Submission No. 007
11.1.15

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LAWYERS

Inquiry into the *Mineral Resources (Aurukun Bauxite Resource) Bill 2016* (Qld)

Ngan Aak-Kunch Aboriginal Corporation RNTBC

25 February 2016

1 Summary

On 16 February 2016 the Queensland Legislative Assembly referred the *Mineral Resources (Aurukun Bauxite Resource) Bill 2016* (**Bill**) to the Infrastructure, Planning and Natural Resources Committee (**Committee**) for examination.

These submissions are made to the Committee on behalf of Ngan Aak-Kunch Aboriginal Corporation RNTBC (**NAK**). NAK is the agent for the Native Title Holders of the area on which the bauxite resource near Aurukun is located, the Wik and Wik Way Peoples, and the owner of the Aboriginal freehold of that land on trust for the Native Title Holders.

In 2006, the then Queensland Parliament added provisions into the *Mineral Resources Act 1989* (Qld) (**MRA**) applying only to the bauxite resource near Aurukun. The provisions were intended to create a simplified process to facilitate the development of the bauxite resource and to enable the State to optimise the financial benefits to the State, the local region and 'Indigenous Parties'.[1] What the provisions in fact did was strip away the rights of the Wik and Wik Way Peoples in relation to their land and provide for a different and lesser treatment of the Wik and Wik Way Peoples as owners of the land in comparison with other landholders in Queensland.

Subject to the matters outlined in Part 6 of this Submission, NAK supports the provisions of the Bill. However, the Bill does not go far enough.

NAK asks that the Committee recommend that the Bill should:

(a) repeal Chapter 5 Part 2 and Chapter 6 Part 2 of the MRA and their ancillary provisions (**Aurukun provisions**) in their entirety;

(b) repeal the Aurukun provisions retrospectively and terminates any existing agreements and applications made in reliance on the Aurukun provisions; and

(c) insert provisions into the MRA giving NAK power, in conjunction with the State of Queensland, to determine who mines on the lands of the Wik and Wik Way Peoples.

If the Committee is not minded to make the above recommendations, NAK asks that the Committee make the recommendations sought in Part 6 of these Submissions.

2 Role of NAK

NAK is the agent appointed under the *Native Title Act 1993* (Cth)[2] for the Native Title Holders identified in each of the Wik and Wik Way native title determinations made by the Federal Court. NAK is also the owner of the Aboriginal freehold of lands as trustees for those Native Title Holders. The land for which NAK is agent and trustee includes the land on which the bauxite resource near Aurukun is located.

NAK is the only legal entity that can enter into agreements in relation to the bauxite resource near Aurukun on behalf of the Wik and Wik Way Peoples (including Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth) and land access agreements).

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[1] Explanatory Notes, *Mineral Resources and Other Legislation Bill 2006*, https://www.legislation.qld.gov.au/Bills/51PDF/2006/MROLAB06Exp.pdf

[2] *Native Title Act 1993* (Cth) ss.57(3) and 58, *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) r.7(1)(a).

3 The Aurukun provisions

In 2006 the MRA was amended by the *Mineral Resources and Other Legislation Amendment Act 2006* (Qld) (**Amendment Act**) to permit the State of Queensland to make special arrangements for the grant of a mineral development licence and mining lease for an 'Aurukun project'.

An '**Aurukun project**' is a project for the extraction, transportation and processing of bauxite on land described as RA315.[3] NAK is the agent and trustee of the Native Title Holders for almost the entirety of RA315.

The policy objectives of the Amendment Act were to:

(a) facilitate the commercial development of the Aurukun bauxite deposit by providing legislative assurance for a simplified process to achieve certainty of mining tenure for the preferred bidder; and

(b) to enable the State to optimise economic, social and financial outcomes for the benefit of the State, the local region and Indigenous Parties.[4]

The Amendment Act inserted the Aurukun provisions into the MRA The Aurukun provisions provide that certain sections of the MRA which would otherwise apply to the grant of mining tenements do not apply to RA315.

4 Discrimination in the Aurukun provisions

The provisions of the MRA applying to an Aurukun project discriminate against the Wik and Wik Way Peoples.

Insofar as the Aurukun provisions limit or deny the enjoyment of rights by the Wik and Wik Way Peoples that are enjoyed by people of other racial or ethnic origin, they are inconsistent with s10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

The Aurukun provisions that are inconsistent with the RDA include:

(a) in relation to a mineral development licence (**MDL**):

(i) the exclusion of the jurisdiction of the Supreme Court to determine the validity of a grant of an MDL[5];

(ii) the exclusion of the power of the Minister to ease the concerns of an owner of land[6]; and

(iii) the exclusion of the requirement that the holder of an MDL (and anyone acting under the MDL) must comply with the mandatory provisions of the Land Access Code.[7] The Land Access Code provides best-practice guidelines for communication between the holder of an MDL and the owner

[3] *Mineral Resource Act 1989* (Qld) Schedule 2, definition of an 'Aurukun project'.

[4] Explanatory Notes, *Mineral Resources and Other Legislation Bill 2006*, https://www.legislation.qld.gov.au/Bills/51PDF/2006/MROLAB06Exp.pdf

[5] *Mineral Resources Act 1989* (Qld) s231K.

[6] *Mineral Resources Act 1989* (Qld) s231A(3).

[7] *Mineral Resources Act 1989* (Qld) ss231A(3) and 231G.

of land and imposes mandatory conditions concerning the conduct of authorised activities under an MDL. The mandatory conditions apply to matters including access points, setting up camps on the land, items brought onto the land and use of gates, grids and fences; and

(b) in relation to a mining lease (**ML**):

(i) the exclusion of the right to object in the Land Court of Queensland to an application for a grant of an ML[8]; and

(ii) the removal of NAK's right to withhold consent to the grant of a mining lease.[9]

On 26 June 2015 NAK commenced an action in the original jurisdiction of the High Court of Australia arguing that certain of the Aurukun provisions are inconsistent with s10(1) of the RDA and are therefore invalid by reason of s109 of the Commonwealth *Constitution*. Those proceedings are listed for a Directions Hearing before the Court on or around 23 March 2016.

5 Need for further amendments to the MRA

The Wik and Wik Way Peoples see the bauxite mine at Aurukun as their best opportunity for economic advancement and self-determination. They want to be part-owners of the mine, to have a real voice in its development and operation and to achieve economic independence through the mine. They see the mine as critical to their future.

The operation of the MRA and the conduct of successive Queensland Governments have prevented the Wik and Wik Way Peoples from achieving their ambition.

In 2011, after nearly forty years of failed attempts by the State of Queensland to develop the bauxite resource at Aurukun (despite the existence of several pieces of legislation specifically aimed at facilitating the development of that resource), the Wik and Wik Way Peoples decided to take their future into their own hands. NAK began working with Australian Indigenous Resources Limited (**AIR**) to develop a proposal to mine the bauxite resource on its land.

Through a joint venture agreement with AIR's subsidiary Aurukun Bauxite Development (**ABD**), instead of merely receiving a passive income stream from royalties, NAK would be an owner and active participant in developing the resource. NAK would receive a 15% non-diluting share in any product generated under the joint venture for the life of the mine, the right to appoint two of the five board members, a commitment to employing 70% local Indigenous people in seven years and NAK would be indemnified against any claim or loss suffered in relation to the joint venture.

The NAK/ABD joint venture has the potential to transform the relationship between Native Title Holders and those wishing to operate on native title land.

Under the Aurukun provisions, only a party selected by the Queensland Government to enter into an Aurukun agreement has the right to apply for an MDL (and then an ML) for an Aurukun Project.[10] In the rest of Queensland any person, including the owner of the land, can apply for an MDL or ML

[8] *Mineral Resources Act 1989* (Qld) s318AAA(3).

[9] [9]*Mineral Resources Act 1989* (Qld) s318AAA(3) excluding s.271A(2).

[10] *Mineral Resources Act 1989* (Qld) sections 231B(1) and s318AAB(1) and Schedule 2, definition of an 'eligible person'.

provided they have the requisite permit or licence.[11] Generally any person can apply for the pre-existing permit or licence.[12]

In November 2012, rather than allowing NAK and AIR to continue to develop their unsolicited proposal, the State of Queensland opened a Competitive Bid Process for the right to apply for mining tenements near Aurukun. NAK was excluded from the Competitive Bid Process both as a participant in the selection of the Preferred Proponent and as a bid partner.

On 12 March 2014, the State of Queensland closed the Competitive Bid Process stating that neither AIR nor Glencore International AG (**Glencore**) the other remaining bidder in the process, could deliver what the Government had hoped for in a timely manner. On 26 August 2014 the State of Queensland reopened the Competitive Bid Process for one day and purported to select Glencore as the Preferred Proponent for the Aurukun bauxite mine without notice to NAK nor to AIR.

Glencore was selected in a legally flawed process under legislation that discriminates against the Wik and Wik Way Peoples.

Further information about the aspirations of the Wik and Wik Way Peoples for the bauxite mine at Aurukun, their long struggle to participate in its development, the flaws in the MRA and the unfair process by which NAK was cut out of the opportunity to participate in the development of the mine on their land is contained in NAK's submission to the Senate Economics References Committee Inquiry into the Bauxite Resource at Aurukun in Cape York which is attached and marked Annexure '**A**' to this Submission.

The Bill does not give NAK the ability to participate in decision-making regarding the resource that gives them the best hope for a strong economic future. The Bill does not undo the flawed process by which Glencore became solely eligible to apply for mining tenements at Aurukun. The Bill does not even go so far as to put NAK in the same position as other landholders in Queensland.

NAK asks that the Committee recommend that the Bill should:

(a) repeal the Aurukun provisions in their entirety;

(b) repeal the Aurukun provisions retrospectively and terminates any existing agreements and applications made in reliance on the Aurukun provisions (including the Aurukun agreement entered into between the State of Queensland and Glencore on 5 January 2015); and

(c) insert provisions into the MRA giving NAK power, in conjunction with Government, to determine who mines on the lands of the Wik and Wik Way Peoples.

6 Concerns arising from the Bill as drafted

If the Committee is not prepared to recommend that the Bill be amended as discussed in Part 5 of these Submissions, we ask that the Committee recommend amendments to the Bill to address the following:

[11] An exploration permit or mineral development licence is required for a mineral development licence application: *Mineral Resources Act 1989* (Qld) s179. An exploration permit, prospecting permit or mineral development licence is required for a mining lease application: *Mineral Resources Act 1989* (Qld) s232(1).

[12] *Mineral Resources Act 1989* (Qld) ss 17, 131(1), 179 and Schedule 2, definition of an 'eligible person'.

6.1 Lack of alignment with Common Provisions Act

Clause 8 of the Bill, if enacted, would amend s318AAD of the Act to introduce additional requirements for the information to be included with an application for an ML under the Aurukun provisions. The new requirements are consistent with the requirements that apply to applications for an ML generally (that is, for applications for an ML outside RA315).[13]

However, clause 8 differs from the requirements that will apply to applications for an ML if the amendments to the *Minerals and Energy Resources (Common Provisions) Act 2014* (Qld) proposed by the *Mineral and Other Legislation Amendment Bill 2016* (Qld) (**MOL Bill**) are made.

The MOL Bill, if passed, will remove the requirement for a 'description' of boundaries in an ML application. Instead, an applicant will be required to 'define' those boundaries in accordance with a new s386R of the MRA (to be inserted by s460 of the *Minerals and Energy Resources (Common Provisions) Act 2014* (Qld) when that provision is proclaimed).[14]

Clause 8 should be amended to include in s318AAD provisions that correspond to those that will be contained in s245 of the MRA once that provision has been amended by the *Minerals and Energy Resources (Common Provisions) Act 2014* (Qld) and the *Mineral and Other Legislation Amendment Bill 2016* (Qld).

6.2 Limits on the use to be made of the Aurukun agreement

Clause 9 of the Bill, if enacted, would insert a new s318AAE into the Act. The new s318AAE would unnecessarily and prejudicially limit the Land Court's consideration of the Aurukun agreement and the disclosure of the Aurukun agreement in relation to a Land Court hearing.

(a) Consideration of the Aurukun agreement by the Land Court

Section 318AAE(2), if enacted, would provide that

> *"In hearing the application, the Land Court may consider the relevant Aurukun agreement, but only to the extent necessary to decide whether the applicant for the mining lease is an eligible person to make the application and to hold the mining lease."*

The Land Court should decide whether or not the Aurukun agreement is relevant to any part of its deliberations. That decision should not be pre-empted by legislation. If the Land Court determines the Aurukun agreement is relevant, it should be able to take the Aurukun agreement into account in determining the matter before it.

Section 268(2) of the MRA states

> *"At a hearing...the Land Court shall take such evidence, shall hear such persons and inform itself in such a manner as it considers appropriate in*

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[13] See *Mineral Resources Act 1989* (Qld) s.245(1)(d)-(g) and (i).

[14] Note also that s453 of the *Minerals and Energy Resources (Common Provisions) Act 2014* (Qld) would have introduced the requirement to 'define' the boundaries of a mining lease application under the Aurukun provisions but that section is proposed to be repealed by cl96 of the *Mineral and Other Legislation Amendment Bill 2016* (Qld). The same issue does not arise for a mineral development licence application under the Aurukun provisions because s428 of the *Minerals and Energy Resources (Common Provisions) Act 2014* (Qld) will introduce the requirement to 'define' boundaries and that provision is not affected by the *Mineral and Other Legislation Amendment Bill 2016* (Qld).

order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence."

Section 318AAE(1)(b), if enacted, would provide that s318AAE(2) applies despite s268(2) of the MRA.

Section 268(2) of the MRA gives the Land Court broad powers to inform itself. If s318AAE is inserted into the MRA, the only proceedings in which that broad discretion is limited would be proceedings relating to an Aurukun project. Given that the Wik and Wik Way Peoples, through NAK, are the group most likely to object to the grant of an ML for an Aurukun project, the effect of the limitation on s268(2) of the MRA would be to provide for different and lesser treatment of the Wik and Wik Way Peoples in the hearing of objections to mining on their land in comparison with the hearing of objections to mining in the rest of Queensland. The discrimination currently in the MRA would be replaced by fresh discrimination.

(b) Disclosure of the Aurukun agreement

Section 318AAE(3), if enacted, would provide

"The relevant Aurukun agreement is not required to be disclosed to any person in relation to the hearing."

This provision is of uncertain application. It does not appear to prevent the disclosure of the agreement. Rather, it states that disclosure of the Aurukun agreement cannot be compelled in a hearing before the Land Court. It appears to leave the decision whether or not to disclose the Aurukun agreement with a person in possession of the Aurukun agreement rather than with the Land Court.

If s318AAE(2) is enacted, the Aurukun agreement would remain relevant to any determination of whether or not the applicant for the ML is eligible to make the application and hold the ML. A party objecting to the grant of an ML (or, indeed, the Land Court itself) may need access to the Aurukun agreement to determine whether or not the applicant is a party to a valid Aurukun agreement at the time the application is made.

Section 318AAE(3) as drafted may create a situation where the Land Court orders disclosure of the Aurukun agreement but the holder of the Aurukun agreement declines to disclose the document.

We assume s318AAE(2) and (3) are intended to protect information in the Aurukun agreement the Government considers to be commercial-in-confidence. The confidentiality of that information can be protected while still allowing the Land Court to consider all relevant evidence. For example, the MRA could be amended to provide that any part of the proceedings relating to the content of an Aurukun agreement are to be conducted in camera and if the content of the Aurukun agreement is disclosed to a party, that party must keep the content of the Aurukun agreement confidential. In any event, the powers of the Land Court under the *Land Court Act 2000* (Qld) are sufficiently broad to support appropriate confidentiality orders if the Court concludes that such protection of information is warranted.

We submit the Committee should recommend that s318AAE should not be inserted into the MRA.

6.3 Transitional provision

Clause 11 of the Bill, if enacted, would insert a new s838 into the MRA; a transitional provision which purports to make certain changes to the MRA contained in the Bill retrospective. The new s838, if enacted, would state

> *"This Act, as in force after the commencement of the Mineral Resources (Aurukun Bauxite Resource) Amendment Act 2016, applies to an application for a mineral development licence made under chapter 5, part 2 whether the application was made before or after the commencement."*

Under s838, the provisions in the Bill would apply to an application for an MDL made before the commencement of the *Mineral Resources (Aurukun Bauxite Resource) Amendment Act 2016* (Qld) (**ABR Amendment Act**). They would not, however, apply to an MDL granted before the commencement of the ABR Amendment Act, nor would they apply to an application for an ML nor to an ML that was granted before commencement of the ABR Amendment Act.

Glencore Bauxite Resources Pty Ltd (**Glencore Bauxite**) made an application for an MDL for an Aurukun project on 14 January 2015. That application has not yet been determined. On 17 November 2015, Gilbert + Tobin wrote to Crown Law seeking an undertaking that the responsible Minister would not grant Glencore Bauxite's application for an MDL until the Bill had been voted on. The State refused to grant that undertaking.

Glencore Bauxite's application for an MDL can be granted after related proceedings before the National Native Title Tribunal are concluded. Those proceedings may be determined as early as March 2016. We cannot predict when the Bill will be voted on and therefore when the ABR Amendment Act will commence. If Glencore Bauxite's application for an MDL is granted prior to the commencement of the ABR Amendment Act, the provisions in the Bill will not apply to that MDL.

We submit the Committee should recommend that the transitional provision provide that the ABR Amendment Act applies to:

- an application for an MDL made under Chapter 5, Part 2 of the Act;
- an MDL granted under Chapter 5, Part 2 of the Act;
- an application for an ML made under Chapter 6, Part 2 of the Act ;and
- an ML granted under Chapter 6, Part 2 of the Act

whether the application was made or the lease or licence was granted before or after the commencement of the ABR Amendment Act.

Attachment to Submission No. 007

Attachment 1

LAWYERS

Submission to Senate Economics References Committee Inquiry into bauxite resources near Aurukun in Cape York

- Ngan Aak-Kunch Aboriginal Corporation RNTBC

19 February 2016

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1 Summary

Ngan Aak-Kunch Aboriginal Corporation RNTBC (**NAK**) represents, protects and manages the native title rights of the Wik and Wik Way Peoples. NAK is also the trustee of Aboriginal freehold for the Wik and Wik Way Peoples. NAK is agent and trustee for the land on which the bauxite resource near Aurukun the subject of the Committee's terms of reference is located; Wik and Wik Way People's land.

The Wik and Wik Way Peoples have long supported the development of the Aurukun bauxite resource. NAK recognises that the development of the bauxite resource provides the best opportunity for the economic advancement of the Wik and Wik Way Peoples. It also provides the best opportunity for the Wik and Wik Way Peoples to become economically self-reliant and to determine their own future rather than being bystanders on their own land. NAK considers that by participating itself in the development of the bauxite mine near Aurukun it can fully realise the promise of native title for which the Wik and Wik Way Peoples have fought so hard.

While rich in culture, beauty and potential, Aurukun remains among the most disadvantaged communities in Australia. In 2014 it had the tenth highest rate of unemployment of any community in Queensland and the fifth highest rate of young adults not engaged in work or study. The level of disadvantage in Aurukun continues to rise.[1] The Wik and Wik Way Peoples urgently need an enterprise that can build a better future; an enterprise that can generate training, employment and build capacity in the community.

The first mining rights over the bauxite resource near Aurukun were granted in 1975. Not a single tonne of bauxite has been mined in the forty years since those rights were first granted despite the Government handpicking the recipient of the mining rights and despite legislation aimed at streamlining the development of the mine.

In 2011, the Wik and Wik Way Peoples decided to take their future into their own hands. Concerned by the inability of successive Governments to facilitate the development of the bauxite mine, NAK began working with Australian Indigenous Resources Limited (**AIR**) to develop a proposal to mine the bauxite resource on its land. Through a joint venture agreement with AIR's subsidiary Aurukun Bauxite Development (**ABD**), instead of merely receiving a passive income stream from royalties, NAK would be an owner and active participant in developing the resource. The NAK/ABD joint venture has the potential to transform the relationship between Native Title Holders and those wishing to operate on native title land.

In November 2012, rather than allowing NAK and AIR to continue to develop their unsolicited proposal, the State of Queensland opened a Competitive Bid Process for the right to apply for mining tenements near Aurukun. NAK was excluded from the Competitive Bid Process both as a participant in the selection of the Preferred Proponent and as a bid partner.

On 12 March 2014 the State of Queensland closed the Competitive Bid Process stating that neither AIR nor Glencore International AG (**Glencore**) the other remaining bidder in the process, could deliver what the Government had hoped for in a timely manner. On 26 August 2014 the State of Queensland reopened the Competitive Bid Process for one day and purported to select Glencore as the Preferred Proponent for the Aurukun bauxite mine.

Glencore was selected in a legally flawed process under legislation that discriminates against the Wik and Wik Way Peoples. NAK is currently challenging that legislation in the High Court. The Wik and Wik Way Peoples, with their proud and strong history of fighting for recognition of their right to benefit

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[1] See, for example, Jesuit Social Services *'Dropping off the Edge Report 2015'*, http://www.dote.org.au/findings/queensland/ pp 75 – 79.

from their lands, have once again been dismissed by the political process and forced to risk their assets and take their chances in the courts. The Wik and Wik Way Peoples are once again left to fight in the highest court in the land merely to be in the position of other landowners.

The Wik and Wik Way Peoples have receive poor and shoddy treatment from the State of Queensland regarding the Aurukun bauxite resource for the past 40 years. The Government's selection of Glencore was facilitated by an outrageous and discriminatory process that effectively closed the door to the Wik and Wik Way Peoples. Rather than working with them to assist them to develop an independent economic base on their own land, the State of Queensland limited their opportunity to so participate. In short, the State prevented the NAK/ABD joint venture from applying for mining tenements over the bauxite resources on Wik and Wik Way land and cruelled the Wik and Wik Way Peoples' prospects for independence and self-determination.

The opportunities for the Wik and Wik Way Peoples offered by the Aurukun bauxite resources have not been realised largely as a result of poor decision-making by successive Queensland Governments. Successive Governments have failed to respect the authority and interests of the Wik and Wik Way Peoples and have imposed laws and processes peculiar to Aurukun that resulted in mining tenements being banked for decades or otherwise not acted upon.

The issues arising in the development of the bauxite resource near Aurukun illustrate the limitations of the *Native Title Act 1993* (Cth) **(NTA)** in enabling Native Title Holders to leverage their land to achieve economic independence.

2 Findings and recommendations

NAK proposes that the Senate Economics References Committee includes the following in its findings and recommendations arising from this Inquiry into bauxite resources near Aurukun in Cape York:

A. That the Senate finds that the legislative framework governing who can apply for mining tenements at Aurukun is discriminatory and flawed and requires urgent overhaul.

B. That the Senate finds that the appointment of Glencore as the eligible party to apply for mining tenements at Aurukun should be terminated.

C. That the Senate recommends that the Federal Government urgently work with the State of Queensland to enable the Aurukun agreement entered into on 5 January 2015 between the State of Queensland and Glencore Bauxite Resources Pty Ltd to be terminated and to enable any person to apply for mining tenements over the bauxite resource near Aurukun.

D. That the Senate recommends that the Federal Government introduce legislation to make the provisions of the United Nations Declaration on the Rights of Indigenous peoples enforceable under domestic law.

E. That the Senate recommends that the Federal Government amend the NTA to ensure that where an Indigenous Land Use Agreement has been validly entered into, a State Government may not grant mining tenements that defeat the Indigenous Land Use Agreement unless the relevant party/ies to the Indigenous Land Use Agreement have failed to meet the reasonable requirements for the grant of the mining tenements prescribed by law.

3 Role of NAK

NAK is the registered native title body corporate for all the determinations of native title made pursuant to the NTA in which the Wik and Wik Way Peoples have been determined to be Native Title Holders.[2] The area in which the bauxite resource near Aurukun is located is known as Restricted Area 315 (**RA315**).[3] On 13 October 2004 the Federal Court determined that the Wik and Wik Way Peoples were the Native Title Holders of the land and waters comprising most of RA315.[4]

When a determination recognising native title is made, the NTA requires that Native Title Holders establish a corporation to represent them and their interests.[5] In 2002 the Wik and the Wik Way Peoples established NAK as their prescribed body corporate for determinations of native title recognising the Wik and Wik Way Peoples. The only people eligible to be members of NAK are those adult members of the Wik and Wik Way Peoples who from time to time hold native title rights and interests in relation to a determination area. NAK represents, protects and manages native title for the Wik and Wik Way Peoples in accordance with the objectives of the Wik and Wik Way Peoples.

NAK is also the trustee of Aboriginal freehold under the *Aboriginal Land Act 1991* (Qld) (**Aboriginal Land Act**) for most of RA315.

NAK is considered the owner of most of RA315 for the purposes of the *Mineral Resources Act 1989* (Qld)(**MRA**).[6] The MRA governs mining tenements in Queensland.

NAK is the only legal entity that can enter into agreements (including Indigenous Land Use Agreements (**ILUAs**) under the NTA and land access agreements) in relation to the bauxite resource near Aurukun on behalf of the Wik and Wik Way Peoples.

4 History of failure to develop the bauxite resource

The Aurukun bauxite resource was first explored during the 1950s.[7]

By the mid-1970s, the land on which the Aurukun bauxite resource is located was an Aboriginal Reserve under the *Land Act 1962* (Qld). Section 29 of the *Aborigines Act 1971(Qld)* prohibited prospecting or mining on an Aboriginal reserve without the approval and permission of the Director of Aboriginal and Islander Advancement or Minister. Section 30 of the *Aborigines Act* authorised the Director to enter such agreements concerning mining on reserves as he or she thought fit. The Director entered into an agreement consenting to bauxite mining on RA315 on terms which included payment of a share of profits be paid to him 'on behalf of Aborigines generally'.

[2] NAK is registered as an Aboriginal and Torres Strait Islander corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and is a prescribed body corporate under r.4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

[3] RA315 was created on 13 December 2002 by the *Mineral Resources Amendment Regulation (No.3)* 2002 (Qld). It is a restricted area under s.391(1) of the *Mineral Resources Act 1989* (Qld) and application for, or grant of, any mining tenements is prohibited other than under chapter 5 part 2 or chapter 6 part 2 of the *Mineral Resources Act 1989* (Qld): see *Mineral Resources Act 1989* (Qld) ss.231B(2) and 318AAB(2).

[4] *Wik Peoples v State of Queensland* [2004] FCA 1306.

[5] *Native Title Act 1993* (Cth) s.55.

[6] Section 202(2) of the Aboriginal Land Act provides that the *Mineral Resources Act 1989* (Qld) applies to Aboriginal land that is or was transferred land as if it were a reserve, and the trustee of the land were the owner of the land.

[7] In 1957 the Aurukun bauxite resource was explored via Authority to Prospect 53M granted under the *Mining Act 1898* (Qld).

Following the consent of the Director, on 22 December 1975 the State of Queensland entered into a lease with Aluminium Pechiney Holdings Pty Ltd (**Pechiney**) and others to mine bauxite at RA315, giving the agreement force of law under the *Aurukun Associates Agreement Act 1975* (Qld). The lease was for a term of 42 years, with an option to renew for a further term of 21 years. From 10 December 1985, Pechiney was the only remaining holder of the lease.[8]

The Wik and Wik Way Peoples, led by Donald Daratchimbar Peinkinna, commenced proceedings, alleging the Director had breached his fiduciary duty in agreeing to royalties being paid to Aboriginal people generally rather than to the Wik and Wik Way Peoples. Mr Peinkinna was successful in the Full Court of the Supreme Court of Queensland. However, the Director appealed to the Privy Council which found the Director's agreement for participation in profits was authorised by the *Aborigines Act 1971* (Qld).[9]

After lobbying by and on behalf of the Wik and Wik Way Peoples, the lease to Pechiney was cancelled by the *Aurukun Associates Act Repeal Bill 2004* (Qld) on 13 May 2004. The lease was cancelled as, among other reasons, Pechiney failed to comply with development conditions requiring the lodgement of a performance bond of $2 million with the Queensland Treasurer by 31 December 1983 and the construction of an alumina smelter in Queensland by 31 December 1987. The lease was cancelled some 29 years after it was granted without any mining activity taking place on RA315.

At the same time the lease to Pechiney was cancelled, the State of Queensland announced its intention to allocate the right to develop the bauxite resource near Aurukun by a competitive bid process.[10]

The State of Queensland explored the area in 2004 and 2005 and launched the bid process in 2005, selecting the Aluminium Corporation of China Ltd (**Chalco**) as the preferred developer of the Aurukun bauxite resource. The bid process required the construction of a greenfield alumina refinery in Queensland and the development of the bauxite mine at RA315.

In 2006 the State of Queensland passed amendments to the MRA applying only to Aurukun which were intended to facilitate and fast-track the development of the bauxite mine at RA315.[11] Those amendments are discussed at Section 10 of this Submission.

The agreement between Chalco and the State of Queensland was finalised in March 2007. An ILUA between Chalco, the State of Queensland, NAK and Aurukun Shire Council was registered in September 2007.

Following its feasibility study, Chalco sought NAK's support to approach the State of Queensland to request that the project proceed as a mine only. The State of Queensland refused the request and in or around July 2010, the State of Queensland terminated its development agreement with Chalco. Again, no mining took place on RA315.

After the development agreement with Chalco was terminated, the Wik and Wik Way Peoples decided to take control of their own future. The Mayor of Aurukun Shire Council, Tharpitch Pootchemunka, called upon Cape York Land Council and Balkanu Corporation to explore opportunities for the Wik and Wik Way Peoples to participate in the development of bauxite mine and to become part-owners of the mine. Traditional owners and other Wik and Wik Way leaders met with the then Premier Bligh, Deputy Premier Fraser and later, after the change of government, with Deputy Premier and Minister for State

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[8] Queensland Parliament, *Aurukun Associates Agreement Repeal Bill 2004* (Qld) – *Explanatory Notes*, p.2.

[9] *Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 17 ALR 129.

[10] *Aurukun Associates Agreement Repeal Bill* Explanatory Notes p3.

[11] *Mineral Resources and Other Legislation Amendment Act 2006* (Qld)

Development Seeney on a number of occasions in 2011 and 2012 and expressed their determination to participate in the development of the Aurukun bauxite mine.

In 2011 NAK began working with a group that would ultimately become AIR/ABD on an unsolicited joint venture proposal to develop the bauxite mine at Aurukun.

In July 2012, following the election of the LNP Government, the Coordinator-General's office invited John Benson (who was working with NAK on the joint venture proposal) to discuss ways forward for the RA315 deposit.

In August 2012, the team preparing a proposal on behalf of NAK and AIR presented to Government, including Deputy Premier Seeney. The team was encouraged to submit a proposal demonstrating the support of the Traditional Owners. NAK understood that there was no deadline for that proposal and that mining rights over RA315 were not going out to tender.

5 Competitive Bid Process

On 27 November 2012, the then LNP Government issued the *Invitation for Expressions of Interest – November 2012* (**EOI Invitation**), opening a Competitive Bid Process to determine who would have the exclusive right to apply for mining tenements for bauxite at RA315. NAK did not receive notice that the Government would put the mining tenements out to tender. They had understood the Government was waiting for the unsolicited proposal from NAK and AIR.

In the rest of Queensland, any adult or company is eligible to apply for a mineral development licence or mining lease.[12] For the mining of bauxite at RA315, however, only a party who has entered into an 'Aurukun agreement' with the State of Queensland under the *Mineral Resources Act 1989* (Qld) (**MRA**) is eligible to apply for a mineral development licence or mining lease.[13] The Competitive Bid Process was aimed at identifying the party with whom the State of Queensland would enter into an Aurukun agreement.

Following the response to the EOI Invitation, the State shortlisted Glencore and AIR to submit a detailed proposal to the State of Queensland in accordance with the *Aurukun Project – Request for Detailed Proposal – April 2013* (**RFDP**). The RFDP stated that the State would evaluate the RFDP Responses to identify a Preferred Proponent to undertake the extraction, transportation and processing of bauxite on RA315 (the **Aurukun Project**).[14] The State would then enter into an Aurukun agreement with the Preferred Proponent.

6 Exclusion of NAK from the Competitive Bid Process

As discussed in Section 5 of these Submissions, NAK, the owner of most of RA315 on behalf of the Wik and Wik Way Peoples, cannot by law apply for mining rights on its own land unless the State of Queensland enters into an Aurukun agreement with NAK. All other landowners in Queensland can apply for mining tenements on their land as of right.

This legislative discrimination against NAK was compounded by the Competitive Bid Process.

[12] Sections 179 and 232 and Schedule 2 (definition of 'eligible person') *Mineral Development Act 1989* (Qld).

[13] Sections 231B(1), 318AAB(1) and Schedule 2 of the *Mineral Development Act 1989* (Qld).

[14] 'Aurukun project' is defined in the MRA Schedule 2. Section 6.6 of the RFDP states that the State will enter into an Aurukun agreement with the Preferred Proponent/s.

6.1 Exclusion of NAK from decision-making

NAK was excluded from participating in the selection of who would mine on their land.

In December 2011, NAK and AIR met with the Coordinator-General of the Department of State Development in Brisbane. NAK was advised that it had to elect whether to participate in the Government's decision-making process for the bid or be a partner in a bid, given what was said to be a conflict of interest.

NAK continued to develop its proposal with AIR and was excluded from decision-making in the Competitive Bid Process thereafter.

6.2 Exclusion of NAK from bidding for mining tenements

After NAK was excluded from the decision-making process, NAK was also prevented by the probity requirements of the Competitive Bid Process from making a bid in partnership with another entity. This effectively excluded NAK from bidding for mining rights on their own land as to do so they would need the financial resources and expertise of a bid partner.

Under clause 3.2.1 of the EOI Invitation, Proponents were only able to hold discussions with NAK by arrangement with, and in the presence of, the Probity Auditor. Such discussions were limited to the matters necessary for the Proponent to answer evaluation criteria relating to the capacity of the Preferred Proponent to address native title and cultural heritage and the experience or understanding of the Proponent to understand issues associated with the development and management of mines that impact remote Indigenous communities.

Under Clause 5.13 of the EOI Invitation, Proponents were prohibited from contacting NAK to provide or obtain information on the Competitive Bid Process or the Aurukun Project other than as stated. Proponents were also prohibited from soliciting or entering into any contract, arrangement or understanding with Native Title Holders to deal exclusively with the Proponent or to otherwise disadvantage another proponent in its ability to negotiate with Native Title Holders during the Competitive Bid Process.

Under Section 3 of the RFDP, all communications with NAK had to comply with a communications protocol.[15] The Communications Protocol included:

(a) that the focus of discussions with NAK was to attempt to negotiate an agreement on the impact on native title, cultural heritage and the Aurukun community of the activities associated with the development of the Aurukun bauxite resource;

(b) the Probity Auditor would oversee meetings between Proponents and NAK; and

(c) no other communications between a Proponent and NAK was permitted.

Despite NAK having been excluded from the decision-making process on the basis that NAK wished to be a joint applicant for mining tenements, the probity requirements governing communication between proponents and NAK did not contemplate or allow for NAK to be an applicant in partnership with another entity.

The Communications Protocol stated that agreements between NAK and a proponent may have a 'benefits package' to meet the 'cultural, commercial, social and economic needs and objectives of NAK for them to participate in a meaningful manner in the development of the Aurukun Bauxite resource'. However, in limiting the proponents' ability to discuss an agreement with NAK other than a

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[15] Communications Protocol is at RFPD Appendix H.

'benefits package', the terms of the RFPD prevented NAK from applying through the Competitive Bid Process to become a part-owner and active participant in the development of the mine itself.

6.3 Limitation of NAK's ability to seek judicial review

As NAK was, in effect, prevented from applying under the Competitive Bid Process, when Glencore was selected as Preferred Proponent in the concerning circumstances discussed at Section 8 of these Submissions, NAK was unable to seek judicial review of the selection of Glencore as it was not a party to the bid.

Despite the first objective of the Competitive Bid Process being to maximise the benefits and returns from the Aurukun Project to the Native Title Holders and the Aurukun Community, the recognition of NAK as the agent for the Native Title Holders and the Queensland Government's knowledge that NAK wished to have part-ownership of the mine and participate as a part-owner in its development, NAK was unable to participate meaningfully in the Competitive Bid Process nor to further its objectives through that Process.

7 Selection of Glencore as Preferred Proponent

On 12 March 2014, the then Deputy Premier of Queensland and Minister for State Development, Infrastructure and Planning, the Hon. Jeff Seeney, issued a media release announcing that the Queensland Governmenthad closed the Competitive Bid Process as the Government was *"not satisfied that either bid...could deliver what the government had hoped for in a timely manner"* and that *"the benefits for local communities were deemed to be insufficient, and timeframes for delivery of those benefits too long".*

The release stated that

> *"...we have decided to bring this process to a close and revisit this development opportunity at a later date, rather than take a chance that the objectives might one day be satisfied by one of the proponents".*[16]

In response to this announcement, AIR sought to address perceived shortcomings in its proposal and worked closely with NAK and ABD to further the NAK/AIR/ABD proposal for the Aurukun Project.

On 31 July 2014, NAK signed a term sheet with ABD which set out the terms under which NAK and ABD would work together to achieve the Aurukun Project. NAK considered that their overriding objective for the bauxite mine – to provide economic independence, employment pathways and capacity building for the Wik and Wik Way Peoples - would best be realised through the joint venture with ABD.

NAK and ABD met with Deputy Premier Seeney in April and July 2014 to advise him of the progress of their proposal.

On 28 August 2014, an officer of the Department of State Development, Infrastructure and Planning wrote to AIR and advised that :

> *1. [The State was] reinstating the Competitive Bid Process; and*
>
> *2. Based on the responses received by the State in response to the RFDP and having regard to the interest expressed by other entities in developing the Aurukun Project, the State has selected Glencore International AG as the Preferred Proponent for the Aurukun Project.*

[16] http://statements.qld.gov.au/Statement/2014/3/12/bauxite-bids-fail-to-deliver-for-cape-indigenous-groups

Also on 28 August 2014 the Deputy Premier issued a media release which stated:

> *The Queensland Government has today announced it would appoint Glencore International AG as the Preferred Proponent to develop the Aurukun Bauxite Deposit in Western Cape York ...*
>
> *The Deputy Premier and Minister for State Development, Infrastructure and Planning, Jeff Seeney said since the government's decision last March ruling out two other proposals, interest to develop the resource has remained.*
>
> ....
>
> *After continuing discussions with a number of parties, the Queensland Government considers Glencore is best placed in terms of both technical capability and financial strength to successfully take on this challenging development.*[17]

Neither NAK nor AIR/ABD was advised prior to the announcement that the Competitive Bid Process was being re-opened.

In a response to the announcement on 28 August 2014, Cape York Land Council and Balkanu Cape York Development Corporation wrote to the Premier and Treasurer expressing concern about the State's selection process.

On 9 September 2014 Nick Stump of ABD wrote to Graeme Albion of the Department of State Development, Infrastructure and Planning seeking clarification of the process by which Glencore was selected.

On 20 September 2014 the Department responded to Mr Stump, stating, among other things, that:

- The State refused to respond to the matters raised in the letter of 9 September 2004;
- There had been continuing interest in developing the Aurukun Project by a number of parties since the Competitive Bid Process closed;
- The State reinstated the Competitive Bid Process on 28 August 2014 and all relevant parties were notified of the State's decision on that date;
- The terms of the Competitive Bid Process applied to the reinstated process;
- The State's decision to select Glencore as Preferred Proponent was based on Glencore's response to the RFDP; and
- No new proposal was submitted by Glencore following the initial determination of the State to discontinue the Competitive Bid Process.

On 24 October 2014, Deputy Premier Seeney's office informed AIR that they were refusing their request for a statement of reasons for the selection of Glencore following the re-opening of the Competitive Bid Process.

On 5 December 2014 Glencore Bauxite Resources Pty Ltd (**Glencore Bauxite**) was registered with ASIC.

NAK understands that on 5 January 2015, one day before writs were issued for the Queensland election held on 31 January 2015, the State of Queensland entered into an Aurukun agreement with Glencore Bauxite (not Glencore International AG). As a party to the Aurukun agreement, Glencore

[17] http://statements.qld.gov.au/Statement/2014/8/28/government-to-drive-for-community-benefits-from-aurukun-mine

Bauxite became exclusively eligible to apply for a mineral development licence or mining lease for the Aurukun project.

On 14 January 2015 Glencore Bauxite lodged its application for a mineral development licence for RA315. We note that while Glencore International AG was selected as Preferred Proponent for the Aurukun project, Glencore Bauxite applied for the mineral development licence.

On 2 April 2015, NAK received notice under s29 of the NTA of a proposed grant of a mineral development licence to Glencore Bauxite for the potential extraction, transportation and processing of bauxite on RA315.

8 Problems with selection of Glencore as Preferred Proponent

8.1 Lack of procedural fairness and transparency

The process by which Glencore was selected as Preferred Proponent, and therefore became exclusively eligible to apply for a mineral development licence or mining lease for the Aurukun project, lacked transparency and procedural fairness.

Clause 3.1 of the Invitation for Expressions of Interest of November 2012 stated:

> *The State is committed to a competitive bid process that is transparent and accountable and which will ensure that all Proponents are afforded fair and equitable treatment.*

Further, clause 3.7 stated that a 'Probity Auditor' would be appointed for the "*duration of the Competitive Bid Process.*" The role of the Probity Auditor included "*ensuring that the procedure adopted in the receipt and evaluation of EOIs is fair and equitable, to monitor the evaluation process and to provide independent validation of this to the State*".

The selection of Glencore as Preferred Proponent lacked transparency and procedural fairness because:

(a) Glencore was selected under the Competitive Bid Process on the basis of a proposal that had earlier been found, in the same process, to be inadequate;

(b) Neither AIR nor NAK was advised that the Competitive Bid Process was being or had been re-opened until after Glencore had been selected under the re-opened process:

(c) AIR was denied the opportunity to submit a further proposal under the Competitive Bid Process nor otherwise address concerns with its previous proposal; and

(d) The Queensland Government refused to provide reasons for its selection of Glencore.

8.2 Failure to comply with the Request for Detailed Proposal

Glencore was selected as a Preferred Proponent despite the fact that it did not comply with the RFDP.

The State's objectives for the development of the Aurukun project, as expressed in both the EOI Invitation and the RFDP, were to:

- Maximise the benefits and returns from the Project to the Native Title Holders and the Aurukun Community;
- Maximise the financial returns to the State; and

- Ensure that the project is delivered at no cost and no risk to the State over the life of the project.[18]

The EOI Invitation stated at 2.2 that

> *The Wik and Wik Way people and the community of Aurukun will play an integral part in the development of the Aurukun Project and it is important to the State that the cultural, commercial, social and economic needs and objectives of the Native Title Holders and ASC are adequately addressed. The capability and capacity of Proponents to engage productively and negotiate in good faith towards reaching agreement with the Native Title Holders and ASC about a package of benefits that will meet their needs and objectives will be an important consideration in the selection of a "Preferred Proponent".*

Under clause 6.7 of the RFDP, each Proponent was required to include in its RFDP Response a copy of:

(a) its offer to, or final negotiating position reached with NAK on behalf of Native Title Holders; and

(b) a detailed economic model of the offer or final negotiating position.

The first of the Evaluation Criteria Considerations relates to the benefits and returns to the Native Title Holders and the Aurukun community. Clause 8.3.1 states that in assessing the benefits and returns from the Project to the Native Title Holders, the following will be taken into account:

- the nature and quality of the Proponent's offer to or final negotiating position with the Native Title Holders and the extent to which it demonstrates the commitment of the Proponent to working with the Native Title Holders in the development of the Aurukun project; and
- the nature, timing, quality and achievability of the economic benefits to the Native Title Holders.

Engaging with NAK and the proponent's offer to NAK were clearly considered by the State to be an important element of the RFDP Response.

Prior to the awarding of Preferred Proponent status to Glencore, Glencore had not made any offer to nor reached a final negotiating position with NAK. Glencore had not advised NAK, let alone negotiated with NAK, on the benefits it was prepared to offer to the Native Title Holders, economic or otherwise.

9 NAK/ABD joint venture agreement

In contrast to the failure of Glencore to make any offer to NAK prior to its selection as Preferred Proponent, after the Competitive Bid Process closed, AIR, and then its subsidiary ABD,continued to work closely with NAK.

NAK and AIR agreed to develop a joint venture for the bauxite mine at Aurukun on the following terms:

- NAK will receive a 15% participating interest and entitlements to any product generated under the joint venture for the Aurukun project. That interest cannot be reduced for the term of the joint venture;

[18] EOI Invitation at 1.3 and RFDP at 1.2.

- Profits owing to NAK can be paid in advance and offset against future profit share;
- NAK is indemnified against any claim or loss suffered in relation to the joint venture;
- NAK can appoint, remove and replace two of the five board members. Gina Castelain and Llyle Kawangka, Wik and Wik Way traditional owners and NAK Board members are currently on the Board of ABD; and
- a local training and employment program will be implemented to provide extensive opportunities for the community of Aurukun. The joint venture has committed to achieving 70% local Indigenous employment within seven years.

On 31 July 2014 NAK signed a term sheet with ABD for the joint venture. On 14 September 2014 NAK entered into an ILUA with ABD and on 31 March 2015 NAK entered into a legally binding joint venture agreement with ABD.

The agreement between NAK and ABD was the result of four years of consultation by NAK with Traditional Owners and negotiations with AIR/ABD.

The agreement is fundamentally different in nature from the usual arrangement between a mining company and Native Title Holders and represents a significant advance in the ability of Native Title Holders to realise their rights. NAK's involvement in the development of the joint venture is also an example of self-determination in practice. Under the agreements with AIR and ABD, NAK's engagement with the Aurukun Project would not be as a passive recipient of royalties but as a partner in the Aurukun Project. It is a once in generations opportunity for the Traditional Owners of RA315 and the people of Aurukun.

Under the agreements with ABD and AIR the community will have a real stake in the mine and the opportunity to fully participate in its development. As Wik Way Traditional Owner, Gina Castelain, told ABC News in September 2014, the ILUA means that "*[f]or the first time in many decades we have a real prospect of independence, of full participation in the mainstream economy and culture*".

10 Discrimination in the Aurukun provisions of the MRA

The provisions of the MRA applying to an Aurukun project discriminate against the Wik and Wik Way Peoples.

In 2006 the MRA was amended by the *Mineral Resources and Other Legislation Amendment Act 2006* (Qld) (**Amendment Act**) to permit the State of Queensland to make special arrangements for the grant of a mineral development licence and subsequent mining lease over RA315. The MRA created provisions applicable only to an Aurukun project.

The policy objectives of the Amendment Act were to:

(a) facilitate the commercial development of the Aurukun bauxite deposit by providing legislative assurance for a simplified process to achieve certainty of mining tenure for the preferred bidder; and

(b) to enable the State to optimise economic, social and financial outcomes for the benefit of the State, the local region and Indigenous Parties. [19]

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[19] Explanatory Notes, *Mineral Resources and Other Legislation Amendment Bill 2006*, https://www.legislation.qld.gov.au/Bills/51PDF/2006/MROLAB06Exp.pdf

The Amendment Act inserted the provisions that are now Chapter 5 Part 2 and Chapter 6 Part 2 of the MRA (**Aurukun Provisions**). The Aurukun Provisions provide that certain sections of the MRA which would otherwise apply to the grant of mining tenements do not apply to RA315. The Competitive Bid Process was conducted in light of the Aurukun Provisions and Glencore Bauxite's application for a mineral development licence was made under the Aurukun Provisions.

Insofar as the Aurukun Provisions limit or deny the enjoyment of rights by the Wik and Wik Way Peoples that are enjoyed by people of other racial or ethnic origin, they are inconsistent with s10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

The Aurukun Provisions that are inconsistent with the RDA include:

(a) in relation to a mineral development licence (**MDL**):

(i) the exclusion of the jurisdiction of the Supreme Court to determine the validity of a grant of an MDL;

(ii) the exclusion of the power of the Minister to ease the concerns of an owner of land; and

(iii) the exclusion of the requirement that the holder of an MDL (and anyone acting under the MDL) must comply with the mandatory provisions of the Land Access Code. The Land Access Code provides best-practice guidelines for communication between the holder of an MDL and the owner of land and imposes mandatory conditions concerning the conduct of authorised activities under an MDL. The mandatory conditions apply to matters including access points, setting up camps on the land, items brought onto the land and use of gates, grids and fences; and

(b) in relation to a mining lease (**ML**):

(i) the exclusion of the right to object in the Land Court of Queensland to an application for a grant of an ML; and

(ii) the removal of NAK's right to withhold consent to the grant of a mining lease.

On 26 June 2015 NAK commenced an action in the original jurisdiction of the High Court of Australia arguing that certain of the Aurukun Provisions are inconsistent with s10 of the RDA and are therefore invalid by reason of s109 of the Commonwealth *Constitution*. Those proceedings are listed for a Directions Hearing before the Court on 24 February 2016.

While not the subject of the High Court proceedings, as discussed in Section 5 of these Submissions, under the Aurukun provisions only a party to an Aurukun agreement with the State may apply for an MDL for RA315 and only a person who holds an MDL for RA315 can then apply for an ML for RA315. As Glencore has entered into an Aurukun agreement with the State of Queensland, only Glencore can apply for mining tenements for RA315. NAK cannot apply for mining tenements on its own land unlike landowners in the rest of Queensland.

Glencore was selected to mine the land of the Wik and Wik Way Peoples under the Aurukun Provisions which provide for different and lesser treatment of the Wik and Wik Way Peoples' than other Queensland land owners.

On 16 February 2016 the Queensland Government introduced the *Mineral Resources (Aurukun Bauxite Resource) Amendment Bill 2016* (**Amendment Bill**). The Bill restores some of the rights of the Wik and Wik Way Peoples stripped away by the Amendment Act in 2006. However:

- the Amendment Bill fails to address the discrimination inherent in the fact that, unlike other landowners in Queensland who are eligible to apply for mining tenements over their land as of right, NAK can only apply for mining tenements over their land if they are selected by the Queensland Government to be a party to an Aurukun agreement;
- the Amendment Bill does not terminate the existing Aurukun agreement with Glencore, awarded in the disturbing circumstances outlined in Sections 6 to 8 of this Submission. This means that in practice NAK cannot apply for mining tenements over their land; and
- any Aurukun agreement entered into between the State of Queensland and the party selected to mine Wik and Wik Way land is not required to be disclosed to the Wik and Wik Way Peoples under the Amendment Bill.

RECOMMENDATION:

That the Federal Government urgently work with the State of Queensland to enable the Aurukun agreement entered into on 5 January 2015 between the State of Queensland and Glencore Bauxite Resources Pty Ltd to be terminated and to enable any person to apply for mining tenements over the bauxite resource near Aurukun.

11 Disregard of the ILUA between NAK and ABD

On 18 September 2014 NAK entered into an ILUA with ABD. The ILUA provides for the exploration, mining and export of beneficiated bauxite within RA 315 by way of a joint venture between NAK and ABD. On 25 February 2015, the National Native Title Tribunal registered the ILUA.

An ILUA is a voluntary agreement between native title groups and others about the use and management of land and waters. An ILUA can only be entered into after consultation with Traditional Owners. Once registered, an ILUA is legally binding on all parties to the ILUA. ILUAs are one of the only ways in which native title holders can pursue economic development of their native title rights and interests.

NAK negotiated the ILUA with ABD in an act of self-determination under which they hope to more fully realise the benefits of their native title. In entering into an Aurukun agreement with Glencore, knowing NAK had entered into an ILUA with ABD for the same project, the Queensland Government disregarded the rights, interests and wishes of the Wik and Wik Way Peoples.

One of the main objects of the NTA is to protect native title and to establish how future acts affecting native title may proceed.[20] The NTA provides a number of means by which a future act may be validly done. The NTA states that if a future act is covered by an ILUA complying with s24EB of the NTA, the other means of validating a future act do not apply.[21] This suggests that a registered ILUA is intended to have priority over other means of validating future acts.

The effect of the registered ILUA between NAK and ABD on Glencore Bauxite's capacity to effectively utilise a mineral development licence may be significant. It may be that even if the State grants an MDL to Glencore Bauxite, any act of Glencore Bauxite's that affects native title will be invalid under the NTA.

Granting Glencore Bauxite an MDL or ML may create a stalemate whereby, in effect, Glencore Bauxite will have approval under the MRA to develop the Aurukun project (albeit uncertain approval

[20] NTA ss3(a) and (b) and 11.

[21] NTA s24AB(1).

given the inconsistency of the Aurukun Provisions of the MRA with the RDA) and the NAK / ABD joint venture will have native title approval.

This impasse would result in delay and uncertainty in realising the benefits of the Aurukun project for both the community of Aurukun and the people of Queensland.

To the degree that the NTA fails to protect the rights of Indigenous Peoples to determine their own economic future through the development of resources on their land, the NTA should be amended.

RECOMMENDATION:

> That the Federal Government amend the NTA to ensure that where an Indigenous Land Use Agreement has been validly entered into, a State Government may not grant mining tenements that defeat the Indigenous Land Use Agreement unless the relevant party/ies to the Indigenous Land Use Agreement have failed to meet the reasonable requirements for the grant of the mining tenement prescribed by law.

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12 Breach of the UN Declaration on the Rights of Indigenous Peoples

The State of Queensland's denial of the Wik and Wik Way Peoples' right to self-determination in the exploitation of the resources on its land breaches Australia's international obligations under the United Nations Declaration on the Rights of Indigenous Peoples (**Declaration**) to which Australia is a signatory.

The Declaration includes the following:

- *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development* (Article 3).

  In denying the joint venture between NAK and ABD the right to pursue mining tenements over RA315 the State of Queensland denied the Wik and Wik Way Peoples' right to self-determination and the right to freely pursue their economic potential.

- *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures* (Article 18).

  In preventing NAK's participation in the selection of the party with which the State of Queensland would enter an Aurukun agreement, the Government has denied the Wik and Wik Way Peoples the right to participate in decision-making affecting their rights.

- *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 19).

  The State of Queensland did not obtain the free, prior and informed consent of the Wik and Wik Way Peoples before denying them the right to apply for mining tenements on their land or stripping away their rights under the Aurukun Provisions of the MRA.

- *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* (Article 32.1).

NAK developed priorities (including a share in the mine) and strategies (through the joint venture with ABD) for the development and use of RA315. They were unable to exercise their rights under Article 32.1 as a result of the actions of the State of Queensland.

- *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, utilisation or exploitation of mineral, water or other resources* (Article 32.2).

  The State of Queensland failed to consult and cooperate with NAK to obtain its free and informed consent on the Aurukun Project and the Competitive Bid Process.

- *States in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration* (Article 38).

  Both the Queensland and Federal Governments have failed to take appropriate measures, Federal or otherwise, to achieve the ends of this Declaration in matters relating to the Aurukun Project.

If Glencore Bauxite's mineral development licence application proceeds, the Wik and Wik Way Peoples will be denied a very real opportunity for self-determination, to freely pursue their economic development and to determine strategies and priorities for the development of their lands and resources.

The Declaration cannot be mere words. It only becomes meaningful by action and the Australian Government must take appropriate action to achieve the commitments in the Declaration.

RECOMMENDATION:

That the Federal Government introduce legislation to make the provisions of the United Nations Declaration on the Rights of Indigenous peoples enforceable under domestic law.

13 Potential further delay of the Aurukun Project

Since Glencore was selected as Preferred Proponent for mining tenements at Aurukun its share price has dropped significantly. NAK understands that Glencore is currently engaged in restructuring, including the sale of unproductive assets and downsizing of its operations, with concomitant job loss.

In 2015 Ivan Glasenberg (CEO of Glencore) announced to investors that the company would avoid new investment in greenfield mines.

To grant mining tenements to Glencore Bauxite given Glencore's current financial position risks a repetition of the history of failed development of the bauxite mine at Aurukun. This is not in the interests of the public of Queensland, of Australia or of the people of Aurukun.

14 Conclusion

In modern Australia it is uncontested that Indigenous Peoples' future lies in their capacity to realise their economic interest in land and that to do so is in the national interest. The Wik and Wik Way Peoples want to be and are entitled to be self-sufficient, to engage themselves with business and to be economically independent rather than dependant on the State. The joint venture agreement NAK has entered into with ABD would enable NAK to achieve economic independence and self-sufficiency, and on their own terms. It would enable NAK to ensure that Wik and Wik Way culture, land and waters are preserved in the development of the mine and to maximise jobs for the people of Aurukun.

If the Queensland Government had doubts about the ability of the NAK/ABD joint venture to deliver the project they could have drafted an agreement with timelines, performance deposits and guarantees to ensure their objectives were met.

The decision to appoint Glencore, in a flawed and discriminatory process, denies NAK the opportunity to realise their rights as Native Title Holders. It is the latest attempt by the State of Queensland to manage the Aurukun Project outside the legislative framework that applies to mining in the rest of Queensland.

NAK fears that at the end of this process, at best it will end up with a package of benefits from Glencore that provide passive royalties and limited, low-level employment for the people of Aurukun in a development in which NAK has no ownership and no say. At worst, given Glencore's current financial position and the pattern of history, the bauxite resource will remain undeveloped and the Wik and Wik Way Peoples will receive no benefit from the resource.

This treatment of the Wik and Wik Way Peoples in relation to the use and development of their own land is unacceptable in modern Australia, inconsistent with reconciliation, inconsistent with our international obligations and an outrage. It flies in the face of all of the rhetoric which comes from governments across Australia about their support for Indigenous people in the development of their own independence and economic base. If NAK's fears come to pass then they and their future generations will be condemned to lives of poverty, hopelessness and despair. The State of Queensland must overhaul all aspects of current legislative framework and processes which establish impediments to the full enjoyment by Wik and Wik Way Peoples of their own land. Furthermore, the State of Queensland should be required to take positive steps to assist NAK in its strategy for prosperity and economic independence.