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

30 March 2016

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

Dear Senators

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

The Cape York Land Council previously made a submission to the Senate Standing Committee on Economics' Inquiry into the development of bauxite resources near Aurukun in Cape York. This submission was in response to the call for submissions before 15 February 2016. Since the submissions period closed, events relevant to the Inquiry's considerations have occurred, so CYLC has prepared a supplementary submission, see Attachment 1, to provide the Committee with an update on events and their relevance.

I trust the Committee will consider the information contained in CYLC's supplementary submission, and include relevant points in its final report to the Senate.

I also hope that the Committee will be able to continue its inquiry into the development of the bauxite resources near Aurukun despite having to postpone the public hearings that had been scheduled for 18-20 April because Parliament has been recalled. It is vital that the Federal Parliament examine the consequences of a developer being selected against the wishes of the native title holders and the impact this has on Indigenous peoples' right to develop. Both matters are national policy issues and have been impaired by the actions of the Queensland Government. It is important that the Committee also knows that these matters have not been resolved by the Queensland Government's rushed passage of amendments to the Aurukun provisions in the Mineral Resources Act earlier this month.

If you wish to discuss any matters raised in the submission please do not hesitate to contact me.

Yours sincerely

Mr Richie Ah Mat
Chair
Cape York Land Council

Attachment 1: CYLC Supplementary Submission to the Senate Standing Committee on Economics Inquiry into the development of bauxite resources near Aurukun in Cape York

On 26 June 2015 the Wik and Wik Way People, through their representative agent Ngan Aak-Kunch Aboriginal Corporation (**NAK**), filed a writ of summons (accompanied by a statement of claim) in the High Court of Australia (B35/2015) alleging that certain provisions of the *Mineral Resources Act 1989 (Qld)* (**MRA**) relevant to the assessment and granting of mining tenures for the development of Aurukun bauxite resources ("**Aurukun Provisions**") are inconsistent with the *Racial Discrimination Act 1975* (Cth) and therefore invalid by reason of the operation of s.109 of the Commonwealth *Constitution*. These proceedings are listed for further directions before the High Court on 28 April 2016.

As a result of the High Court writ, on 16 February 2016 the Queensland Minister for Natural Resources and Mines introduced the *Mineral Resources (Aurukun Bauxite Resource) Amendment Bill 2016* (Qld) ("**the Bill**") into the Queensland Parliament. In essence, the purpose of the Bill was to amend the Aurukun Provisions to restore certain rights of review or objection against decisions of the State in relation to the grant of a mineral development licence (**MDL**) or mining lease. The Bill provided that the review and objection rights applicable to an Aurukun project were made equivalent to those rights under the MRA ordinarily available to all land owners.

The Bill was referred to the Infrastructure, Planning and Natural Resources Committee for examination, and the Committee provide its report to Parliament on 10 March 2016, recommending that the Bill be passed. The Bill's second and third reading occurred on 15 March 2016 and the Bill was subsequently passed by the Queensland Parliament. The Bill will commence by Royal assent.

The effect of the Bill will be that NAK, as the owner of the Aboriginal freehold land over which a MDL or mining lease for an Aurukun project would be granted, will now have rights to object and apply for judicial review of the grant of those tenures, and have the Land Court consider any objections. CYLC supports that NAK's opportunity to apply for judicial review and object to the grant of a mining tenure on land it owns is now equivalent to the rights enjoyed by other land owners in Queensland.

On the face of it the Bill has addressed many of the issues raised regarding the discriminatory aspects of the Aurukun Provisions and may result in withdrawal of the High Court proceedings. However, the Bill's amendment of the MRA did not go far enough because the Bill did not provide for the repeal of the original decision to appoint a preferred proponent which was made in reliance upon the Aurukun Provisions. CYLC believes that the Senate Inquiry should consider this matter closely because it goes to the heart of how the interests of the Wik and Wik Way people have been marginalised.

The key issue is that the Aurukun Provisions of the MRA (pre and post amendment) provide for an "Aurukun agreement", which is an agreement between the State and a party selected by the State to develop an Aurukun project. Only a party to an Aurukun agreement may apply for a MDL and mining lease as part of an Aurukun project. Significantly, the process to select the party to enter into an Aurukun agreement is not prescribed by the Aurukun Provisions. Instead, an administrative process, based on a competitive tender, was used by the State to select the preferred proponent. The administrative process of selection is not prescribed by statutory criteria and is therefore a matter of Ministerial discretion

The State has been a party to an Aurukun agreement with Glencore Bauxite Resources Pty Ltd since December 2014. This followed the events of 28 August 2014 when the Queensland Government re-opened a competitive tender process that had been dormant since March 2014, and on the same day selected Glencore as the preferred proponent.

CYLC considers that the administrative process used by the State to select Glencore as the party to enter into an Aurukun agreement was flawed and did not properly consider or give due merit to the bid that was supported by Wik and Wik Way people. This case was made in CYLC's original submission to the Inquiry and was also made by other submitters including NAK.

The Bill should have been used as an opportunity for the Queensland Parliament to overturn the State's Aurukun agreement with Glencore so that the process to select the proponent to enter into an Aurukun agreement could be run again under a clear, transparent and fair process that emphasised criteria such as benefits to the land owners, native title holders and local Aboriginal community. Repeal of a pre-existing agreement is not without precedent. CYLC notes the State's decision to repeal the *Aurukun Associates Agreement Act 1975* including the mining leases issued in reliance upon that Act by enacting the *Aurukun Associates Agreement Repeal Act 2004*.

The Bill should also have been used as an opportunity to include a statutory process and criteria for the selection of the preferred proponent to enter into an Aurukun agreement. CYLC notes that a competitive tender regime is already in place under the MRA with respect to obtaining exploration permits for coal,[1] and that this statutory regime may be specifically adapted and modified for use for the development of the Aurukun bauxite resource.

The State rebutted attempts to have the Bill amended to include a proposal to overturn the Aurukun agreement with Glencore, and include a statutory process for the selection of a preferred proponent, by claiming these matters were outside the scope of the Bill. However it is clear that the scope of the Bill is a policy position adopted by the Queensland Government and that there was no real legal impediment to including these matters within the scope of the Bill. CYLC considers that the Bill should have provided for these matters.

Indeed, the Infrastructure, Planning and Natural Resources Committee's report to Parliament about the Bill, dated 10 March 2016, included a Statement of Reservation by the Member for Dalrymple, Mr Shane Knuth, which in part stated:

> In its current form Native Title holders are given limited ability to participate in decision-making regarding the resource. As the bill does not terminate existing Aurukun agreements for preferred proponents which are solely eligible to apply for a mining tenement within the Aurukun Bauxite resource area.
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> The failure of the Queensland Government to comprehensively address the issues created by revisiting decisions made in collaboration with the Aurukun Provisions, and the decision to appoint a Preferred Proponent, does not truly reinstate the rights of traditional land owners to develop resources on the land where they hold native title.
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> Though I accept the department has stated that these issues were beyond the scope of the bill, I am not convinced that the department or the government are truly limited in their ability to address issues in regards to awarding Preferred Proponents.

With respect to the tender process the Bill's second reading consideration in detail, recorded in the Hansard of 15 March 2016, highlights the concerns of CYLC and is representative of the attitude of the Queensland Government. A question from the Member for Dalrymple, Mr Shane Knuth, to the Minister for State Development and Minister for Natural Resources and Mines, Hon. AJ Lynham, and the Minister's response are reproduced below:

[1] Chapter 4 part 3 divisions 2 and 3 of the MRA

> **Mr KNUTH**: I have a question to the minister regarding the tender process with regard to this bill. We acknowledge that the bill proposes to give objection rights to Indigenous people. Whilst we have given these objection rights to Indigenous people, Indigenous people are more concerned about the transparency of the tender process. They are more concerned about the transparency of the tender process rather than the objection rights because the horse has more or less bolted.
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> **Hon. AJ LYNHAM:** I thank the member for Dalrymple for his concerns. These concerns have been previously raised with me. This bill does not address those specific issues relating to the preferred bidder for the Aurukun bauxite deposit. This bill simply addresses the removal of the perceived discrimination of the Aurukun bauxite agreement.

CYLC considers that the Senate Standing Committee on Economics must be aware that although the Bill restores review and objection rights for land holders in relation to an Aurukun project the Bill does not address the more important issue of providing Wik and Wik Way people with a fair opportunity to be significantly involved in the development of bauxite resources located upon land they own. That is part of the right to development afforded to all peoples by the United Nations. As such, the Bill does little to support the Wik and Wik Way people's aspirations for social and economic development, so welfare dependency will continue to be the norm in Aurukun.

CYLC requests that the Senate Standing Committee on Economics' report identifies that a fundamental injustice remains, and that the Queensland Government must address this injustice by overturning decisions made whilst the discriminatory Aurukun Provisions were in place.

Further, CYLC submits that the process to select the preferred proponent to develop the Aurukun bauxite resource should be run again using a statutory process modelled and appropriately adapted on the competitive tender provisions outlined under the MRA.

CYLC notes for the record that the Queensland Government is not prepared to release the legal advice that it claims to have received confirming that the selection process was valid. Nor is it prepared to release the Aurukun agreement. The Senate Committee ought to insist that the Wik Way people be given an opportunity to review the State's legal advice and agreement with a multinational that provides it exclusive rights to pursue the development of a mine on Wik Way land without their permission.