over time, since future court rulings (e.g. Part B of the Wik native title claim), legislation and issuing of mining leases could alter their property rights on any of the tenure-title combinations within the study area. The author's interpretation of the characteristics of property rights to timber resources held by Wik people throughout the range of tenure-title combinations presently found within the study area, and on Aboriginal freehold, are summarised in Table 2.

Wik people currently hold the right to commercially harvest timber from the 180,000 ha of commercially important forest on Part A of the Wik native title claim area without payment of royalties to DPI Forestry. Since royalties represent a substantial proportion of the cost of sawlogs to the timber industry in Queensland, this substantial cost saving could aid in making a forestry industry viable in the study region. However, the majority of the timber resource on native title land is located on the opposite bank of the Archer River to Aurukun town and the higher quality forest types on this land are not presently accessible by bush roads. Transport of logs to Aurukun may be prohibitively expensive, meaning that small-scale portable sawmilling 'on country' may be the only feasible means for Wik people to process the resource. Nevertheless, the generation of employment outside of town offers real employment possibilities for outstations.

Table 2. Characteristics of property rights to timber resources held by Wik people on particular land tenure-title combinations in the study area

Characteristics of property rights to timber resources	Rights of Wik people to timber resources conferred by particular land tenure-title combinations		
	Aurukun Shire lease with no other titles or interests and Aurukun Shire lease land covered by Mining Lease 7032	Cook Shire (unallocated State-owned land) covered by Mining Lease 7024	Aurukun Shire lease land with native title and Aboriginal freehold (under the *Aboriginal Land Act 1991*) [b]
Comprehensiveness	Domestic, local use of timber only [a] Royalties payable if permit obtained to commercially harvest timber Forestry activities regulated by the Code of Practice for Native Forest Timber Production on State-owned land and relevant environmental and other legislation *Activities cannot interfere with the rights and obligations of mining companies on mining leases*	No legal rights [a] Royalties payable if permit obtained to commercially harvest timber	Full-range of uses of timber resources consistent with freehold tenure in Queensland, including commercial harvesting Forestry activities regulated by relevant environmental and other legislation and, when complete, the Code of Practice for Native Forest Timber Production on Private Land *Activities cannot interfere with the rights and obligations of mining companies on mining leases*
Duration	50 years (until 2028)	No legal rights	Indefinite
Exclusivity	No right to exclude persons with an authority to enter Aurukun Shire to use timber granted under any Act, lease, license, permit or other authority	No legal rights	With the exception of mining companies holding a valid mining lease that includes rights to timber, Wik people can exclude all others from the timber resources and benefits derived from those resources
Transferability	No right to transfer rights to timber	No legal rights	Rights to timber can only be sold or assigned to Wik people and non-Wik spouses of Wik people in accordance with traditional law and custom
Divisibility	No right to divide the timber resources of Aurukun Shire into smaller units	No legal rights	Timber resources can be sub-divided between Wik people and non-Wik spouses of Wik people in accordance with traditional law and custom

a. A permit to commercially harvest timber from these land tenure-title combinations can be obtained from the Queensland Department of Primary Industries Forestry.
b. In the Aboriginal freehold case, reported rights assume that rights to timber are transferred with the rights to land. If not, then rights to timber are the same as for Aurukun Shire lease land with no other titles or interests and Aurukun Shire lease land covered by Mining Lease 7032.

Over the remaining 240,000 ha of commercially important forest types within the study region, Wik people may apply for a permit to commercially harvest timber, although the Queensland Government can demand royalties[11]. This resource is likely to be attractive despite the higher log cost, because a high proportion of the resource is on mining leases (harvesting is likely to be impeded by fewer environmental restrictions), the forests have larger standing timber volumes per hectare on average than those on native title land, and they are more easily accessible by road than those on native title land. Forestry operations in forests outside of native title lands could potentially support large-scale operations providing substantial employment and income generating opportunities, thereby reducing the welfare dependency of Wik people.

Throughout the study region, forestry activities would be subject to particular environmental and other legislation and Codes of Practice for Native Forest Timber Production. These will limit the intensity of harvesting operations in the study region, but not preclude harvesting altogether. As part of his PhD dissertation, the author has undertaken research to ascertain the quantity and quality of timber in the study region, feasible processing opportunities and markets. An economic model is being developed that will assist identification of a suite of potential social welfare improving forestry opportunities in Aurukun. If Wik people choose to establish a forestry industry, it is envisaged that this model will assist traditional decision-making processes about culturally appropriate forestry activities on their lands.

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[11] If rights to timber are transferred with the title to land when Aurukun Shire is transferred to Aboriginal freehold under the *Aboriginal Land Act 1991*, all timber in Aurukun Shire would cease to be the property of the State.

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