
“Give a little, take a little”: the Ugar traditional boundaries project

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Background

The Torres Strait is the birth place of native title recognition in Australia and native title rights have been legally recognised over much of the land and seas in the region. Following the historic 1992 Mabo decision of the High Court, the majority of rights have been recognised by way of consent determinations made by the Federal Court of Australia following extensive negotiation with respondent parties. Typically, consent determinations over islands identify the particular native title rights that are contained within the area of an entire island as bounded by the sea, the Torres Strait islander group who hold those rights, and the prescribed body corporate whose job it is to administer them. What is not usually reflected in consent determination orders are more localised individual or family traditional ownership of land within the boundaries of the native title claim, that is, the traditional *internal* boundaries within the area over which communal native title has been recognised. This lack of legal clarity about the granular operation of cultural authority among members of the larger native title society creates challenges around gaining consent for native title decision-making. In some instances, this has exacerbated local conflict over land management in the context of development.

Communal decision-making in the context of native title can be a complex and unwieldy process that sometimes sits uncomfortably with traditional land governance structures. Under the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) (the Regulations) Prescribed bodies corporate (PBCs) are required to consult with and obtain the consent of the common law native title holders who will be affected by a “native title decision” before the decision can be made. “Native title decisions” include decisions to enter into Indigenous Land Use Agreements such as those typically required for infrastructure projects on native title land. Where there is a particular process of decision-making under traditional laws, that process must be followed for the giving of the consent. Fulfilling the requirement of the Regulations to consult with the affected common law native title holders is not necessarily a straight forward task, and is increasingly identified among both Torres

Strait islander and Aboriginal native title groups around the country as a significant impediment to the effective management and enjoyment of their rights. In some cases there is uncertainty or even dispute in relation to the identity of the affected native title holders for a particular area of land related to a proposed “native title decision.” Uncertainty about traditional ownership can cause difficulties for PBCs which can delay or increase the resources required to finalise native title agreements. The negative impact of uncertainty about traditional ownership directly impacts on proponents, local and state governments and other parties seeking to negotiate native title agreements with PBCs.

Earlier this year, one community of native title holders, the Ugarem Le of the far eastern Torres Strait island of Ugar (also known as Stephen Island) embarked upon a project which aimed to address uncertainties about the location of discrete local rights in land through a process that involved confirming, pegging out and mapping traditional boundaries for the entire island.

The Ugar people’s ownership of Ugar, Campbell Island and Pearce Cay was recognised in the *Ugar(Stephen Islanders¹)* determination made by the Federal Court at Ugar on 9 December 2004. The consent determination arose from a native title claim filed in June 1996 which was successfully negotiated resulting in all parties agreeing to recognise the exclusive native title rights of the Ugarem Le in relation to land. The Ugar Ged Kem Le Zeuber Er Ked Le (Torres Strait Islanders) Corporation PBC (the PBC) administers these native title rights on behalf of the Ugarem Le.

It was the PBC who successfully led the project discussed here to identify traditional boundaries on Ugar, within a collaborative framework that involved:

- the Native Title Office of the Torres Strait Regional Authority (the NTO) and its legal advisers Gilkerson Legal;
- the National Native Title Tribunal (the Tribunal);
- the Torres Strait Island Regional Council (TSIRC); and
- the Queensland State Government Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP).

Key project drivers

The Ugar traditional boundaries project was driven by a backlog of requests from local and state government to negotiate with native title holders about the provision of infrastructure projects on Ugar. It was also driven by the desire of the traditional owners for more clarity about their individual and family group native title rights over land.

The infrastructure proposals for Ugar consisted of five projects to:

- 1) extend the community hall;
- 2) upgrade the helipad to allow for access at night;
- 3) construct a new desalination plant;
- 4) construct a new fuel bowser; and
- 5) provide for a freezer facility for the remote island.

The proponent for the infrastructure projects was the local government authority, TSIRC.

One of the factors that prevented the PBC from progressing negotiations with TSIRC for these important community infrastructure projects was a dispute about the identity of the particular native title holders for the areas of land affected. Underlying the dispute about the identity of the traditional owners was a lack of clarity around the location of traditional boundaries, and together this lack of certainty about the right people for the right areas significantly impeded the ability of the PBC to conduct the necessary consultation required as under the Regulations.

Part of the challenge of identifying discrete local authority on Ugar is related to the way in which rights in land are traditionally articulated among the Ugar Le community, with traditional laws customarily transmitted via word of mouth. Under Ugarem Le law, the whole of Ugar is divided into identifiable parcels each owned by different Ugarem Le families. The Ugarem Le law requires the consent to be given by the particular traditional owner on whose land the dealing is proposed. Certainty of traditional boundaries is therefore required to ensure that the PBC consults with, and obtains consent from, the appropriate traditional owner.

The PBC was supported in undertaking the project by the NTO and their legal advisers Gilkerson Legal. Following a request by the PBC and the NTO, the Tribunal provided facilitation, planning and geospatial assistance pursuant to s 24BF of the Native Title Act 1993 (Cth). The resourcing for the project was contributed by:

- TSIRC;
- DATSIP;
- the NTO and the PBC; and
- traditional owners.

Project scope

Early on in their negotiations with the DATSIP and TSIRC, the PBC advanced a proposal to identify and map traditional boundaries ahead of its consideration of the proposed ILUAs associated with the infrastructure projects.

The project coincided with a DATSIP scheme to formally survey all existing structures in each island community throughout the Torres Strait. Housing and other structures in indigenous communities in Queensland were previously built directly on the Deed of Grant in Trust communal land without separate survey as would typically occur in non-Indigenous communities.

The scope of the project was identified by the following three objectives for the PBC:

1. Identify, peg and record all traditional boundaries on Ugar.
2. Utilising the results of objective 1, identify the affected native title holders for each of the five infrastructure projects and consult with them with a view to obtaining their consent for the PBC to enter into agreements with TSIRC for the construction of the infrastructure.
3. Participate in the State government's Community Survey Program through a process where traditional owners pegged existing infrastructure and town blocks, aligning where possible survey and traditional boundaries.

Commencing on 27 July 2015 and running for 2 weeks, Ugar traditional owners and other project participants spent time on Ugar working together to achieve these objectives. All three objectives were successfully met and the project has resulted in significant other benefits, such as the streamlining of consultation and decision-making for all future projects, the prospect of improved service delivery and the strengthening of the Ugar community.

Project methodology

Phase 1 – planning and preparation (6 months)

A coordinated process for addressing the resolution of traditional boundaries at Ugar was identified by the PBC and the NTO at the very beginning of the process. In particular, during early 2015 the PBC Chair Seriako Stephen worked closely with the NTO and Gilkerson Legal to drive and where necessary "sell" the concept of resolving traditional boundaries for the whole island to the state and local government proponents.

Early in the planning phase, a visit to the island of 2 weeks was identified as being necessary to the successful implementation of the project and the elders and family representatives who needed to be present during such a visit were identified.

Crucially, funding for the project was identified and settled reasonably early in the planning phase. Appropriate resourcing contributions were made by DATSIP, TSIRC and the TSRA. The PBC's costs were separately met. Under s 60AB of the Native Title Act 1993 (Cth) and Pt 4 of the Regulations, proponents of dealings requiring a native title decision must usually meet the PBC's costs. In this instance, however, the PBC board members and traditional owners invested considerable amounts of time and effort beyond what was covered by the fees recovered for their services.

The PBC Chair, TSIRC Councillor, TSIRC, state government officials and the TSRA board members had shared interests and agreed upon objectives which they worked cooperatively towards achieving. The project objectives were agreed and clearly articulated in the project documentation.

A detailed project plan was developed which was updated throughout the process. There was "buy-in" to the project plan by the PBC members, the funding parties, external advisors and the community. A draft project plan was first circulated in May 2015 together with draft information sheets about the infrastructure projects. A final Project Plan was then circulated in June and further work was done by a Planning Committee during the weeks prior to the island visit to develop a detailed plan and program.

Planning meetings were convened by the Tribunal from April 2015, with agendas prepared and circulated to participants in advance. Participants met to plan the project and prepare for the activities on 13 separate occasions. The Tribunal convened meetings by teleconference with participants linking in from their own office/home or Tribunal offices in various locations including Brisbane, Cairns, Perth, Thursday Island and Ugar.

The need for dedicated logistical management of the project was identified early on and TSIRC agreed to appoint a staff member to provide this support. The NTO's administration team collated information about traditional owners' travel and assisted with arrangements.

The community of Ugar has a resident population of around 70–80 people. 35 traditional owners returned home for the project, which in itself is no simple task. Access to Ugar is restricted to helicopter out of Horn Island, and with seat numbers limited and flights highly dependent on weather conditions, transport to Ugar is expensive and can be difficult to secure. In addition to the traditional owners returning to the island, 10 TSIRC, NTO and Tribunal staff and advisors attended. For all persons attending, travel, accommodation and meal arrangements were required.

Materials including pegging and survey equipment and food needed to be sent by barge up to 6 weeks in advance to ensure it would arrive. Ugar can only be accessed by barge on a full moon during high tide.

Advance meetings were convened by PBC Chair Seriako Stephen and divisional Councillor and traditional owner Rocky Stephen with traditional owners on Thursday Island, Cairns, Townsville and Mackay approximately 6 weeks prior to the visit to Ugar. These meetings provided an opportunity for the PBC representatives to explain to members the objectives of both the traditional boundaries project and the infrastructure proposals, and to identify and resolve issues in advance. Material was specially prepared for these advance meetings including information sheets regarding the traditional boundaries project and the infrastructure projects.

Related issues with the potential to undermine the success of the project were identified in advance and were the subject of separate mediation conducted by the Tribunal on Thursday Island 4 weeks in advance of the traditional boundary identification. The issues were able to be resolved through the mediation.

In the months prior to the second phase of the project involving the actual mapping of the boundaries, the Tribunal prepared and circulated mapping information and proposed instructions for boundary identification for comment and revision.

Phase 2 — physical mapping of boundaries (2 weeks)

During the first week the ground work was laid through preliminary activities such as:

- providing background information to traditional owners about native title and land tenure;
- agreeing on an approach to identifying and confirming traditional boundaries; and
- preliminary traditional boundaries being marked on a map for discussion.

Following these preliminary activities traditional owners commenced a series of site visits during which boundaries were marked using pegs and tape and were then photographed. Details of disputed boundaries were recorded so that mediation could be conducted during the second week of the mapping phase.

The second week of the mapping phase involved a series of mediation sessions conducted by the Tribunal to resolve disputed boundaries. Sessions were held with individual families prior to bringing families together for mediation prior to site visits to each disputed area.

Tribunal Geospatial staff recorded GPS coordinates and other geospatial information for each boundary marker, and as agreements were reached, signatures of

traditional owners were captured for each boundary marker and recorded in a work book which had been developed prior to the visit. One hard copy map was used as a "point of truth" with boundaries marked in pen on a transparent overlay.

The importance of the project and the progress being made was reported to the broader island the community each morning and evening when they gathered for a communal meal. During these gatherings the PBC Chair gave a community briefing, providing clear and consistent information to community members.

During the second week the TSIRC Mayor, Fred Gela, gave a presentation for the island community about the infrastructure projects and a range of other salient issues for the community including economic development and home ownership. Locations for the infrastructure were discussed, debated, agreed and recorded for later incorporation into the ILUAs and Project Agreements documents.

Throughout the project strong and effective leadership was demonstrated by PBC Chair Seriako Stephen, Cr Rocky Stephen, TSRA Board Member Jerry Stephen, Mayor Fred Gela and elders which ensured participants focussed on the work and achieving outcomes in a determined way. There was cohesion between and among families and a clear sense of "speaking with one voice".

All participants showed a personal commitment to cooperative engagement and were prepared to spend the necessary time required to work through the process. Throughout the visit the involvement of the whole community was evident. Police, rangers, fishers, cooks, drivers, dishwashers, cleaners, clergy, table and seating arrangers, decorators, gardeners and council officers all contributed to making the visit run smoothly and enabling participants to focus on relationships and the project objectives.

At the end of the second week the hard copy map of agreed boundaries for the whole island was displayed during a celebratory community dinner. A signing ceremony was held at which the necessary PBC consent certificates² were signed by traditional owners affected by each of the infrastructure proposals. Following this, the PBC directors convened a meeting during which the PBC formally resolved to enter into the ILUAs and Project Agreements associated with the five infrastructure projects.

Phase 3 — post mapping consolidation and project closure

One week after the onsite boundary identification had been completed, key project participants gathered in Cairns for debrief session convened by the Tribunal. Participants identified the steps which needed to occur next to complete the project and discussed the factors

which had contributed to the success of the project. The participants discussed the challenges for the project and identified what could have been done better or differently. The Tribunal documented the project experience including the results of the debrief discussion in a project report.

The Tribunal collated the GPS and other data collected on the island and prepared an electronic map of Ugar traditional boundaries. The map contains the evidence of traditional owners' agreement to boundaries embedded in it. The user can click on each boundary marker depicted on the map to access other information including:

- traditional owners' signatures;
- photos of the boundary pegs and where available;
- photos of traditional owners placing the boundary peg.

This interactive map has been supplied to the PBC along with hard copy versions.

Project outcomes

All three project objectives described above were achieved and have resulted in some tangible and enduring outcomes for the community. Traditional boundaries for the whole island were identified, agreed and recorded and the backlog of infrastructure projects for the island were consented to by the affected traditional owners, resulting in execution of the necessary agreements.

As a result of this project, decision-making and consultation for all future projects on Ugar will now be streamlined, which will help to improve service delivery and potentially contribute to a more prosperous and healthy island community. The foundations have been laid for PBC business and aspirations to be effectively implemented and the community now feels prepared with the tools it needs to welcome and constructively consider infrastructure and economic development proposals.

In addition, the project contributed to the strengthening of relationships both internal and external and enhanced people's confidence in the community's ability to effectively manage native title and appropriately respond to development issues. In the course of the project, future leaders emerged and an intergenerational transfer of traditional knowledge was enabled. Local experience and expertise was built in the areas of facilitation, project management and mapping.

Where to now?

The PBC is now in possession of an interactive map of the Ugar traditional boundaries and is in the process of considering options for disseminating this information to all participating traditional owners.

The PBC is also considering establishing a “traditional land register” to record all traditional land dealings — their location, their purpose, and their nature (eg, unencumbered gift of full traditional ownership, life occupancy and use, and so on). The register could also record changes to boundaries and other traditional land ownership outcomes.

One option available to the PBC is to make the interactive traditional boundaries map and traditional land register available to traditional owners via a secure website.

Amendment of the PBC’s rule book to incorporate traditional boundaries mapping and its relevance to consultation and decision making is also being considered, as are amendments to incorporate more effective alternative dispute resolution processes.

What made the project a success?

There were a number of elements to the approach described here which contributed to the overall success of the project. There was strong leadership from the PBC and their advisers to drive, and where necessary “sell”, the concept of resolving traditional boundaries for the *whole* island as opposed to taking a piecemeal approach focussed only on areas the subject of discrete infrastructure proposals.

The comprehensive approach to project planning was also crucial. Work was done early in the planning to define the project objectives. Parties ensured that the outcomes of the project would meet the needs of all participants. The interests of the key people and organisations participating in the project were completely aligned. A detailed project plan was developed through a series of planning meetings convened by Tribunal in the months before the actual implementation of the mediated boundary mapping on Ugar. The upfront investments of time and resources in developing a comprehensive project planning gave the project the best chance of success. It enabled each issue and action to be identified and appropriate responsibilities and time frames allocated. The approach also provided structure and momentum to the project and gave parties confidence in the process.

The advance work done with traditional owners was particularly critical to the success of the project. This work, which involved meeting with traditional owners at a number of locations across Queensland in the weeks prior to the “on island” work, was critical to preparing participants and managing expectations.

On the island, the involvement of a Tribunal member as an independent mediator allowed participants and representatives to focus on the resolution of issues. The

separate sessions held with individual families prior to bringing families together for mediation, provided an important opportunity for people to talk openly and be heard.

The availability of Tribunal Geospatial expertise in the planning and preparation phase of the project and the presence of a Geospatial expert on the island for the majority of the 2 weeks was essential to ensuring the functionality of the mapping technology and the accuracy of the recorded data.

The logistics of housing and providing meals for the 40–50 additional people on the island for the duration of the 2 weeks presented a challenge for the resident community. The response of the community, which was an overwhelming willingness to cooperate and work hard, long hours, was essential to the project’s success.

Most importantly, throughout the 2 weeks of Phase 2 on Ugar community, values were clearly articulated by traditional owners, understood, reinforced, and practised. That the main priority of the project was to ensure wider community benefits was reiterated by those involved with frequent use of the expression: “give a little, take a little.”

Conclusion

The Ugar traditional boundaries project both addressed the short term needs of the particular proponents and traditional owners as well as providing long term benefits for the community as a whole. Agreements between the Ugarem Le and the local government authority to deliver five much needed infrastructure projects for the community have been finalised and executed. Decision making and consultation for all future projects at Ugar will be streamlined — delivering an ongoing cost benefit for the PBC and native title holders, governments and other proponents and improved service delivery for the community.

By resolving traditional land ownership issues in such a holistic way, the foundation has been laid for economic development proposals and other future PBC business to be appropriately considered and effectively implemented.

Through the project experience, local expertise has been built and cultural learning, leadership and social cohesion enhanced.

The community-driven nature of this project from the outset set the stage for positive outcomes to flow forward. Importantly, the project was not imposed upon a reluctant community. The Ugarem Le saw an opportunity to resolve traditional land ownership in their community in a holistic way which would benefit themselves as well as a range of parties, and their leaders worked hard to take advantage of that opportunity and achieve a result.

Economic development and improved services and infrastructure are critical needs for many indigenous communities in Australia. Sometimes, there is a perception among proponents that native title holders and native title processes create unnecessary delays that impact on their capacity to do business. This often is not the case and many native title groups have a strong desire to use their rights to improve the economic and social conditions in their communities. The outcomes of the Ugar traditional boundaries project demonstrate that there is an opportunity for governments and proponents to try a different approach, and invest in community-led processes that support traditional owners to resolve disputes and engage in native title negotiations in order to achieve results and yield long term benefits for all involved.

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Footnotes

1. *Stephen obh the Ugar People v State of Queensland* [2004] FCA 1574; BC200408489.
2. Reg 9 of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) provides that common law holders of native title rights and interests are taken to have been consulted on, and to have consented to, a proposed native title decision of a prescribed body corporate if a document is signed by at least five members of the prescribed body corporate and each of the signatories is a common law holder whose native title rights and interests would be affected by the proposed native title decision (or if there are fewer than five members of the prescribed body corporate who are affected common law holders, a document signed by five members of the body corporate and each affected common law holder who is a member of the body corporate).