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21 January 2013

Agriculture, Resources and Environment Committee
Email: arec@parliament.qld.gov.au

Dear Sir/Madam

Re: Submissions in relation to the *Mining and Other Legislation Amendment Bill 2012*

Please find enclosed the submissions of Cape York Land Council Aboriginal Corporation (CYLC) in relation to that part of the Bill which contains proposed amendments to the *Fossicking Act 1994* (Fossicking Act).

CYLC is the Native Title Representative Body for Cape York pursuant to the *Native Title Act 1993* (Cth) and has a proud history of representing Traditional Owners and native title holders in the region since 1990.

The legislative amendments proposed to the Fossicking Act will have a negative effect on the native title rights and interests of the people of Cape York.

Please let us know if you require any further information.

Yours faithfully,
CAPE YORK LAND COUNCIL

PETER CALLAGHAN
CHIEF EXECUTIVE OFFICER
CAPE YORK LAND COUNCIL ABORIGINAL CORPORATION

**Submission of Cape York Land Council Aboriginal Corporation to the Agriculture, Resources and Environment Committee's consideration of the *Mining and Other Legislation Amendment Bill 2012*
21 January 2013**

Background

The *Mining and Other Legislation Amendment Bill 2012* (the Bill) was introduced on 28 November 2012 by Andrew Cripps MP, Minister for Natural Resources and Mines, and was then referred to the Agriculture, Resources and Environment Committee.

These submissions relate to the proposed amendments contained in the Bill in relation to the *Fossicking Act 1994* (the Fossicking Act).

One of the primary objectives of the Bill is expressed to be to amend the *Fossicking Act 1994* to "remove unnecessary regulatory burden on fossickers". However, CYLC is concerned that the proposed amendments will impact on native title rights and interests, and potentially create a liability for holders of fossicking licences for non-compliance with the future act provisions of the *Native Title Act 1993* (Cth) (NTA).

The Bill proposes to remove section 11 from the Fossicking Act. Section 11 provides:-

11 Act's application if approved determination of native title

(1) This Act does not apply to land or waters if—

- (a) there is an approved determination of native title over the land or waters; and*
- (b) the determination provides that native title exists over the land or waters.*

(2) However, this Act does apply to the land or waters if—

- (a) there is an indigenous land use agreement for the land or waters that is registered on the register of indigenous land use agreements; and*
- (b) the agreement includes statements to the effect that—*
 - (i) the parties to the agreement consent, with or without stated conditions, to fossicking over the land or waters; and*
 - (ii) the [Native Title Act 1993](#) (Cwlth), part 2, division 3, subdivision P, is not intended to apply to fossicking over the land or waters.*

(3) In this section—

approved determination of native title see [Native Title Act 1993](#) (Cwlth), section 253.

indigenous land use agreement see [Native Title Act 1993](#) (Cwlth), section 253.

register of indigenous land use agreements see [Native Title Act 1993](#) (Cwlth), section 253.

Mining and future act provisions of NTA

We understand that the State has formed the view that the issue of a Fossickers Licence is consistent with s.24MD(6A) of the NTA, on the basis that as landowners do not have procedural rights regarding the grant of a fossickers licence, nor do native title holders/claimants; and that the issue of such a licence is not a right to mine, so the Right to Negotiate provisions of the NTA do not apply.

"Fossick" is defined in s.5(1) of the Fossicking Act as:-

- (a) search for fossicking material in a systematic or unsystematic way –*
 - (i) on the ground's surface; or*
 - (ii) by digging with a hand tool; or*
- (b) collect fossicking material.*

“Fossicking material” is defined in s.3 of the Fossicking Act as:-

- (a) a gemstone;
 - (b) an ornamental stone; or
 - (c) a mineral specimen; or
 - (d) alluvial gold; or
 - (e) a fossil (other than a fossil of a vertebrate animal); or
 - (f) a substance prescribed by regulation to be fossicking material;
- but does not include a meteorite, tektite or impact or ejected material associated with a meteorite impact structure.

The *Native Title Act 1993* (Cth) (NTA) definition of "mine" refers to:-

- (a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or
 - (b) extract petroleum or gas from land or from the bed or subsoil under waters; or
 - (c) quarry;
- but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:
- (d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or
 - (e) processing the sand, gravel, rocks or soil by non-mechanical means.

We understand that section 11 was originally introduced so that a fossicking licence could be issued as a low impact future act under the NTA. Section 24LA of the NTA which deals with low impact future acts specifically refers in sub-para (1)(b) to acts which are not low impact future acts, and refers at (1)(b)(v) to “mining (other than fossicking by using hand-held implements)”.

It seems to us that fossicking clearly includes activities that fall within the NTA definition of mining. If s.11 is removed, and steps are not taken to ensure compliance with subdivision P of the NTA (including compensation liability), then it appears that the risk of non-compliance will fall on fossicking licence holders, which does not seem to be fair or reasonable.

Access issues

Section 11 currently requires an ILUA to be negotiated with native title holders, with consent by the native title holders to fossicking and a statement that Subdivision P of the NTA does not apply.

In response to our concerns about the proposed amendments, the Department of Employment, Economic Development and Innovation (DEEDI) advised by letter of 30 October 2012 that the amendments would include a requirement for fossickers to obtain the permission of native title holders to fossick on land the subject of an exclusive possession determination of native title (see proposed s.27(1)(d)).

DEEDI said that this additional provision would place native title holders who have exclusive native title rights on a par with ordinary freehold landowners, giving them the ability to grant or refuse access to the relevant land with or without conditions.

However:-

- this amendment does not address the rights of native title holders with non-exclusive rights, who will have no say about access and its potential effect on native title rights and interests; and
- there will be considerable uncertainty for fossickers who seek licences for exclusive native title land, as there is no guarantee that they will get agreement to access and they will potentially be in breach of the future act provisions of the NTA, as noted above.

We note that by contrast the New South Wales Mining Act 1992 at s.12(6) extends to any native title land (exclusive or otherwise):-

(6) A person must not carry out fossicking on any land that is, or in waters that are, the subject of an approved determination of native title under the Commonwealth Native Title Act to the effect that native title exists, except with the consent of the relevant registered native title body corporate with respect to that native title.

Cultural heritage

If section 11 is removed, and there is no requirement for agreement to access non-exclusive native title land, there is a high potential for damage to cultural heritage.

Many sites and objects of significance to the Traditional Owners remain unmapped or unrecorded on registers. If there is no requirement to consult with native title holders, then it is difficult to see how appropriate precautions can or will be taken in practice. We doubt that those conducting activities described as “intermittent small scale recreational activities” will have the ability, resources or awareness of appropriate cultural heritage processes.

Delays in native title outcomes

We are extremely concerned that the proposed removal of s.11 from the Fossicking Act will result in fossickers re-entering the native title process, and if accepted as parties to native title claims, withholding consent to any determination of native title unless and until they are given a guarantee of access for fossicking activities post-determination.

This will add to the cost and timeframes for all parties.

CYLC submits that AREC should conclude that the Fossicking Act provisions of the Bill should not proceed.