



Chuulangun Aboriginal Corporation

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Committee Secretary
State Development, Natural Resources and
Agricultural Industry Development Committee
Parliament House
George Street
Brisbane Qld 4000

Email to: sdnraide@parliament.qld.gov.au

Dear Committee Members,

Thank you for the extension of time to make a submission to the *Land, Explosives and Other Legislation Amendment Bill 2018*.

Chuulangun Aboriginal Corporation (Chuulangun) is based on Aboriginal freehold lands on Kuuku I'yu Northern Kaanju clan estates within the Mangkuma Land Trust (MLT) on Cape York Peninsula. We represent the interests of particular Kuuku I'yu families within the Mangkuma lands as well as the wider Kuuku I'yu Northern Kaanju homelands. Our functions include management of the 197,500 ha Kuuku I'yu Northern Kaanju Ngaachi Wenlock and Pascoe Rivers Indigenous Protected Area (IPA) which is located on the MLT, and development of sustainable income opportunities on homelands. Our interests in terms of management and protection of biocultural and heritage values also extend across the wider Kuuku I'yu Ngaachi which underlays a number of properties including pastoral lease and national park.

The Mangkuma Land Trust is the official land-holding body for 425,000 ha of Aboriginal freehold land transferred in 2001 under the Aboriginal Land Act 1991 (ALA). It was formed for the purpose of providing a legal entity by which the members of the land trust may perform functions under the Act. Its objectives include to "Relieve the disadvantage, distress, dispossession, lack of housing and employment opportunities, poverty, ill health and suffering of the Traditional Owners of Mangkuma by pursuing all appropriate means including contributing to the cultural, social, and economic and environmental wellbeing and development of the Traditional Owners of Mangkuma".

Since its incorporation in 2002, Chuulangun has been a strong advocate for the recognition of the correct governance and decision-making processes for Cape York and we have made this stance clear in the many submissions made to Bills and inquiries of government over some 16 years.

This is a fairly extensive Bill so our submission addresses only those issues of our immediate concern, namely, amendments to the ALA with respect to the option of granting land to a Registered Native Title Body Corporate (RNTBC) outside of their determined native title area;

Kuuku I'yu Northern Kaanju Ngaachi | Wenlock & Pascoe Rivers | Cape York Peninsula

"The deterioration of the land is felt by Payanamu and if proper land management is not carried out, Payanamu will not allow the land to be sustainable"

and protecting the cultural and natural values of the Shelburne and Bromley properties on Cape York Peninsula through amendment of the Cape York Peninsula Heritage Act 2007 (CYPHA).

Consultation

At the outset, it is important to note the absolutely inadequate consultation with respect to this Bill. When it was first introduced in 2017, only 16 days were allowed for submissions, which is insufficient time to review such an extensive Bill amending nine current acts. The low number of submissions received last year, none of which were from Indigenous organisations, reflects the poor consultation, particularly with the Indigenous community, organisations and land-holding bodies on Cape York who are directly affected by the amendments.

Again, with the current call for submissions, only 12 days were allowed, which is a completely inadequate. Further, the invitation to make submissions was not widely communicated, and we only heard of the Bill by word-of-mouth. We know of a number of other Indigenous organisations on Cape York who are in a similar situation.

It is not the case that further assessment under the Guide to Better Regulation should not be required as the proposals are unlikely to result in significant adverse impacts – we believe there is significant potential from this Bill to adversely impact the interests of Aboriginal people in Cape York. It is blatantly apparent that the “targeted” consultation only occurred with Cape York Land Council (CYLC), Queensland South Native Title Services and the Department of Aboriginal and Torres Strait Islander Partnerships. The MLT, an organisation established for the very purpose that the Bill seeks to affect, was not consulted. This begs the question whether the government is trying to fast track these amendments through Parliament, at the behest of particular privileged entities, to the detriment of Traditional Custodians.

This noticeable lack of consultation and transparency ignores not only the *Legislative Standards Act 1992 (Qld)* but for Indigenous people who are significant landowners of Cape York, it also breaches the principle of free prior and informed consent enshrined in the United National Declaration on the Rights of Indigenous People (UNDRIP), of which Australia is a signatory.

Amendment of the Aboriginal Land Act

The general objects of the Bill for increasing the ability of Aboriginal people and Torres Strait Islanders to access and utilise their land is supported, but we have significant concerns about the potential for exploitation of Traditional Custodians without sufficient protections to ensure appropriate consultation and decision-making is undertaken prior to land being granted to a RNTBC.

Whilst there are some protections in the Bill that the Minister be satisfied that, for example, the appointment of the CATSI corporation is supported by consultation with Aboriginal people particularly concerned with the land, the land is the subject of a native title determination and the CATSI corporation is the RNTBC for the determination and that an ILUA has been entered into with the CATSI nominated as the proposed grantee for the land, *this is wholly inadequate*, given the history of consultation in Cape York, the propensity of particular organisations to speak for others without authorisation based on inadequate consultation, and the current climate where an unsupported native title claim (Cape York United Number 1 Claim) has been lodged by the Land Council across a large area of native title land, without the free, prior and informed consent of the Traditional Custodians. This clause should require that at the very least, in the clause and not only by way of example, that the Minister must be satisfied that there is free, prior and

informed consent, provided through traditional governance arrangements accepted by the Traditional Custodians of the subject land for the RNTBC to be appointed and make decisions about the land. Additionally, there needs to be recognition of existing duly constituted bodies, such as the MLT, as organisations that have been established to make decisions about the land, and that they are not sidelined.

The fear of Chuulangun and the MLT at present is that this Bill has been developed in consultation only with the Land Council, to progress the Land Council's interest and preferential treatment, and to override perceived obstacles to the Land Council's agenda.

The explanatory notes suggest the new provisions will *“provide flexibility for Aboriginal and Torres Strait Islander owner groups to nominate an existing registered native title body corporate to be grantee of land which is not subject to a native title determination provided the land is adjacent to, or in the vicinity of, a relevant native title determination area and the traditional owner groups are the same or similar. This flexibility removes the need to establish and fund a new entity with the same or similar membership, and administrative and governance arrangements, if an otherwise suitable entity already exists.”* The concern is that, if the people, through free, prior and informed consent wish to establish a new entity, and not utilise an existing entity, they must be able to do so, without the interference or bullying of other entities progressing an agenda not supported by the Traditional Custodians of the land.

This suggests that this may be part of a wider 'land grab' on the part of the Land Council, the CY number 1 claim being a prime example, and that the Land Council has the ear of government to the detriment of Traditional Custodians on Cape York who do not agree with their agenda. By way of example, with respect to the MLT, there is no official record of any dealings inside the Land Trust, especially dialogue regarding advantages, burdens and disadvantages that the No. 1 claim has on our current recognised rights and liberties gained through the ALA. CYLC presumably “certified” that all reasonable efforts had been made to identify the persons who hold native title over the relevant area and those persons authorised the claim. That the MLT and its members were not consulted is concerning and calls into legal question the basis for CYLC certifying that the claim was properly authorised. Another example is the current negotiations over the Orchid Creek property, which neighbours the Mangkuma lands. Despite being the neighbouring landowners and having Traditional Custodians for the property amongst its members, the MLT have been ignored in negotiations. Instead, the Land Trust received a 'standard process' letter from the Cape York Peninsula Tenure Resolution Program informing adjoining landowners about the investigation of the future use and tenure of the Orchid Creek property. The letter did not mention or recognise the appropriate involvement of Mangkuma in the negotiation process.

Amendment of the Cape York Cultural Heritage Act

The Bill will also make amendments to the CYPHA to *“support the protection and cooperative management of cultural and natural values of the Cape York Peninsula.”* The ability for Traditional Custodians to prohibit resource extraction activities on their land has long been sought and these amendments will ensure that the existing prohibition on resource extraction activities on the Shelburne Bay and Bromley properties is retained following their transfer as Aboriginal freehold land. There are other lands where Traditional Custodians seek to protect the outstanding biocultural, environmental and landscape values of their land, and the amendments need to go further, not just to legislatively protect Shelburne Bay and Bromley, but to provide a mechanism, through both the land tenure resolution process and through alternative

negotiation processes, for Traditional Custodians to nominate their land for protection from resource extraction. There does not appear to have been an opportunity provided during land tenure resolution for other lands, nor during the supposed consultation for this Bill, to include other lands in this amendment to the CYPHA. This again smacks of preferential treatment and an opportunity provided to some, but not others.

For many years, Traditional Custodians across Cape York have been arguing for greater protection of their lands from mining; protections that are currently not afforded under other arrangements, such as the ALA, CYPHA and Native Title Act (NTA). For instance, the Kaanju Ngaachi IPA, declared with the consent of the relevant Traditional Custodians and the MLT in 2008 over almost half of the Land Trust, is managed under the National Reserve System, and yet mining and other inappropriate developments threaten its biocultural and heritage values. Further, in a submission to the now redundant draft Cape York regional plan which was meant to replace repealed wild rivers protections, Chuulangun recommended the inclusion of the IPA in the strategic environmental area, to safeguard the IPA's unique nationally significant biocultural values, which include high endemism, high species diversity, significant habitat for the palm cockatoo, extensive areas of tropical grassland, and high fish diversity in the Wenlock and Pascoe Rivers.

Further, in 2013-14, after extensive consultation using a customary consent process, Traditional Custodians for the greater Lockhart River region (Payamu), encompassing more than one million hectares on eastern Cape York, including the MLT and the IPA, provided their consent to consider a possible world heritage nomination over their lands based on the biocultural landscape model. Traditional Custodians recognised that current laws and processes do not provide enough protection, and they agreed that world heritage listing provided a higher level of protection for their traditional lands. Queensland Labor has included possible world heritage nomination for areas of Cape York with traditional owner consent in their policy platform and in 2015 invited Traditional Owner groups who were interested in discussions around a world heritage nomination process to contact the Department of Environment and Heritage Protection. To this end, in late 2016, prompted by discussions with Payamu Traditional Custodians and the MLT, and supported by the World Heritage Unit within the Queensland government, Chuulangun submitted a proposal to 'reinvigorate world heritage on Cape York'. A year later there has been no response from the government nor progress on Cape York world heritage. This begs the question whether the government is not pursuing world heritage because it is not being driven by those 'umbrella' organisations with which it normally does business. It is being put in the 'too hard basket'.

Consistency with fundamental legislative principles (FLPs)

While the Bill seeks to streamline and ensure the effectiveness of key regulatory frameworks within the Natural Resources, Mines and Energy portfolio, enhance worker and community safety and security in the explosives and gas sectors, and support the protection and cooperative management of cultural and natural values of Cape York, it must also address the fundamental concerns Traditional Custodians have, relative to their pre-existing primary substantive rights that intersect the policy objectives and Amendments relating to the Bill. Consistency with FLPs,

and the departure from them, needs serious consideration, particularly in light of how these operate and affect Traditional Custodians on Cape York¹.

Inconsistencies with FLPs is seen within the context of how these operate among the State, the Land Council and RNTBCs, which give insufficient regard to the rights and liberties of individuals, clan families, clan groups and tribal groups, and especially their traditional laws and customs and how these govern their rights and liberties. This can be clearly seen in how RNTBCs are developed and are fundamentally flawed as they do not address rights and liberties as defined by individual clans and clan families, and their individual traditional laws and customs, as they are required to do so under the NTA². If retreat from FLPs is not designed and implemented properly, then that part of primary substantive rights that covers ‘personal and group safety’ will continue to be a detestable issue for many Traditional Custodians on Cape York. There are many cases where Aboriginal individuals and communities have suffered repression for their opposition to matters that impact them, and also to particular agendas to which they do not agree.

There is concern about the FLPs in relation to the amendments to the ALA, and in relation to the possible granting of land to a RNTBC where the RNTBC does not hold native title, as the native title holders’ rights and interests in the land may be negatively impacted.

Whilst the explanatory notes suggests that enabling “*a RNTBC to hold land outside of their determination area does not mean that they are the organisation which can make native title decisions for that land and that where no determination of native title has been made, then an Indigenous Land Use Agreement (ILUA) is made with the people claiming to hold native title and goes through a more extensive notification and objection period prior to the National Native Title Tribunal registering the ILUA to ensure that the right people have had an opportunity to comment on the agreement*”, this is inadequate to address the potential breach of FLPs, as outlined in our previously expressed concerns. A requirement for free, prior and informed consent in the Bill, using traditional governance arrangements accepted by the Traditional Custodians of the subject land, may help to address this.

¹ Supporting these concerns is the present report (James Anaya – Special Rapporteur on the rights of Indigenous peoples) submitted to the Human Rights Council regarding Extractive industries and indigenous peoples. Identifying human rights concerns relating to extractive industries and sectors contained in the Bill, and providing a series of observations and recommendations drawn from his experiences he studied, and point to new models that are, or would be consistent with international standards and conducive to fulfilling indigenous peoples’ rights. (*United Nations General Assembly – Human Rights Council, twenty-first session, Agenda item 3, and Twenty-fourth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development – 6 July 2012 & 1 July 2013*)

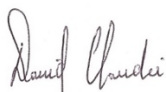
² RNTBC functions are derived through the Native Title (Prescribed Bodies Corporate) Regulations 1999. Under s.7 ‘Functions of registered native title body corporate not acting as trustee (Act s.57) and relate to s.8 ‘Consultation with, and consent of, common law holders.’ The RNTBC acts as an agent PBC, and s.8 requires it to consult with, and obtain the consent of, the common law holders in accordance with this regulation or regulation 8A before making a decision. This rarely happens, as the RNTBC constitution does not include in its functions and powers, a clear objective ‘to manage the rights and interests of the common law holders as authorised by the common law holders.’

Recommendations

We make the following recommendations with respect to this Bill:

- The consultation period of the Bill be extended and the audience for invitations to make a submissions be widened, to include all land trusts and Indigenous organisations that may be affected by the amendments – this should be standard practice for the consultation processes of government with respect to all Bills and inquiries.
- That mechanisms be put in place under the ALA to ensure appropriate consultation and decision-making is undertaken prior to land being granted to a RNTBC, and that consultation be via traditional governance arrangements accepted by the Traditional Custodians of the subject land.
- Recognition of existing duly constituted bodies in the ALA, such as land trusts and Indigenous organisations, as organisations that have been established to make decisions about the land, and that they are not sidelined in the transfer of new lands.
- Land trusts, Indigenous organisations and Traditional Custodians be provided with the opportunity via appropriate mechanisms to include their lands for protection from mining as part of amendments to the CYPHA.
- That the Payamu biocultural landscape, including the MLT lands and the Kaanju Ngaachi IPA, be protected from mining under the CYPHA.
- That government acknowledge that many Traditional Custodians recognise that current laws and processes do not necessarily provide enough protection for the biocultural and heritage values of their lands and that world heritage nomination is seen by them as a possible means to afford greater protection for their lands.
- That government be clear and transparent on its policy towards possible world heritage nomination of areas of Cape York, and give an equal hearing to those Traditional Custodians who wish to consider their lands for world heritage nomination.
- A requirement for free, prior and informed consent in the Bill, using traditional governance arrangements accepted by the Traditional Custodians of the subject land, to address consultation and FLP issues.
- Facilitation of consultation and negotiation of land transfers of the ALA should be through representatives chosen by those Traditional Custodians particularly concerned with the land, supported by appropriate resources, and in accordance with the applicable customary decision-making institutions and procedures.
- That the ALA and CYPHA defer to the UNDRIP, in particular Articles 11, 12, 25, 26, 29, 32 and 34, on matters concerning protection of Indigenous cultural heritage, traditional knowledge, prior free and informed consent and protection of primary substantive rights.

Sincerely,



David Claudie

Kuuku I'yu Northern Kaanju Traditional Custodian
CEO/Chairman | Chuulangun Aboriginal Corporation
Chairman | Mangkuma Land Trust