Nature Conservation and Other Legislation Amendment Bill 2022

Submission to State Development and Regional Industries Committee

17 March 2022

Introduction

1. Thank you for the opportunity to comment on the Nature Conversation and Other Legislation Amendment Bill 2022 (**the Bill**).

2. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).

3. The Commission has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights. It includes rights drawn from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act. This includes complaints made by prisoners about the conditions of their detention and related concerns.

5. Rather than assessing the entire Bill, this submission focuses on the application of the HR Act to the amendments regarding bee keeping in national parks.

Compatibility with human rights

6. The primary purpose of the Bill is to amend the *Nature Conservation Act 1992* (**NCA**) to provide a 20-year extension to enable beekeeping on specified national parks to continue until 31 December 2044. The extension will only apply to areas where beekeeping could be lawfully undertaken immediately prior to the transfer of the land to national park. This is essentially achieved by clause 25 of the Bill, which inserts a new s 36A into the NCA.

7. As noted in the Statement of Compatibility, clause 25 of the Bill potentially limits the cultural rights of Aboriginal and Torres Strait Islander peoples in s 28 of the HR Act. Section 28 acknowledges that Aboriginal and Torres Strait Islander peoples have unique spiritual connections to land and waters, forming a key part of their cultural identities.

Significance of UNDRIP

8. The rights in the HR Act are drawn from international human rights instruments, most particularly the International Covenant on Civil and

Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] Section 28 is modelled on article 27 of the ICCPR, and articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

9. The United Nations Human Rights Council has provided guidance on the right to be consulted, through its Expert Mechanism on the Rights of Indigenous Peoples:

> The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.[2]

10. The Australian Parliamentary Joint Committee on Human Rights has similarly suggested that UNDRIP does not create new rights, but provides 'clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of Indigenous peoples'.[3] This is echoed in the *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation*, developed by the Heritage Chairs of Australia and New Zealand, which notes that UNDRIP:

> Does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples…The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide.[4]

11. A key obligation of UNDRIP is to seek the free, prior and informed consent from Indigenous peoples. Article 32 of UNDRIP particularly requires that the state seek the free, prior and informed consent of Indigenous peoples prior to the approval of any project that affects lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. The *A Way Forward* report, which

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[1] Explanatory Notes, Human Rights Bill 2018, 3-5.
[2] Human Rights Council, *Free, prior and informed consent: a human rights-based approach* - Study of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc A/HRC/39/62 (10 August 2018) [3].
[3] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *ParentsNext: examinations of Social Security (Parenting payment participation requirements-class of person) Instrument 2021* (Inquiry Report, 4 August 2021), 81.
[4] Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 32.

examined the destruction of Indigenous heritage sites at Juukan Gorge, defined the terms 'free, prior and informed consent' in the following ways:

- **Free:** The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.
- **Prior:** The consent is sought sufficiently in advance of any authorisation or commencement of activities.
- **Informed:** The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.
- **Consent:** A collective decision made by the right holders and reached through a customary decision-making process of the communities.[5]

12. The Commission appreciate that much of this guidance has involved large scale projects that may significantly disrupt traditional land and waters. Nonetheless, there is increasingly recognition that even intangible cultural heritage must be protected.[6]

Adequate consultation?

13. The Statement of Compatibility states that twelve First Nations groups currently have native title determinations or native title claims over national parks with apiary sites located on them. The Department of Environment and Science wrote to each of these grounds to seek feedback about the proposed amendments. The outcome of this consultation is summarised as follows in the Statement:

> One First Nations group raised concerns that non-native bees will compete with native pollinators, disrupt the proper pollination of some plants, including bushfood plants, and that escaped feral bee colonies will compete with native birds and mammals for tree hollows, which will lead to the potential degradation of the cultural and natural resources of the area. They provided feedback indicating that issuing apiary permits, which authorises beekeeping activities on national parks, without consulting and obtaining their consent would be inconsistent with the section 28 of the Human Rights Act 2019, specifically subsections 28(2)(a), 28(2)(d) and 28(2)(e). No other responses were received by the Department of Environment and Science regarding this matter.[7]

[5] Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 179 at [6.85]
[6] Ibid, 199 at [7.80],
[7] Statement of Compatibility, Nature Conservation and Other Legislation Amendment Bill 2022, 3.

14. The Commission welcomes this consultation, but it should be noted that this may not be sufficient to demonstrate a reasonable and proportionate justification of s 28. Section 28(2)(d) may arguably protect the cultural rights of any person with a cultural interest in lands or waters, beyond those with an interest under native legislation. In 2020, in considering the Forest Wind Farm Development Bill 2020, the Queensland Parliament's State Development, Tourism, Innovation and Manufacturing Committee commented that assessing the Bill against section 28 of the Queensland Act required knowledge about what the spiritual relationship of Indigenous people is to the project area as defined in the Bill. While Indigenous Land Use Agreements made under the *Native Title Act 1993* (Cth) would assist identifying parties who have either obtained or are claiming native title, the Committee noted that this may not include all Indigenous persons who have a spiritual connection with the land in the project area.

15. The Committee concluded that section 28(2)(d) on its face does not require the government to investigate who might hold Indigenous spiritual connections to the land for the Bill. As a result, whether that Bill fell within the scope of the right may only become apparent if any Indigenous people who are able to provide information about connection with the relevant land came forward claiming a breach of the right.[8] Nonetheless, the Commission suggests the Department consider if all Indigenous people with a spiritual connection to the relevant land have had an opportunity to comment on the proposal.

Justification

16. The HR Act allows human rights to be limited, but only if such limitations are justified according to the criteria in s 13, including because such limitations are the least restrictive way to achieve an important purpose.

17. The following justification is provided for the limitation on s 28 in the Statement of Compatibility:

> Beekeeping is inconsistent with the management principles for national parks and there is some scientific research indicating that non-native bees have the potential to outcompete native fauna for floral resources and disrupt natural pollination processes. However, beekeeping is currently permitted on a temporary basis on 49 national parks. This is predominantly a consequence of land transfer processes, particularly the 1999 South East Queensland Forests Agreement (SEQFA), where it was agreed to dedicate a number of State forests (where beekeeping was a lawful use) as national parks. As part of these forest transfer processes, amendments were made to the NCA in 2004 to

[8] State Development, Tourism, Innovation and Manufacturing Committee, Queensland Parliament, *Forest Wind Farm Development Bill 2020* (Report No 1, 56th Parliament, July 2020, 41.

provide for the temporary continuation of beekeeping in relevant national parks, until 31 December 2024, to provide time for alternative land outside of these national parks to be found; however, finding sufficient and accessible alternative sites has been challenging.

Apiary sites in national parks contribute to the production of honey and other honeybee related products and also provide locations for beehives to recover when they are not being used to provide pollination services to the agricultural sector.

Loss of access to national parks on 31 December 2024 would have a detrimental impact on the supply of honeybee products and crop pollination services and consequently the government announced that legislation would be introduced to provide a 20-year extension to the current phase out. The extension will provide continued access for the industry to honey resources on specified national park lands and time to work to seek alternative sites off national parks; support adoption of industry best practice on protected areas; and identify initiatives to assist the industry to progressively relocate off-park over the next 20 years.[9]

18. As briefly discussed in this justification, the Bill would repeal section 184 of the NCA, which currently provides for beekeeping to continue until 2024 and was inserted into the NCA by the *Environmental Protection and Other Legislation Amendment Act 2004.* The Explanatory Notes to that amendment stated:

New section 184 facilitates the tenure transfers by providing for the continuation of beekeeping in national parks and national parks (recovery) until 2024. Beekeeping can occur on forest reserves according to provisions under the NC Act. Upon dedication of these lands to national park or national park (recovery), the keeping of beehives would become inconsistent with the management principles for national park or national park (recovery), and would therefore not be permissible under the NC Act.

Conversion of the majority of South East Queensland Forests Agreement and Wet Tropics forest reserve lands to national park or national park (recovery), without making special provision for continued access through statutory mechanisms, would result in this industry no longer being able to operate. The Bill provides that despite sections 15 and 34 of the NC Act, a regulation may authorise a person to undertake beekeeping in a specified national park or national park (recovery) until 31 December 2024.[10]

[9] Statement of Compatibility, Nature Conservation and Other Legislation Amendment Bill 2022, 2

[10] Explanatory Notes, Environmental Protection and Other Legislation Amendment Bill 2004, 96-97.

19. It seems similar justification was provided in 2004 for temporarily providing access to national parks for beekeeping to that accompanying this Bill.

20. In relation to the concerns raised by one First Nations group, the Statement of Compatibility suggests that:

> The Bill amends the NCA to enable beekeeping to continue in national parks until 31 December 2044, the amendments themselves do not automatically authorise access to national parks for beekeeping. The amendments only provide a time extension and a similar framework to what is currently in place for the beekeeping industry to apply for apiary permits in a prescribed apiary area under the Nature Conservation (Protected Areas Management) Regulation 2017. It is during the permit application process that the department will assess compatibility with section 28 of the *Human Rights Act 2019* and consider the lawfulness and reasonableness of any limitations identified. Therefore, the Department of Environment and Science will need to assess each permit application and consider a range of matters, including human rights and also Native Title matters, before deciding whether to grant a permit.[11]

21. The Statement of Compatibility concludes therefore that the cultural rights of Aboriginal and Torres Strait Islander peoples are not limited.

22. The Commission disagrees, as the material set out in the Statement instead suggests that the amendments will extend a statutory framework that permits activity that at least one First Nations group has identified as interfering with their cultural beliefs. This would appear to include extending existing permits that would otherwise expire.[12] Therefore, we submit, the material discussed in the statement does not demonstrate that the right is not limited, but instead provides (potential) justification for why this limitation is proportionate and reasonable.

Recommendations

23. The Commission suggests that further information should be provided by the government to allow a full assessment as to whether the limitation on s 28 is proportionate including:

- The number and duration of permits already granted, and extent to which they will continue with or without review by the Department due to the proposed amendments;
- What measures, that could not be taken in the preceding 20 years to facilitate this 'phasing out' of beekeeping, can now be implemented over the next twenty years.

[11] Statement of Compatibility, Nature Conservation and Other Legislation Amendment Bill 2022, 3.
[12] See Clause 27 of the Bill.

- Confirm that broader consultation will occur through the permit application process, in particular attempts will be made to contact or hear from other Aboriginal and Torres Strait Islander peoples who may have a cultural interest in areas proposed for beekeeping beyond those identified through native title processes.
- Whether the Department will only grant new permits with the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples who have cultural connections to the land, including those who have cultural connections with the areas concerned, who have not had formal native title recognition.