



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

25 February 2016

Dear Committee Members

Please find attached a submission from the Cape York Land Council (CYLC) to inform the Infrastructure, Planning and Natural Resources Committee's consideration of the *Mineral Resources (Aurukun Bauxite Resource) Amendment Bill 2016*.

Also attached for your information, at Attachment 1, is a copy of the submission made by CYLC to the Australian Senate Standing Committee on Economics regarding its inquiry into the development of bauxite resources near Aurukun in Cape York.

CYLC trusts that the Committee will take note of issues raised in our submission and makes the Queensland Parliament aware of these important matters and how they can be resolved through amendment of the Bill.

CYLC also offers to meet with the Infrastructure, Planning and Natural Resources Committee to discuss any issue raised in this submission.

Please do not hesitate to contact me if you wish to discuss this submission or have any further questions.

Yours sincerely,

Richie Ah Mat  
Chairperson  
Cape York Land Council

**Cape York Land Council submission to the  
Infrastructure, Planning and Natural Resources Committee regarding the  
*Mineral Resources (Aurukun Bauxite Resource) Amendment Bill 2016***

**Introduction**

The Aboriginal people of Aurukun aspire to self-empowerment, to improve their social and economic wellbeing, and to reduce their dependence on government welfare. The policy rhetoric of the Queensland Government supports Aboriginal peoples' aspirations for social and economic development, but a wide gap remains between the social and economic circumstances of Aboriginal Queenslanders, particularly the Wik and Wik Way People of Aurukun, and mainstream Queenslanders. Aboriginal social and economic development faces significant and ongoing obstacles but it is clear that the nexus between Aboriginal peoples' native title and land rights, Aboriginal freehold and the development of mineral resources, provides a potential development opportunity which can significantly benefit Aboriginal people. Government policy makers must strive to make the most of this opportunity, particularly in remote areas where there are few economic or job creation opportunities available to the inhabitants of those areas.

**Amending legislation**

However, the Queensland Government's previous decisions regarding the selection of a Preferred Proponent for the development of bauxite resources near Aurukun demonstrate that it was not seeking to improve the social and economic wellbeing of Aboriginal people. Following selection through an administrative process, the Preferred Proponent uniquely benefits from a discriminatory legislative regime set out under Chapter 5 Part 2 and Chapter 6 Part 2 of the MRA and their ancillary provisions (**Aurukun Provisions**).

Amendments to the *Mineral Resources Act 1989* (Qld) (**MRA**) proposed by the *Mineral Resources (Aurukun Bauxite Resource) Amendment Bill 2016* (Qld) (**the Bill**) restore certain rights to Aboriginal land owners but do not undo the original decision to appoint a Preferred Proponent which stood to benefit from a regime that was plainly discriminatory and whose appointment was made under a flawed selection process. The failure of the Queensland Government to comprehensively address the discrimination by revisiting all decisions made under the Aurukun Provisions, and the decision to appoint a Preferred Proponent, is inconsistent with policy rhetoric and further entrenches Wik and Wik Way Peoples' disadvantage.<sup>1</sup>

**Special regime for the mining of Aurukun bauxite**

The Cape York Land Council (**CYLC**) supports the inclusion of a special regime for the assessment and granting of mining tenures for an Aurukun project.<sup>2</sup> However, this special regime must not only benefit the people of Queensland, who are the owners of the mineral resource, but also maximise benefit to the socially and economically disadvantaged Wik and

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<sup>1</sup> The Wik and Wik Way People is also the term given to the common law native title holders pursuant to a series of Federal Court native title determinations made between 2000-2012. The majority of the land affected by the Bill lies within land that is both native title land and Aboriginal freehold.

<sup>2</sup> The Aurukun project is a term defined under the MRA as a project for the extraction, transportation and processing of bauxite on land that comprises RA315. See: *Mineral Resources Act 1989* (Qld) schedule 2 (definition of "Aurukun project").

Wik Way Peoples, who are the registered owners of Aboriginal freehold land and native title holders of the land where the mineral resource exists, identified as Restricted Area 315 (**RA315**).

CYLC submits that any special regime which provides for the granting of a right to mine upon RA315 must simultaneously satisfy the objective of the MRA to “...provide for the assessment, development and utilisation of mineral resources to the maximum extent practicable consistent with sound economic and land use management”, and the preamble of the *Aboriginal Land Act 1991 (ALA)* (which established the Wik and Wik Way Peoples ownership of the land) which in part states:

*“6 Some Aboriginal people have a requirement for land to ensure their economic or cultural viability.*

*7 Some land has been set aside for Aboriginal reserves or for the benefit of Aboriginal people and deeds of grant in trust are held on behalf of certain Aboriginal people.*

*8 The Parliament is satisfied that Aboriginal interests and responsibilities in relation to land have not been adequately and appropriately recognised by the law and that this has contributed to a general failure of previous policies in relation to Aboriginal people.*

*9 The Parliament is further satisfied that special measures need to be enacted for the purpose of securing adequate advancement of the interests and responsibilities of Aboriginal people in Queensland and to rectify the consequences of past injustices.*

*10 It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by this Act, for the adequate and appropriate recognition of the interests and responsibilities of Aboriginal people in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.”*

The intention of the ALA’s preamble, and the broader Queensland Government commitment to close the gap on Indigenous disadvantage, must therefore also be incorporated into the MRA for the assessment and grant of mining tenures for an Aurukun project.

Accordingly, CYLC requests that the Infrastructure, Planning and Natural Resources Committee reports back to the Queensland Parliament that the Bill must be amended to ensure that the Bill achieves the dual purpose of providing benefit to Queenslanders generally, and to Wik and Wik Way people specifically. A special regime provides the opportunity to achieve this outcome.

### **Recommendations**

To achieve this CYLC makes the following observations and recommendations regarding the Bill:

- the Bill’s provisions to restore appeal and objection rights for the grant of a Mineral Development Licence (**MDL**) or Mining Lease (**ML**) for an Aurukun project, including their application to an ongoing MDL applications, are supported. However, the Bill should also provide that a right of judicial review should arise from a MDL application, including any determined application, made in relation to RA315 during the currency of the Aurukun Provisions. CYLC submits that if a decision was made to grant an ongoing MDL application before the Bill was passed it would make a mockery of the purpose of the Bill; and

- the Bill should be amended to introduce new provisions to revoke the previous selection of a Preferred Proponent and the subsequent Aurukun Agreement entered into by the Preferred Proponent which forms the basis of their right to apply for a MDL or ML under the Aurukun Provisions.

### **Conclusion**

The application of the MRA's Aurukun Provisions to date have marginalised the Wik and Wik Way Peoples' opportunities to improve their social and economic circumstances from the development of resources located on land where they hold native title and Aboriginal freehold rights and interests. This is clearly an injustice for people who already experience extreme disadvantage, and an embarrassment for the Queensland Government which is supposedly committed to improving the wellbeing of Indigenous Queenslanders.

However, if the MRA's Aurukun Provisions are amended in line with the points raised in this submission and with a purpose to provide opportunities and benefits for Wik and Wik Way people then there is very strong potential for the Aurukun Provisions to be an example of best practice and have the transformational effect of lifting the Wik and Wik Way People out of social and economic disadvantage into a positive and prosperous future.

CYLC trusts that the Infrastructure, Planning and Natural Resources Committee takes note of the points raised in this submission and raises them with the Queensland Parliament. Given the extensive history of this matter representatives from CYLC would welcome an opportunity to meet with the Committee to discuss this submission in more detail and clarify any points raised in this and other submissions.

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# **Attachment to Submission No. 006**



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

25 February 2016

Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Senators

**Regarding the Inquiry into the development of bauxite resources near Aurukun in Cape York**

Please find attached a submission from the Cape York Land Council regarding your Inquiry into the development of bauxite resources near Aurukun in Cape York.

I trust that the information contained in our submission is illuminating for your Inquiry, and that the Inquiry results in the Australian Senate coming to understand the full extent of the injustice done to Aurukun's Wik and Wik Way people. More importantly I trust that the Senate undertakes actions that lead to the remedy of this situation and support the Wik and Wik Way people in their efforts to develop the bauxite resources in ways that are most beneficial to them and the people of Queensland.

If you require any further information or would like to discuss any aspect of this submission please do not hesitate to contact me.

Yours sincerely,

Richie Ah Mat  
Chair  
Cape York Land Council

## **Inquiry into bauxite resources near Aurukun in Cape York**

On 24 November 2015, the Senate referred an inquiry into bauxite resources near Aurukun in Cape York to the Senate Economics References Committee for inquiry and report. The terms of reference are as follows:

The development of the bauxite resources near Aurukun in Cape York, with particular reference to:

- a) the economic development of the bauxite resources near Aurukun in Cape York;
- b) any issues relating to native title rights and interests on the land on which these resources are located;
- c) the process for the finalisation of an exclusive Mineral Development Licence Application on this land;
- d) any opportunities for traditional owners to receive ongoing benefit from the resources located on this land; and
- e) any other related matter.

### **ANNEXURES**

<b>Annexure</b>	<b>Description</b>	<b>Paragraph</b>	<b>Page</b>
1	The Wik Native Title Determinations	10	
2	Deed of Grant of Aboriginal freehold land	14	

## CYLC SUBMISSION TO INQUIRY

1. Cape York Land Council (**CYLC**) (ICN 1163) is a native title representative body (**NTRB**) for an area which encompasses the Cape York Region including offshore islands and the adjoining sea.
2. CYLC undertakes a range of statutory functions in connection with Native Title as defined under the *Native Title Act 1993* (Cth).<sup>1</sup>
3. CYLC's board of directors is comprised of Indigenous representatives from 17 communities across CYLC's representative area and since its inception CYLC has represented Traditional Owner Groups in native title determination applications and the negotiation of numerous native title agreements across Cape York.
4. In addition to the statutory functions of a NTRB, CYLC also performs broader Land Council functions including:
  - (a) responding to the implementation of Queensland legislation which affects native title interests including the *Aboriginal Land Act 1991* (Qld), *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld), *Aboriginal Cultural Heritage Act 2003* (Qld), *Cape York Peninsula Heritage Act 2007* (Qld);
  - (b) participation in policy reviews and legislative amendment processes which affect native title and Aboriginal interests;
  - (c) participation in policy implementation such as the Cape York Welfare Reform agenda;
  - (d) participation in cultural heritage mapping and protection;
  - (e) participation in land use planning and management;
  - (f) providing a centralised, secure repository for anthropological research and genealogies;
  - (g) involvement in resolving land administration and land tenure issues on Aboriginal land;
  - (h) promoting home ownership and economic development on Aboriginal land; and
  - (i) promoting economic development and healthier living.<sup>2</sup>
5. CYLC has provides support services to Prescribed Body Corporates (**PBCs**) and Registered Native Title Bodies Corporate (**RNTBCs**) so that native title claimants and holders have legally compliant and capable organisations to represent their interests and achieve benefits from native title.<sup>3</sup>
6. CYLC has a long and close relationship with the Wik and Wik Way people through support for their claims to native title, the transfer of Aboriginal land, and support for their representative body, Ngan Aak-Kunch Aboriginal Corporation, to hold and manage Wik and Wik Way peoples' rights, including the negotiation and implementation of mining agreements.
7. CYLC is supporting Ngan Aak-Kunch's current High Court challenge to the discriminatory provisions of the *Mineral Resources Act 1989* (Qld).

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<sup>1</sup> *Native Title Act 1993* (Cth) s.203B.

<sup>2</sup> Cape York Land Council Annual Report 2014 – 15, pp.15-16.

<sup>3</sup> Cape York Land Council Annual Report 2014 – 15, p. 15.



## Background

8. The bauxite resources near Aurukun in Cape York can be principally divided into two major deposits. The first is encompassed by Rio Tinto's tenement mining lease 7024 (**ML7024**), while the second is located in restricted area 315 (**RA315**).<sup>4</sup> A restricted area is an area established by gazette notice under s.391(1) *Mineral Resources Act 1989* (Qld) (**MRA**) that imposes restrictions, or prohibitions, upon the creation of mining tenements. Covering an area of approximately 1,905 square kilometres RA315 is the description given to the area of land which more or less comprises the 'Aurukun project'. The Aurukun project is a term defined under the MRA as a project for the extraction, transportation and processing of bauxite on land that comprises RA315.<sup>5</sup>
9. Significantly, and for the purposes of this submission, RA315 is subject to the following determinations of native title made in favour of the Wik and Wik Way People pursuant to the *Native Title Act 1993* (Cth) (**NTA**),
  - (a) *Wik Peoples v State of Queensland* [2000] FCA 1443 handed down on 3 October 2000 (QUD6001/98);
  - (b) *Wik and Wik Way Native Title Determination No.2* (contained in *Wik Peoples v State of Queensland* [2004] FCA 1306) handed down on 13 October 2004 (QUD6001/98);
  - (c) *Wik and Wik Way Native Title Determination No.3* (contained in *Wik Peoples v State of Queensland* [2004] FCA 1306) handed down on 13 October 2004 (QUD6001/98);
  - (d) *Wik and Native Title Claim Group v State of Queensland* [2004] FCA 789 handed down on 29 July 2009 (QUD6029/01);
  - (e) *Wik and Native Title Claim Group v State of Queensland* [2002] FCA 1096 handed down on 11 October 2012 (QUD6029/01),(collectively "**the Wik Native Title Determinations**").
10. A copy of the Wik Native Title Determinations appears at **Annexure 1**.

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<sup>4</sup> Restricted area 315 is presently described by a gazette notice published in the *Queensland Government Gazette* of 27 July 2012 at p.902. However, as the explanatory note at p.877 makes plain, this and other gazette notices made on that date merely served to "maintain the status quo of current Restricted Areas within Queensland". Prior to the gazette notice of 27 July 2012, restricted areas were contained within schedule 3 of the *Mineral Resources Regulation 2003* (Qld) (as continued in effect by s.767 of the *Mineral Resources Act 1989* (Qld), despite the repeal of the schedule by the *Mineral Resources Amendment Regulation (No. 2) 2012* (Qld)). Until its amendment by s.101 of the *Clean Energy Act 2008* (Qld), the establishment of restricted areas under *Mineral Resources Act 1989* (Qld) s.391 was done by regulation. Restricted area 315 had been contained in part 188 of schedule 3 of the *Mineral Resources Regulation 2003* (Qld), since that regulation was made. Restricted area 315 was first established, in the same terms as at present, by the *Mineral Resources Amendment Regulation (No. 3) 2002* (Qld) which amended the *Mineral Resources Regulation 1990* (Qld) with effect from 13 December 2002.

<sup>5</sup> *Mineral Resources Act 1989* (Qld) schedule 2 (definition of "Aurukun project").

11. For the majority of the area comprising RA315 the Wik and Wik Way Peoples (“**Native Title Holders**”) enjoy the exclusive right to:<sup>6</sup>

*give or refuse, and determine the terms of any permission to enter, remain on, use or occupy the Determination Area by others.*
12. Under the Wik Native Title Determinations, Ngan Aak-Kunch Aboriginal Corporation RNTBC (ICN 4097) (**NAK**) is the registered native title body corporate and so is the agent and sole representative of the Native Title Holders in relation RA315.
13. The area of RA315 is also almost entirely within a grant of Aboriginal freehold land (under the *Aboriginal Land Act 1991* (Qld)) made to NAK as trustee for the Wik and Wik Way People on 5 September 2013. Prior to 5 September 2013 the land where RA315 is located was held by Aurukun Shire Council (**ASC**) as shire lease under the now repealed *Aurukun and Mornington Shire Leases Act 1978* (Qld). A copy of the deed of grant of Aboriginal freehold land appears at **Annexure 2**.
14. Accordingly, as trustee of Aboriginal freehold and registered native title body corporate NAK is:
  - (a) the sole representative of the Native Title Holders in relation to native title matters arising in relation to the land or waters within the external boundary of RA315;
  - (b) the owner and relevant decision making body with respect to Aboriginal land; and
  - (c) the land ‘owner’ for the purposes of the MRA by reason of NAK’s trusteeship of Aboriginal freehold land.
15. Under the Wik Native Title Determinations and the grant of Aboriginal freehold land, the Queensland Government retains ownership of minerals and, subject to the rights of the Native Title Holders and land owners, is responsible for granting rights to explore and exploit mineral resources, such as bauxite, to proponents by the grant of an appropriate mining tenement, such as a Mineral Development Licence (**MDL**) or Mining Lease (**ML**). An application for the grant of a MDL or ML together with applicable compensation arrangements relating to Aboriginal land is dealt with under the MRA.
16. However, the NTA identifies the grant of a mining tenement over an area where native title rights exist as a ‘future act’ – that is, an act in relation to land or waters which validly affects native title.<sup>7</sup> Before a mining tenement is granted a notification and negotiation process generally follows under the NTA between Native Title Holders and a proponent to secure the consent of Native Title Holders for impacts to their native title rights and interests. In the absence of agreement with Native Title Holders (and after the expiry of 6 months), the proponent may apply to the National Native Title Tribunal for a determination that the future act (being the grant of the mining tenement) may be done, whether or not subject to conditions.<sup>8</sup>
17. Therefore there are two key statutory processes that must be satisfied to enable the Aurukun Project to be developed – one process under the MRA and one process under the NTA. For each of these processes NAK as the land ‘owner’ and the registered native title body corporate is the relevant entity to represent Wik and Wik Way Peoples’ interests.

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<sup>6</sup> See, for example, *Wik Peoples v State of Queensland* [2000] FCA 1443, order 3(c) per Drummond J, 3 October 2000.

<sup>7</sup> *Native Title Act 1993* (Cth) s.235.

<sup>8</sup> *Native Title Act 1993* (Cth) s.35.

18. Pursuant to the terms of the Wik Determinations, NAK is the agent of Wik and Wik Way People in respect of their native title rights and interests.<sup>9</sup> Accordingly there is no doubt about who are the Native Title Holders for RA315 or how to engage with them. For all native title matters concerning RA315 the Queensland Government and mineral resource developers must engage with NAK.

### **Aurukun Provisions**

19. In 2006 the Queensland Government enacted the *Mineral Resources and Other Legislation Amendment Act 2006* (Qld) to introduce special provisions applicable only to the Aurukun project (the “**Aurukun Provisions**”).<sup>10</sup> The Aurukun Provisions permit the State to make special arrangements for the grant of a mineral development license and, subsequently, a mining lease, for the Aurukun Project.
20. The Aurukun Provisions provide for an “Aurukun agreement”, which is an agreement between the State and a person selected by the State to develop an Aurukun Project. The Aurukun Provisions dispense with any requirement for an exploration permit, as a pre-requisite tenure,<sup>11</sup> and provide a proponent who is a party to an Aurukun agreement<sup>12</sup> with a simplified application process for obtaining a mineral development licence, and a similarly simplified application process for obtaining a mining lease. The selection by the State of a proponent to enter into an Aurukun agreement may be done through a competitive bid process.
21. Significantly, the Aurukun Provisions suspend certain rights of appeal or objection against any decision of the State, rights that are ordinarily available to land owners under the MRA. The rights of appeal or objection are dealt with in paragraphs 32 and 33 below.
22. This simplified application process has been achieved at the expense of the decision making rights of the Wik and Wik Way People under the MRA. Thus the practical effect of the Aurukun Provisions is the suspension of hard fought rights secured in a series of bitterly contested legal challenges dating from at least 1976.<sup>13</sup>
23. On 28 August 2014, the Queensland Government re-opened a competitive bid process that had been dormant since March of that year, and on the same day announced Glencore International AG as the Preferred Proponent. In December 2014, an Aurukun agreement was signed between

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<sup>9</sup> *Native Title Act 1993* (Cth) s.57(3) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) r.7.

<sup>10</sup> See *Mineral Resources and Other Legislation Amendment Act 2006* (Qld) s.4 (inserting part 6A (Mineral development licence for Aurukun project)) and s.5 (inserting part 7AAA (Mining lease for Aurukun project)). The provisions now appear as *Mineral Resources Act 1989* (Qld) chapter 5 part 2 (Mineral development licence for Aurukun project) and chapter 6 part 2 (Mining lease for Aurukun project). Chapters were introduced into the *Mineral Resources Act 1989* (Qld) by the *Mines Legislation (Streamlining) Amendment Act 2012* (Qld).

<sup>11</sup> See *Mineral Resources Act 1989* (Qld) ss.179 and 232(1).

<sup>12</sup> *Mineral Resources Act 1989* (Qld) schedule 2 (definition of “Aurukun agreement”) provides:

**Aurukun agreement** means an agreement between the State and a person selected by the State to develop an Aurukun project.

<sup>13</sup> *Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 17 ALR 129, Brennan F., *Land Rights Queensland Style* (Brisbane: University of Queensland Press, 1992).

the Queensland Government and Glencore Bauxite Resources Pty Limited (ACN 603 233 272) (“Glencore”).

### Native Title Processes

24. On 24 April 2015, the State of Queensland (under the NTA right to negotiate called the “Government Party”) gave notice under s.29 of the NTA of its intention to grant Mineral Development Licence 2001 (**MDL 2001**) to Glencore. MDL 2001 comprises a portion of RA315 and is over 57,330 ha in area.
25. The notice carried a statement under s.29(7) of the NTA that the Government Party considered the act to be an act attracting the ‘expedited procedure’.
26. The expedited procedure is a fast-tracking process for the grant of a tenement that is considered to have a minimal impact on native title.<sup>14</sup>
27. The expedited procedure approach is contrary to the approach taken by past Queensland Governments who have encouraged proponents to engage in negotiations with the Wik and Wik Way People over the development of RA315.
28. For example, the ways in which native title was addressed in regard to the impact of previous works contemplated or undertaken in and around the area comprising RA315 include:
  - (a) the Amrun Project (formerly known as South of Embley) in Rio Tinto’s adjacent mining lease ML 7024 is subject to the provisions of the Comalco Indigenous Land Use Agreement (Western Cape Communities Co-existence Agreement) registered under the NTA on 24 August 2001;
  - (b) previous sampling work done in relation to the Aurukun bauxite resource by Chalco Australia Pty Ltd (the previous holder of a prior tenement, in the vicinity of MDL 2001, described as MDL 378) was done in accordance with the Aurukun Bauxite Project (Feasibility Study) Agreement, a body corporate Indigenous Land Use Agreement (**ILUA**) negotiated with the Native Title Holders and in recognition of their exclusive native title rights and interests. That agreement was registered under the NTA on 6 August 2007; and
  - (c) on or about September 2014, the Native Title Holders (under the NTA right to negotiate called the “Native Title Party”) entered into the Aurukun Bauxite Indigenous Land Use Agreement (a body corporate ILUA) with Aurukun Bauxite Development Pty Ltd (**ABD**) which provides a suite of benefits such as job creation targets, Indigenous contracting opportunities, cash payments and an equity stake in addition to a comprehensive regime for the protection and management of Aboriginal cultural heritage. That agreement was registered on 25 February 2015.
29. On 8 September 2015 NAK formally objected to the inclusion in the notice under s.29 of the NTA of a statement that the act attracts the expedited procedure.<sup>15</sup> The objection was thereafter referred to the National Native Title Tribunal (**NNTT**) for inquiry. At the time of this submission’s preparation, the NNTT inquiry is ongoing. However the NNTT’s determination on NAK’s objection is expected by mid-March 2016, and the Senate Inquiry should inform itself of the outcome of

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<sup>14</sup> See *Native Title Act 1993* (Cth) ss.29(7) and 237. For more information see: [www.nntt.gov.au/futureacts/Pages/Expedited-procedure-objections.aspx](http://www.nntt.gov.au/futureacts/Pages/Expedited-procedure-objections.aspx).

<sup>15</sup> NAK objected by making a expedited procedure objection application to the National Native Title Tribunal under *Native Title Act 1993* (Cth) s.75.

the NNTT's inquiry. CYLC will provide a further submission to the Senate when the NNTT's inquiry is completed.

### **High Court Proceedings regarding the MRA's Aurukun Provisions**

30. On 26 June 2015 NAK filed a writ of summons (accompanied by a statement of claim) in the High Court of Australia (B35/2015) alleging that certain of the MRA's Aurukun Provisions are inconsistent with the *Racial Discrimination Act 1975* (Cth) and therefore invalid by reason of the operation of s.109 of the Commonwealth *Constitution*.
31. For the purposes of this Senate Inquiry, the most significant of the offending Aurukun Provisions as they relate to the grant of an MDL can be summarised as follows:
  - (a) exclusion of the Land Court's jurisdiction;<sup>16</sup>
  - (b) exclusion of the need to comply with the mandatory provisions of the Land Access Code;<sup>17</sup>
  - (c) exclusion of the power of the Minister to make directions to the holder of a mineral development licence 'to ease concerns of an owner of land';<sup>18</sup>
  - (d) exclusion of the right to seek judicial review of a decision under the MRA relating to a mineral development licence for an Aurukun Project.<sup>19</sup>
32. Similarly, the most significant of the offending Aurukun Provisions as they relate to the grant of a mining lease can be summarised as follows:
  - (a) exclusion of the requirement to include certain information governing how the land is identified and described in an application for a mining lease;<sup>20</sup>
  - (b) exclusion of the requirement that the mining lease must comply with an 'At Risk Agreement';<sup>21</sup>
  - (c) exclusion of the Land Court's jurisdiction to disputes about an 'At Risk Agreement';<sup>22</sup>
  - (d) exclusion of the right to object to an application for a grant of a mining lease.<sup>23</sup>
33. NAK's High Court proceeding has not yet been listed for hearing. However, to the extent that the matter has progressed within the period of the Committee's Inquiry, the Committee should inform itself of the progress of, and any outcome relating to, the High Court proceeding. CYLC will provide further information to the Committee about the High Court proceeding as it becomes available.

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<sup>16</sup> *Mineral Resources Act 1989* (Qld) s.231A(3).

<sup>17</sup> *Mineral Resources Act 1989* (Qld) s.231A(3) and 231G.

<sup>18</sup> *Mineral Resources Act 1989* (Qld) s.231A(3).

<sup>19</sup> *Mineral Resources Act 1989* (Qld) ss.231A(1) and 231K.

<sup>20</sup> *Mineral Resources Act 1989* (Qld) s.318AAA(3).

<sup>21</sup> *Mineral Resources Act 1989* (Qld) ss.318AAA(3) and 318AAH.

<sup>22</sup> *Mineral Resources Act 1989* (Qld) s.318AAA(3).

<sup>23</sup> *Mineral Resources Act 1989* (Qld) s.318AAA(3).

## NAK's position

34. The Wik and Wik Way People, who are the Native Title Holders and the owners of the Aboriginal Freehold land where RA315 is located, are some of the most socially and economically disadvantaged people in Australia. As their representative body, NAK supports the aspirations of Wik and Wik Way People to use their rights and interests in land to improve their social and economic circumstances and reduce their dependence on welfare. The development of the Aurukun project has obvious and significant potential to achieve improved social and economic outcomes for the community.
35. Supporting the development of Aurukun bauxite resources has been the position of the Wik and Wik Way People since the resource was held by Pechiney in the 1970s and then subsequently when those leases were relinquished in favour of Chalco Australia Pty Ltd.
36. None of these earlier proponents engaged in any productive commercial activity over the area which now comprises RA315 despite the proven quality of the bauxite resource and the extensive sampling work that has occurred over the years.
37. It is on that basis, and the community's earnest desire to avoid the disappointments of the past, that NAK has supported the ABD's bid to develop the Aurukun project.
38. Accordingly, on 19 September 2014, after four years of negotiation, ABD executed an ILUA with NAK, registered with the NNTT as Q12014/087 (the "**ABD ILUA**"). The ABD ILUA provides exclusive consent to ABD to mine on RA315.
39. The Native Title Holders preferred proponent to develop the Aurukun project, as expressed by the ABD ILUA, was subsequently ignored by the State Government.
40. NAK acknowledges that the Queensland Government owns the bauxite within RA315 and that the right to grant interests to develop the bauxite resources is within the exclusive power of the State. However, as the Native Title Holder and trustee of the land in which those resources are located, NAK has a significant role in decision making about how the Aurukun project is developed and who develops it. Indeed, the Queensland Government and NAK should be jointly responsible for promoting the development of the Aurukun project and work together to identify the conditions of development, including a suitable developer.
41. NAK's approach has been consistent with the UN Declaration on the Rights of Indigenous Peoples which has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' in dealings with Indigenous peoples. Articles 19 and 32 of the Declaration state:<sup>24</sup>

### *Article 19*

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

### *Article 32*

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<sup>24</sup> A copy of the Declaration of the Rights of Indigenous Peoples is available at [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

1. *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*

2. *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

3. *States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

42. Indeed, the 11 December 2015 Report to the Council of Australian Governments' Senior Officers Working Group entitled: *Investigation into Indigenous Land Administration and Use* reaffirmed that the principle of free, prior and informed consent should underpin any decision to delegate, streamline or pre-authorise decision-making.<sup>25</sup>

43. NAK also notes that the Queensland Government's actions are inconsistent with its commitment to the COAG agreement to Close the Gap in Indigenous disadvantage, and its commitment to Welfare Reform in Aurukun, because the Government's preference for Glencore to develop the resource would not result in the most beneficial social and economic outcomes for the Wik and Wik Way People.<sup>26</sup>

44. In summary, NAK considers that the conditions of the Aurukun project should be such that it provides maximum benefit to the Wik and Wik Way People and the people of Queensland. However, the Queensland Government has not acknowledged the rights and responsibilities of NAK and has followed a course which apparently deliberately seeks to marginalise NAK's interests, and in doing so further disadvantages the Wik and Wik Way People.

### ***Aboriginal Land Act 1991 (Qld)***

45. The Queensland Government's actions are also inconsistent with the objective of the *Aboriginal Land Act 1991 (Qld) (ALA)*, which regulates Aboriginal land such as the land where RA315 is located, because it does not "...*foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.*"<sup>27</sup>

46. The Queensland Government's actions positively diminish the Wik and Wik Way Peoples capacity for self-development, self-reliance and cultural integrity. Relevantly, the preamble to the ALA, in part, states:

*6 Some Aboriginal people have a requirement for land to ensure their economic or cultural viability.*

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<sup>25</sup> The report of the Senior Officers Working Group is available at [www.dpmc.gov.au/indigenous-affairs/about/jobs-land-and-economy-programme/coag-land-investigation](http://www.dpmc.gov.au/indigenous-affairs/about/jobs-land-and-economy-programme/coag-land-investigation). See particularly pp.5, 11 and 43 (references to "free, prior and informed consent").

<sup>26</sup> See [https://www.coag.gov.au/closing\\_the\\_gap\\_in\\_indigenous\\_disadvantage](https://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage)

<sup>27</sup> *Aboriginal Land Act 1991 (Qld)* preamble, paragraph 10.

*7 Some land has been set aside for Aboriginal reserves or for the benefit of Aboriginal people and deeds of grant in trust are held on behalf of certain Aboriginal people.*

*8 The Parliament is satisfied that Aboriginal interests and responsibilities in relation to land have not been adequately and appropriately recognised by the law and that this has contributed to a general failure of previous policies in relation to Aboriginal people.*

*9 The Parliament is further satisfied that special measures need to be enacted for the purpose of securing adequate advancement of the interests and responsibilities of Aboriginal people in Queensland and to rectify the consequences of past injustices.*

*10 It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by this Act, for the adequate and appropriate recognition of the interests and responsibilities of Aboriginal people in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.*

### **Cape York Land Council's Position**

47. Cape York Land Council (CYLC) has consistently supported the Wik and Wik Way People's aspirations in accordance with its corporate objectives which relevantly include:

*3.1 ... the relief of poverty, sickness, destitution, serious economic disadvantage, distress, suffering and misfortune of Aboriginal persons, communities and groups within the Representative Area.*

*3.2 Without limiting the generality of Rule 3.1, and in recognition of the severe problems encountered by Aboriginal people and the disadvantaged circumstances in which they find themselves, the corporation shall advance its principal object by:*

*(a) facilitating return of traditional Aboriginal land and waters to Aboriginal persons, and obtaining secure title to that land and waters;*

*(b) ascertaining the wishes, aspirations and opinions of Aboriginal persons relating to the management, use and control of traditional Aboriginal land within the Representative Area, and promoting and providing assistance to give effect to those wishes, aspirations and opinions;*

*(c) advancing and propagating education and learning generally amongst Aboriginal persons*

*(d) encouraging the continuation and preservation of traditional Aboriginal culture amongst Aboriginal persons, and the protection of members' intellectual property relating to traditional Aboriginal culture;*

*(e) providing for the general social welfare of Aboriginal persons;*

*(f) representing Aboriginal persons in all matters relating to land within, and human rights issues relating to, the Representative Area;*

*(g) assisting Aboriginal persons to protect sacred sites and sites of significance;*

*(h) assisting Aboriginal persons to return to their traditional lands;"*



48. In accordance with its corporate objectives CYLC has consistently represented the Wik Way People in all matters related to their traditional lands and waters.
49. Relevantly, CYLC has consistently supported the Wik and Wik Way People with respect to:
  - (a) the Wik Native Title Determinations;
  - (b) the transfer of Aboriginal land to NAK;
  - (c) the negotiation and implementation of numerous exploration and mining agreements.
50. With respect to previous mining agreements, negotiated outcomes generally include a standard mixture of benefits. These include:
  - (a) cultural heritage protection;
  - (b) a passive royalty stream; and
  - (c) best endeavour commitments to employment and business opportunities.
51. The Comalco Indigenous Land Use Agreement (ILUA) (Western Cape Communities Co-existence Agreement) ("**WCCCA Agreement**") applies to ML7024 which adjoins RA315 and is the best known of these mining agreements. The WCCCA Agreement is administered by the Western Cape Communities Trust and its three Sub-Regional Trusts.
52. However, notwithstanding their strong legal and moral right to the land subject to various mining operations, the Wik and Wik Way People have been unable to translate previously negotiated royalty-style arrangements into a share of the enterprises engaged in exploiting the resources upon land which is both native title land and Aboriginal freehold.
53. Additionally, despite the negotiation of ILUAs and mining agreements with proponents as a condition of consent for the grant of a mining lease, the vital transfer of skills, understanding and capacity building have not occurred, thereby severely limiting the potential for the economic development of the Wik and Wik Way People.
54. The ABD ILUA was specifically negotiated for the purpose of addressing these shortcomings by providing the Wik and Wik Way People with:
  - (a) a non-dilutable equity stake in the corporate vehicle set up to develop the Aurukun project;
  - (b) seats on the board of the corporate vehicle set up to develop the Aurukun project;
  - (c) training and employment programs;
  - (d) local business and contracting programs.
55. In the absence of any comparable benefits package presented by Glencore or the Queensland Government, the ABD ILUA represents the best opportunity for realising the long held aspirations of the Wik and Wik Way People for social and economic development and respects their right to self-determination.

## **Conclusion**

56. The Wik and Wik Way People, many of whom live in Aurukun, are some of the most economically and socially disadvantaged people in Australia.
57. The decision making process for developing the Aurukun project should maximise benefits accruing to the Wik and Wik Way People and the people of Queensland.

58. The Queensland Government has not acknowledged the rights and responsibilities of NAK as the holder of native title and the trustee of Aboriginal land over RA315, and has followed a course which marginalises NAK's interests, and in doing so further disadvantages the Wik and Wik Way People.
59. The Queensland Government has sought to marginalise NAK's interests and further disadvantage Wik and Wik Way People by:
- (a) adhering to the Aurukun Provisions of the MRA;
  - (b) notifying MDL 2001 as an act attracting the expedited procedure under the NTA; and
  - (c) refusing to recognise the ABD ILUA.
60. The arrangements that NAK has negotiated with ABD provide NAK with a genuine stake and an ongoing role in the development of the Aurukun project and would improve the economic and social conditions of Wik and Wik Way People.
61. The Queensland Government's preference for Glencore offers significantly less benefit to NAK and the Wik and Wik Way People.

### **Concluding submission**

62. To restore and respect NAK and Wik and Wik Way Peoples' rights as the owners of Aboriginal freehold where the bauxite resource exists:
- (a) The Aurukun agreement between the Queensland Government and Glencore, must be terminated because it was made using the MRA's discriminatory Aurukun Provisions;
  - (b) Any application from Glencore for a mineral development licence over RA315 must be terminated because it would be considered pursuant to the MRA's discriminatory Aurukun Provisions;
  - (c) The MRA should be amended to remove any part of the Aurukun Provisions deemed discriminatory<sup>28</sup>, and to include a statutory process for the selection of a Preferred Proponent to develop the Aurukun project. The Preferred Proponent selection criteria must be heavily weighted towards a proponent which offers the best opportunities and benefits for the Wik and Wik Way People. NAK must be meaningfully involved in the process to amend the Aurukun Provisions, and in the process to select the Preferred Proponent.
63. To restore and respect NAK and Wik Way People's rights as native title holders for land where the bauxite resource exists:
- (a) Any future MDL grant process must be subject to a 'full right to negotiate' under the NTA;
  - (b) As a condition of grant of an MDL or ML the Queensland Government, NAK and the preferred proponent must negotiate an Indigenous Land Use Agreement on terms acceptable to the Wik and Wik Way People.
64. To help fulfil Queensland Government commitments to support the social and economic development of Aboriginal Queenslanders, and to help fulfil Wik and Wik Way Peoples' aspirations for self-empowerment, social and economic development and reduced dependence on government welfare the Queensland Government and NAK must enter into a formal partnership to discuss and decide on the most appropriate way to develop the Aurukun project.

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<sup>28</sup> See paragraphs [32]-[33] above.