Cape York Land Council Aboriginal Corporation
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Committee Secretary
State Development, Natural Resources and Agricultural
Industry Development Committee
Parliament House
George Street
BRISBANE QLD 4000
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19 March 2019

Re: *Natural Resources and Other Legislation Amendment Bill 2019* (Qld)

Dear Secretary

Cape York Land Council (**CYLC**) is the Native Title Representative Body (**NTRB**) under the *Native Title Act 1993* (**NTA**) for the Cape York region. CYLC's representative body area includes all land and sea country north of the Daintree River. In our NTRB role we fulfil statutory functions under the NTA. In our broader Land Council role we support, protect and promote Cape York Aboriginal Peoples' interests in land and sea to positively affect their social, economic, cultural and environmental circumstances. In this capacity we provide comments on the *Natural Resources and Other Legislation Amendment Bill 2019* (Qld) (the **"Bill"**).

Aboriginal Land Act 1991 (Qld) amendments
The Bill proposes to amend the *Aboriginal Land Act 1991* (Qld) (**ALA**) to replace what is currently a process of declaration by regulation with a ministerial declaration process (see Bill cl.10, 11, 12, 13, 14, 16, 17, 19, 22), thereby enabling the Minister administering the ALA to make a declaration about land available for grant as inalienable Aboriginal freehold (ALA ss.10 and 12); the reservation of forest products and quarry materials to the State on those lands (ALA ss.55 and 82); and altering the application of the Act by declaring city or town land (which, as "excluded land", is not available State land under the Act) or declaring tidal land to be available State land (ALA ss.27 and 28).

CYLC notes that replacing a regulation making process with a ministerial declaration process is a potential breach of fundamental legislative principles under s.4 of the *Legislative Standards Act 1992* (Qld) because it does not give sufficient regard to the institution of Parliament (*Legislative Standards Act 1992* (Qld) s.4(2)(b) and 4(4)). CYLC is also concerned this proposal does not reflect that the optimal categorisation of a process for a declaration about land available for grant as inalienable Aboriginal freehold under the ALA is legislative and not administrative.

The accepted definition of the distinction between administrative and legislative character is that given by Latham CJ in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 as follows:

> The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

In CYLC's view, the matters proposed for Ministerial declaration are legislative in character as they create, alter and affect rights. The current regulation making process gives the Legislative Assembly oversight of any regulation that the responsible Minister decided to place before the Executive Council, and the opportunity to review (in committee) and/or disallow the regulation. The proposed declaration process is not subject to this level of Parliamentary oversight so CYLC considers that the current regulation making process should be retained.

The only justification for the change from regulation to Ministerial declaration offered in the explanatory notes for the Bill are that the change would "reduce government's legislative burden by replacing a subordinate legislation process with a ministerial declaration process" (Explanatory Notes for the Bill, p.2). The claim of any burden from making regulations under the ALA is not well made – only three (amending) regulations were made in 2018, five in 2017 and four in 2016. Further, if the goal is to reduce the burden on the Executive Council, the State could clearly maintain the legislative status of declarations under the ALA by replacing regulations with Ministerial rule making that remains clearly legislative in character and subject to disallowance. This is the practice adopted by the Commonwealth Parliament (see, for example, *Industrial Chemicals Act 2019* (Cth) s.180 and Argument S., 'The use of "legislative rules" in preference to regulations: a "novel" approach?' (2015) 26(4) *Public Law Review*, 12-18).

CYLC is also concerned that the proposed ministerial declaration process will prompt the characterisation of the declarations made as administrative in character, and so be subject to judicial review. The lack of clarity concerning the legislative or administrative character of the proposed declarations under the Bill will create the potential (likely in our view) that the liability of declarations to judicial review will be tested judicially and at length. We believe this would be a highly undesirable outcome of the proposed amendments. The amendments therefore should be:

(a) removed from the Bill; or

(b) the legislative status of a declaration under the Bill should be declared as part of the legislation (together with a statement of a declaration's status as subordinate legislation under the *Statutory Instruments Act 1992* (Qld).

Either of these measures would ensure that the undesirable, and presumably unintentional, potential of a ministerial declaration under the Bill's provisions to be treated as an administrative instrument would be avoided.

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

Yours sincerely

Richie Ah Mat
Chair
Cape York Land Council