Cape York Land Council Aboriginal Corporation
ICN 1163 | ABN 22 965 382 705

10 July 2017

Agriculture and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Cape York Land Council submission to the Agriculture and Environment Committee regarding the Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2017

Dear Committee Members

The Cape York Land Council (CYLC) is the Native Title Representative Body (NTRB) for the Cape York region. In our NTRB role we fulfil statutory functions under the *Native Title Act 1993* (Cth). In our broader Land Council role we support, protect and promote Cape York Aboriginal peoples' interests in land and sea to positively affect their social, economic, cultural and environmental circumstances. In this capacity CYLC welcomes the opportunity to comment on the Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2017 (the Bill).

CYLC has previously provided comments to the Department of Environment and Heritage Protection (EHP) regarding the Special Wildlife Reserves (SWR) proposal in response to the Private Protected Area Consultation Paper on 27 July 2016, the Draft Queensland Protected Area Strategy on 24 February 2017, the exposure draft of the Bill on 3 April 2017, and a supplementary submission regarding the exposure draft of the Bill on 9 June 2017.

Over this time we have developed a good understanding of the effects of the proposed amendments to the *Nature Conservation Act 1992* (NCA) to provide for SWRs. One of our concerns was addressed during the drafting process to ensure that tenure resolution processes are not pre-empted by a SWR being declared over transferable land under the *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*. Despite this, we have serious ongoing concerns about the Bill and have become increasingly alarmed as the SWR proposal has developed.

We urge you to recommend to Parliament that the Bill not progress further until the important concerns detailed below have been addressed to our satisfaction and that of Traditional Owner groups we represent.

Issue 1. The proposed SWRs will further exacerbate the situation on Cape York where pastoral leases cease to be used for the purpose of grazing or agriculture and become defacto conservation tenures. We have seen the situation emerging on Cape York where a pastoral lease is purchased by a conservation organisation, a nature refuge declared under the NCA, the property completely or

partially destocked, and the property managed to achieve conservation outcomes rather than the purpose for which the lease was issued.

If proposed amendments to provide for SWRs that are equivalent to private national parks proceed then the conversion of pastoral leases to defacto conservation tenures will accelerate. This is because the declaration of a SWR will make it more attractive for conservation organisations to raise funds to purchase a pastoral lease to be managed as a perpetual private national park. This creates a major risk that wealthy conservation groups will use the acquisition of pastoral leases and their conversion to SWRs as a way of strategically locking land up from economic development.

Whilst we are not opposed in principle to conservation outcomes, this type of land use change should only occur following consent from native title parties, as would be required if the pastoral lease tenure was otherwise changing to national park tenure. In cases where Cape York pastoral leases have been purchased by the State and converted to a public national park the State has negotiated an Indigenous Land Use Agreement (ILUA) with Aboriginal traditional owners to provide consent for this land use and tenure change. The same principle must apply to the declaration of a SWR.

The proposed process for the declaration of a SWR over a pastoral lease would set a dangerous precedent that will undermine the integrity of and confidence in the State's land titling system. If land use is to be converted from pastoralism to a conservation purpose then this should be done with full transparency and due process, including native title consent through an ILUA.

Issue 2. Cape York Aboriginal people aspire to engage in mainstream economic activities to help close the gap on their social and economic disadvantage and to contribute to the Queensland and Australian economy. SWRs will constrain this outcome in at least two different ways. Firstly, SWRs will result in less agricultural activity on pastoral leases which will limit employment opportunities for Aboriginal and other people. Working on pastoral leases is one of the few employment opportunities available on Cape York and this opportunity should not be put at risk without other employment opportunities being secured. If employment opportunities will result from a SWR then there should be a commitment to employ local Aboriginal people in these positions. This commitment could be made through an ILUA associated with a SWR declaration.

Secondly, the declaration of a SWR would result in the prohibition of mining and some other land uses within the declared area. Normally the grant of a mining lease would require the consent of native title parties through an ILUA, with employment and other economic benefits for native title parties negotiated in the process of reaching agreement. If a SWR was declared according to the process proposed in the Bill it would prohibit new mining and other development opportunities in that area, and native title parties would consequently lose the potential for economic benefit without their agreement. If the declaration of a SWR required the consent of native title parties through an ILUA then native title parties could decide whether they support the potential loss of mining or other opportunities in exchange for any potential benefits associated with a SWR.

Issue 3. The Bill describes when the Minister must enter into a conservation agreement for a SWR. The Minister and landholders must agree to the declaration of a SWR, and the terms of the conservation agreement for the SWR.

The definition of "landholder" does not include native title holders but does include pastoral leaseholders and freehold land owners. This is an issue that CYLC has consistently raised regarding the NCA more broadly in that it recognises the holder of a term lease as a "landholder" but it does not recognise native title holders as landholders.

The Bill further marginalises Aboriginal people as it requires that the Minister must not enter into a conservation agreement, the precursor to a SWR declaration, without the written consent of persons (in addition to landholders) whose rights or interests will be materially affected by the agreement. However, EHP asserts that native title holders' rights and interests will not be materially affected by a SWR declaration despite the fact that a SWR is a major change to the land tenure and will exclude future land use activities that could be of benefit to native title holders, such as grazing, mining or intensive agriculture, and will preclude these activities should the native title holders ultimately acquire the lease.

Broadening the NCA definition of "landowner" to include native title holders, and mandating that their consent be sought and acknowledged via an ILUA, would resolve most of the issues that CYLC and Aboriginal people have with the NCA and the SWR proposal.

Issue 4.
CYLC considers that the Bill's proposed exclusion of native title holders from the rights and protections afforded to landholders in respect of the declaration SWRs is contrary to s.10 of the Racial Discrimination Act 1975 (Cth) (RDA). This argument is further laid out in Attachment A to this submission.

Conclusion. In CYLC's view, the provisions of the Bill present a similar difficulty for native title holders as those that arise from the present Nature Refuge provisions of the NCA. The Bill's definition of "landholder" should be amended to include native title holders, and this amendment would avoid the NCA's violation of s.10 of the RDA. The negotiation of native title holders consent for a conservation agreement for a SWR (and other conservation agreements under the NCA) could readily be achieved by structuring such an agreement as an ILUA under the *Native Title Act 1993* (Cth).

Public Hearing. CYLC requests an invitation to address the Committee and speak to this submission at the public hearing regarding the Bill to be held in Brisbane on 12 July 2017.

If you wish to discuss any matters raised in this submission please do not hesitate to contact me.

Yours sincerely

Peter Callaghan
Chief Executive Officer
Cape York Land Council

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9 June 2017

Mr David Shevill
Acting Director Conservation Operations
Conservation and Sustainability Services
Department of Environment and Heritage Protection
Level 5, 400 George Street
GPO Box 2454
BRISBANE QLD 4001.

By email: [redacted]

Dear Mr Shevill

We write to make a further submission in respect of the proposed *Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2017* (Qld) (the **"SWR Bill"**), as invited by the Department of Environment and Heritage Protection following our teleconference on 18 May 2017. As previously described, Cape York Land Council (**CYLC**) is concerned that the SWR Bill may permanently disadvantage native title holders in its treatment of their rights. The SWR Bill does so by using relevantly similar machinery for the creation of its new category of protected area, the "special wildlife reserve" (**SWR**), as exists at present under the *Nature Conservation Act 1992* (Qld) (**NCA**) for nature refuges.

In essence the NCA for nature refuges, and in future for SWRs if the SWR Bill is enacted in its present version, does not require native title holders to give their consent to the creation of the protected area in all circumstances. This is in contrast to the position of a freehold owner or pastoral lessee under the *Land Act 1994* (Qld), whose consent is a mandatory prerequisite to the declaration of the protected area. The State has previously asserted that native title holders' consent is not required because native title rights are not "materially affected" by a declaration of a nature refuge. But that position overlooks the less favourable treatment of native title holders. Freehold owners' and pastoral lessees' consent is required regardless of the degree to which their interests will be affected by a proposed declaration. By failing to afford native title holders the same protection as that of freehold owners or pastoral lessees, the NCA (and the provisions of the SWR Bill if enacted) will violate s.10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

We will explain our view by reference to the provisions of the SWR Bill for the declaration of SWRs that are relevantly the same as those for nature refuges under the NCA.

Nature refuge provisions of the NCA and SWRs

The declaration of a nature refuge begins with a Ministerial proposal that is given to all landholders (NCA s.44,(1)-(3), SWR Bill cl.43A(2)-(4)). If the Minister and the "landholders concerned" agree about certain matters, including that the land in question should become a nature refuge, the Minister must enter into a conservation agreement with the landholders (NCA s.45(1), SWR Bill cl.43B(1)). The State takes the view that the term "landholder" in the NCA does not include native title holders, and so the native title holders' participation in a conservation agreement is not required.

The existence of a valid conservation agreement for an area is a mandatory prerequisite to the declaration of a nature refuge, at least where the area is not State land (NCA s.46(1), SWR cl.43D). The NCA purports to protect persons with interests in land that do not confer "landholder status" (and mining tenements and analogous interests) by requiring the written consent of those persons to a proposed conservation agreement, but only in the event that their (the persons who aren't landholders) interests are "materially affected by the conservation agreement" (NCA s.45(2), SWR Bill cl.43B(2)). By relegating native title holders to the status of persons whose consent is only required if their interests are materially affected, the NCA purports to give native title holders less security of enjoyment of their property than a pastoral lessee. For example, the consent of a pastoral lessee is still required even if a conservation agreement will impose no restriction on the actual use of land by the pastoral lessee. The same is not true of native title holders.

Discrimination for RDA s.10

In CYLC's past experience of the nature refuge declarations in Cape York, the State has taken disproportionate comfort from the fact that the future act provisions of the *Native Title Act 1993* (Cth) do not apply where native title rights are not "affected" within s.227 of that Act. That is not the totality of the protections available to native title holders. Section 10 of the RDA "does not alter the characteristics of native title" [(1995) 183 CLR 373 at 437], but ensures that native title holders have "the same security of enjoyment of their [native title] over or in respect of land as others who are holders of title granted by the Crown and that a State law which purports to diminish that security of enjoyment is, by virtue of s.109 of the Constitution, inoperative" [*ibid.* 438].

The RDA is concerned with substance and not form. As Justice Deane observed in the 1988 *Mabo [No.1]* case:

> The second point to be made about s.10 is that the section is not to be given a legalistic or narrow interpretation. As its opening words ("If, by reason of ...") make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law. [(1988) 166 CLR 186 at 230]

CYLC believes that the exclusion of native title holders from the rights and protections afforded to landholders in respect of the declaration of nature refuges (and as is proposed for SWRs by the SWR Bill) is contrary to s.10 of the RDA.

Conclusion

In CYLC's view, the provisions of the SWR Bill present a similar difficulty for native title holders as arises from the present nature refuge provisions of the NCA. By excluding native title holders from the category of landholder, the NCA violates s.10 of the RDA. The definition of "landholder" should be amended to include native title holders. Native title holders participation in a conservation agreement could readily be achieved by structuring such an agreement as an Indigenous land use agreement under the *Native Title Act 1993* (Cth).

If you wish to discuss any aspect of this submission please do not hesitate to contact me.

Yours sincerely,

Peter Callaghan
Chief Executive Officer
Cape York Land Council