Submission No. 64

North Queensland Land Council
Native Title Representative Body Aboriginal Corporation
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Our ref: FAME EPA Bill2016

31 March 2016

Mr Rob Hansen
Research Director, Agriculture and Environment Committee
Parliament House
BRISBANE QLD 4000

By email only: aec@parliament.qld.gov.au

Dear Mr Hansen

SUBMISSION: Environmental Protection (Chain of Responsibility) Amendment Bill 2016

We refer to the invitation for submissions in response to the Agriculture and Environment Committee's ("the AEC") inquiry into the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016* ("the Bill").

The North Queensland Land Council ("NQLC") is a Native Title Representative Body and we make this submission on behalf of ourselves and on behalf of our clients, for whom the level and degrees of harm caused to the environmental and cultural values of the lands subject to the kinds of activities specifically contemplated in respect of the Bill, is unacceptable.

In this respect NQLC supports and encourages the State to enhance environmental protections, however we do not support the Bill in its current form.

Specifically, in its current form the Bill would capture native title parties as being persons in the 'chain of responsibility' in a way that may not have been the intention of the proposed amendments.

As the AEC would be aware, the *Native Title Act 1993* (Cth) ("the NTA") establishes a regime whereby registered native title parties have the right, inter alia, to negotiate with proponents compensation benefits for the impact on their native title rights and interests in respect of the kind of activities subject to the *Environmental Protection Act 1994* (Qld) ("the EPA").

As a consequence of this Bill native title parties will be significantly, detrimentally disadvantaged by the proposed amendments in the ways set out more fully below.

Section 363AA - *Definition – Relevant Activity*

Noting that an 'environmentally relevant activity' is one were activities are carried our subject to an environmental authority (EA), NQLC highlights that where an activity

requires an EA, a native title party will most likely be affected for the reason of a registered native title claim, determination or other landholding.

Section 363AB(1) – *Related Person*

Prima facie, a native title party is a 'related person' to whom an environmental protection order may be issued against "…the person who owns the land…". The EPA, Schedule 4, Dictionary provides, relevantly:

> owner—
>
> The owner of land is—
>
> - for freehold land—the person recorded in the freehold land register as the person entitled to the fee simple interest in the land; or
> - for land held under a lease, licence or permit under an Act—the person who holds the lease, licence or permit; or
> - for trust land under the Land Act 1994—the trustees of the land; or
> - for Aboriginal land under the Aboriginal Land Act 1991—the persons to whom the land has been transferred or granted; or
> - for land for which there is a native title holder under the Native Title Act 1993 (Cth)—each registered native title party in relation to the land.

Aboriginal persons or entities do hold each one of the above listed titles and in some cases the titles may overlap. There are a number of examples in NQLC region where an Aboriginal entity holds trust lands that are also subject to a registered native title claim and indeed in some instances, a determination of exclusive native title. The same example applies to leasehold and Aboriginal Land Act ("ALA") lands.

In such a circumstance, it would appear that two (2) separate Aboriginal entities connected by virtue of a common membership, could independently be issued an order – resulting in the same persons being sanctioned twice for the actions over which they have no control.

> **SUBMISSION**: The NQLC submits that native title holders and Registered Native Title Bodies Corporate ("RNTBCs") should be expressly excluded from the definition of 'related person'.

Section 363AB(2) & (4) – *Relevant Connection*

Similarly, native title holders and RTNBCs would appear to meet the criterion of having a 'relevant connection' as 'benefitting financially' by virtue of any agreement between themselves and a proponent that results in compensation benefits arising.

Financial benefits

There are two (2) usual means by which native title parties may be deemed to benefit financially:

- Native Title Protection Conditions (NTPCs) – where an exploration tenement granted under the expedited procedure regime (s32 NTA) in Queensland it is subject to the NTPCs which impose an obligation on the proponent to pay an annual administration fee; and

- Negotiated Agreements – agreements with proponents either in the form of an Indigenous Land Use Agreements ("ILUAs") or Ancillary Agreements pursuant to the NTA right to negotiate provisions.

Most certainly in the first, and most usually in the second instance there is a direct monetary payment to the native title party. Moreover, in the second instance the compensation benefits will usually comprise a 'package' of items that would fall within the current definition of a financial benefit at s363AB(6).

Any 'financial benefits' arising to a native title party are for the express purpose of compensating that party for the impact on the activities conducted under an EA on their native title rights and interests.

> **SUBMISSION:** NQLC submits that the diversion of such 'benefits' to remedy environmental harm caused as a result of a proponent's activities is perverse to the intent of the compensation. As such, native title parties and RNTBCs must be expressly excluded from the scope of the current definition.

Agreements

At s363AB(4)(e), other persons who may be captured in the chain of responsibility are those who have 'any agreement' with the company. There are currently 255 registered ILUAs within NQLC's boundary, a substantial number of which would entail an agreement with an entity operating under an EA.

Unlike ILUAs, Ancillary Agreements are not subject to any registration process therefore the number of current agreements is difficult to ascertain. Nevertheless, it is suffice to note that a considerable number of such Agreements are currently in force.

In both cases however, the content of the compensation package is most usually commercial in confidence between the executing parties.

The Bill proposes that the administering authority may examine the terms of such an agreement for the purposes of determining whether a person has a relevant connection with a company.

NQLC does not support native title parties being characterised as 'relevant person' nor that they should be considered to have a 'relevant connection' therefore it is unnecessary for 'any agreement' to be examined by an administering authority for the purposes of establishing same.

> **SUBMISSION:** NQLC submits that it is unnecessary for agreements between native title parties and proponents to be considered by an administering authority and such agreements must be expressly exclude from the scope of the current definition.

Company Structure

Again, native title parties would appear to fall within the matters to be considered by an administering authority in respect of the 'structure' with whom the company may have an arrangement (s363AB(4)(d)). Indeed, it is not unknown for corporate entities to be established for the express purposes of implementing an agreement and administering the compensation benefits.

> **SUBMISSION:** NQLC does not support native title parties being characterised as 'relevant person' nor that they should be considered to have a 'relevant connection' therefore submit that corporate entities holding compensation benefits must be expressly excluded from the scope of the current definition.

Grants of Access

Throughout the Bill, various sections require the consent of the owner and occupier of the land prior to access being to the land being granted.

Specifically, these subsections are as follows:

- Section 363AF(2)(a)
- Section 363AG(3)(a)
- Amendment to Section 452(1) to insert (ca).

> **SUBMISSION:** NQLC notes that native title holders are rarely, if ever, afforded such notifications and submits that the Bill should expressly included the requirement to notify native title parties.

Other Viable Alternatives

With respect to alternative proposals to the Bill, the Explanatory Notes states:

> *"There are no other viable alternatives that would achieve the policy objectives other than the proposed Bill".*

The NQLC rejects this assertion.

Without commenting on the efficacy of the schemes, the NQLC notes that Western Australia and New South Wales have programs which places the burden on operators and does not cast the net so widely as to capture innocent persons peripherally benefitting from the specific operations.

In Conclusion

The NQLC does not support the *Environmental Protection (Chain of Responsibility) Amendment Bill 2016* in its current form.

The NTA does not provide the right of veto nor does the 'right to negotiate' establish a regime of free, prior, informed consent. In fact, the NTA institutes a regime whereby a native title party must negotiate or contest arbitration proceedings or be subject to a Ministerial determination.

To impose an environmental protection order on a party who has no authority in respect of the granting of a tenement, nor the doing of an activity pursuant to an environmental authority is not only manifestly unjust, the financial, cultural and emotional harm could be irreparable.

We urge the Government to review the Bill with the view to protecting native title parties and other Aboriginal landholders from liability.

If you have any queries regarding this submission, please do not hesitate to contact Ms Rhonda Jacobsen, Senior Legal Officer – Manager, Future Acts Mining and Exploration (FAME) Unit on (07) 4042 7000.

Yours faithfully

[redacted]

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