

GLENCORE

15 February 2016

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

Dear Senators,

Please find enclosed a submission by Glencore Bauxite Resources Pty Ltd to the Senate Economics Reference Committee in respect of its *Inquiry into the development of bauxite resources near Aurukun*.

Glencore was selected as the preferred proponent for the Aurukun bauxite resource in August 2014, following an open and competitive tender process that was commenced by the Queensland Government in November 2012. Glencore participated in this process and, on the basis of a credible and detailed project proposal for a small-scale bauxite mine at Aurukun, we concluded an agreement with the State of Queensland in January 2015 that enables us to undertake further assessment of the resource.

Glencore is committed to communicating openly and transparently with Traditional Owners and members of the Aurukun community and we acknowledge the Wik and Wik Way People as the traditional owners of the land where the Aurukun bauxite resource is located.

Although this project is at a very early stage of development, over the past 12 months our team has visited Aurukun more than a dozen times. We've sat down face-to-face with many Traditional Owners and learnt more about their views, particularly those of the families who can speak for the country within the proposed project area.

We intend to continue our regular and thorough consultation with the local community and Traditional Owners as we look to commence the necessary feasibility studies and impact assessments.

Glencore has a strong track record in developing mining projects, both in Australia and globally. In addition, our global marketing network enables us to connect the resources we produce with a wide range of customers around the world. We believe that if the development of the Aurukun bauxite resource proceeds, it has the potential to bring considerable long-term benefits to the local community and we are committed to ensuring Traditional Owners' future aspirations are reflected in these outcomes.

This submission provides a detailed account of our involvement in the project to date and positive engagement with the local community. It also makes some observations regarding the rights of the Traditional Owners – we believe that any barriers to the full participation and engagement of these critical stakeholders are very concerning and merit attention in this Inquiry.

We look forward to an opportunity to appear before the Committee in the course of its inquiry. Please do not hesitate to contact us if you require further information.

Yours sincerely

[SIGNED]

Julian Farrugia
Project Director

SUBMISSION TO SENATE ECONOMICS REFERENCE COMMITTEE

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SUBMISSION TO SENATE ECONOMICS REFERENCE COMMITTEE

EXECUTIVE SUMMARY

Glencore is one of the world's largest diversified natural resource companies. With a network of operations and businesses, spanning over 50 countries, we produce and market more than 90 commodities to customers at every stage of the commodity supply chain.

Australia is an important part of our global business. We have about 18,000 employees here across commodity businesses that include grain, copper, coal, nickel and zinc. Since 2007, we've invested over \$21 billion into Australia – outside of mergers and acquisitions - building new operations and sustaining existing operations, plants and infrastructure.

We have a strong track record of project development in Australia and have a global marketing network that effectively connects Australian resources with customers all over the world.

The Queensland Government ran, over a number of months, an open and competitive tender process in respect of the Aurukun bauxite resource. Glencore fully participated in this process and, on the basis of a credible and detailed project proposal, were selected as the preferred proponent by the State.

In November 2012, the previous LNP Queensland Government called for expressions of interest, seeking a preferred proponent for the further development of the Aurukun bauxite resource. Glencore was one of five parties shortlisted in April 2013 and invited to submit a detailed proposal for the right to assess the feasibility of developing the resource.

Glencore's proposal followed five months of work, drawing on internal and external expertise and of a number of meetings with native title holder representatives and the Aurukun Shire Council. We submitted a detailed Prefeasibility Study to the Queensland Government identifying a potential mining operation that could produce up to six million tonnes of bauxite per annum over an initial twenty year period.

Although the bidding process was initially discontinued in March 2014 without a preferred proponent being selected, we, and other parties, were invited to participate in further discussions with the Government. In August 2014, and on the basis of our original project concept, the Government decided to select Glencore as its preferred proponent for the resource, and to seek to finalise an Aurukun Agreement.

We undertook these negotiations with the previous LNP Queensland Government through the remainder of 2014 and executed an agreement in December which was countersigned on 5 January 2015. The current ALP Queensland Government has also stated its support for the process and decision.

The Aurukun Bauxite Project is at a very early stage of the project development cycle. Pending the grant of the relevant tenure, we plan to commence feasibility studies and impact assessments as well as continue broad community and traditional owner consultations.

Being a party to an Aurukun Agreement makes us eligible to apply for a Mineral Development Licence ("MDL") over the Aurukun resource under the *Mineral Resources Act 1989* ("MRA"). A MDL is the tenure necessary to undertake further exploration and studies of the resource. Glencore submitted its application for this licence on 12 January 2015.

Immediately following our selection as preferred proponent, we made several requests to again meet with the directors of Ngan Aak Kunch Aboriginal Corporation (“NAK”), the prescribed body corporate for the native title holders, the Wik and Wik Way People. We stated our desire to seek an agreement regarding our proposed project activities.

In reply, NAK’s advisors stated that, notwithstanding the Queensland Government’s announcement of Glencore’s selection on 28 August 2014, NAK had entered into an Indigenous Land Use Agreement (“ILUA”) with Aurukun Bauxite Development Pty Ltd (“ABD”) on 18 September 2014. The ILUA obligated NAK to “*not negotiate, enter into discussions or enter into agreement with any other person in relation to the development of the Aurukun Bauxite Project*”.

ABD was, and remains, a related party of Australian Indigenous Resources Pty Ltd, one of the unsuccessful bidders in the 2013 competitive process.

As a result of NAK’s inability to discuss the project with us, the State gave notice that it would use the expedited procedure under the *Native Title Act 1993* (“NTA”). This would allow the State to grant the mineral development licence subject to standardised Native Title Protection Conditions.

At the end of the four month notification period, the Cape York Land Council, on behalf of NAK, lodged an objection to the use of the expedited procedure with the National Native Title Tribunal (“NNTT”). As a result, the grant of the MDL remains pending and we are yet to commence any field activities in the resource area.

As with any project we undertake, our approach is focused on assessing the economic viability of development. This involves working through the relevant market, technical, commercial, environmental and community factors which must all align before a project is in a position to successfully proceed.

Our observations and discussions over the past 18 months have highlighted a number of concerns regarding Traditional Owners’ rights and interests, particularly:

- **The restraint imposed by a third party on a fundamental element of their native title rights - namely their “right to negotiate” - without avenue for recourse;**
- **Whether, in the making of agreements, obligations under the NTA and its regulations - to consult with, and obtain consent from, affected common law holders of the native title - may not have been properly met; and**
- **The need for greater support of native title organisations, such as NAK, to ensure that they can access adequate resources and independent expertise that are required if they are to achieve the full economic benefit of their native title rights.**

During 2015 we have been to Aurukun on more than a dozen occasions. Traditional Owners have directly raised with us their concerns that their voices are not being heard.

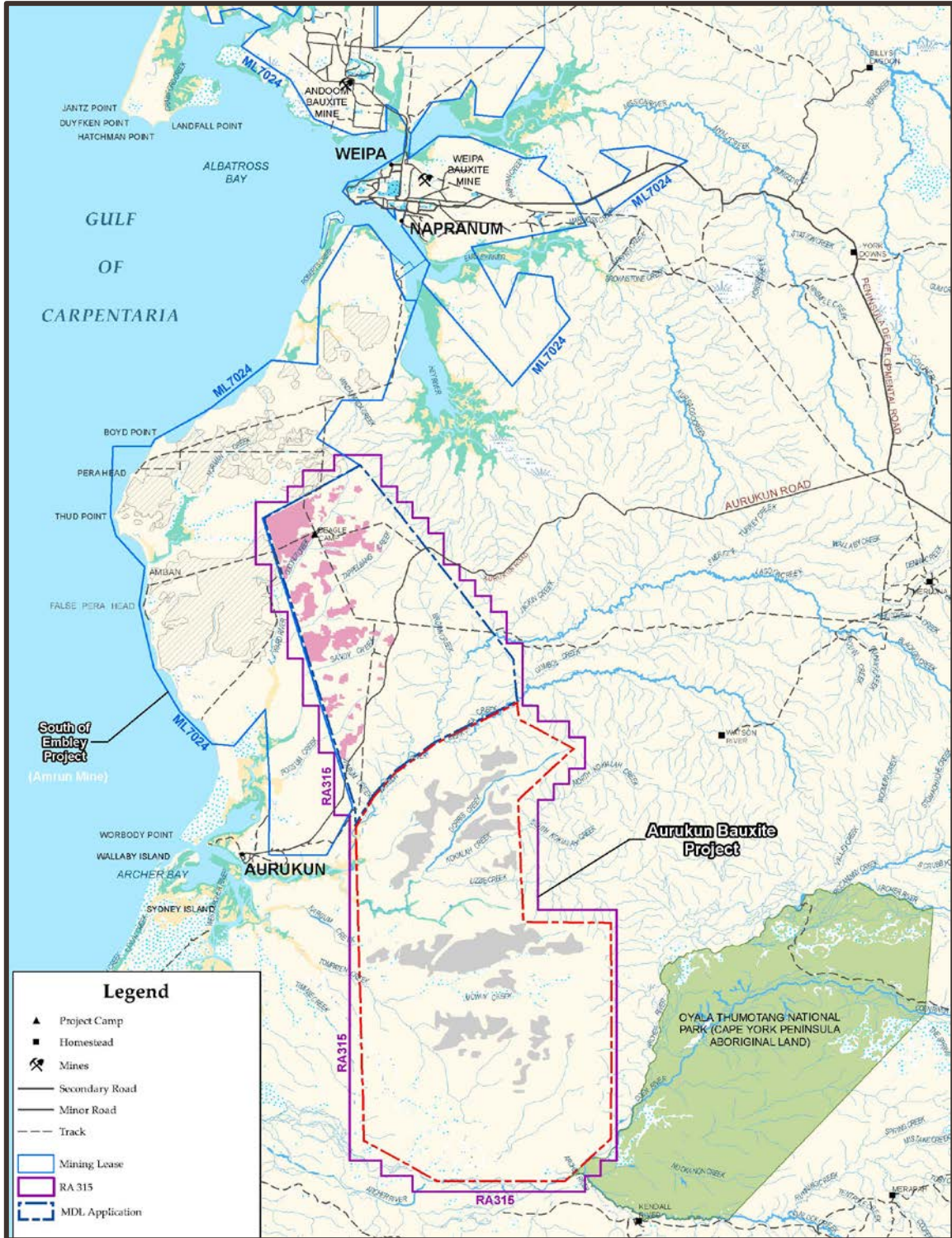
Enabling Traditional Owners to be fully informed about a project and its potential impacts and benefits is a critical element of the principles of free, prior and informed consent for Indigenous people, as endorsed by the International Council on Mining and Metals and to which we subscribe.

It is clear that the directors of NAK share a genuine desire to strengthen their community and achieve better outcomes for the native title holders they represent. However, without access to adequate resources and independent expertise, prescribed body corporates, such as NAK, are being prevented from playing their critical role as part of the enabling “infrastructure” for economic development opportunities in remote parts of Australia.

Glossary

ABD	Aurukun Bauxite Development Pty Ltd
AIR	Australian Indigenous Resources Pty Ltd
ALA	Aboriginal Land Act 1991 (Qld)
ASC	Aurukun Shire Council
CYLC	Cape York Land Council
DNRM	Department of Natural Resources and Mines
EOI	Expression of Interest
EPA	Environmental Protection Act 1994 (Qld)
ICMM	International Council on Mining and Metals
ILUA	Indigenous Land Use Agreement
MDL	Mineral Development Licence
MRA	Mineral Resources Act 1989 (Qld)
NAK	Ngan Aak Kunch Aboriginal Corporation
NNTT	National Native Title Tribunal
NTA	Native Title Act 1993 (Cth)
RFDP	Request for Detailed Proposal

Resource Location



SUBMISSION TO SENATE ECONOMICS REFERENCE COMMITTEE INQUIRY INTO THE DEVELOPMENT OF BAUXITE RESOURCES NEAR AURUKUN

1. About Glencore

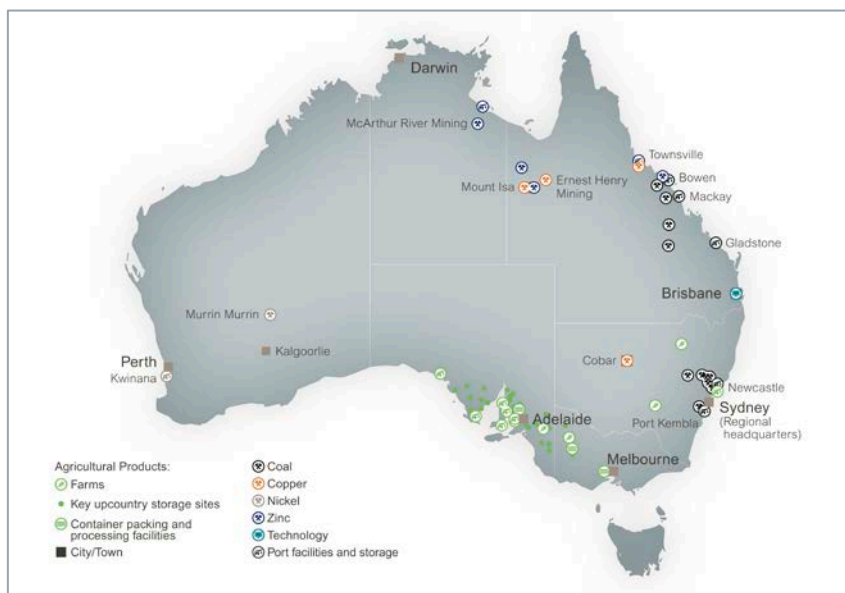
Glencore welcomes the opportunity to provide this submission to the Senate Inquiry into the development of bauxite resources near Aurukun.

Glencore is one of the world's largest diversified natural resource companies, producing and marketing more than 90 commodities, encompassing metals and minerals, energy products and agricultural products. Our network of operations and businesses includes more than 150 mining and metallurgical, oil production and agricultural assets and spans over 50 countries and around 181,000 people.

We market and distribute physical commodities sourced from third party producers as well as our own production. We also provide financing, processing, storage, logistics and other services to commodity producers and consumers. Our unique business model means that we cover a wide range of products, activities and locations, with a presence at every stage of the commodity chain.

Australia is an important part of our global business and we've operated here for more than 15 years.

We hold significant interests in a range of commodity industries across all mainland states and the Northern Territory. Headquartered in Sydney, we are a major Australian employer, with about 18,000 people working across industries that include coal, copper, cotton, grain and oilseeds, nickel and zinc. The location of our operations in Australia is set out below. More information is available at www.glencore.com.au.



Since 2007, our business has invested over \$21 billion into Australia – excluding mergers and acquisitions - building new operations and sustaining existing operations, plants and infrastructure. That equates to an average rate of investment of roughly \$2.6 billion every year or \$7 million dollars a day, every day for the past eight years.

2. Background and Project status

The Aurukun bauxite resource was first explored and defined between 1969 and 1972.

Mineral rights over the resource have previously been held by the “Aurukun Associates”¹, between 1975 and 2004², and Aluminium Corporation of China Limited, between 2007 and 2011³.

Over that period, while Australia became the world’s largest producer of bauxite, the Aurukun bauxite resource was unable to be successfully developed for a variety of reasons including the quality of the resource, market conditions, legal processes and regulatory impositions.

An open and competitive bidding process

In November 2012 the Queensland Government made a public call for expressions of interest from proponents interested in developing the Aurukun bauxite resource.

Shortlisted parties⁴ were then given four and a half months, between May and September 2013, to:

- Review a large amount of technical and geological information about the Aurukun bauxite resource and respond to a Request for Detailed Proposal (“**RFDP**”);
- Meet with both the Aurukun Shire Council (“**ASC**”) and Ngan Aak Kunch Aboriginal Corporation (“**NAK**”) on a monthly basis; and
- Prepare a detailed “Prefeasibility Study” that described “*the configuration of the Project preferred by the Proponent*”.

All meetings with the ASC and NAK were conducted in accordance with the requirements of the “Competitive Bid Process” and were held in the presence of an Independent Probity Auditor.

In September 2013, Glencore submitted a detailed proposal which identified a potential mining operation that could produce up to six million dry product tonnes of beneficiated bauxite per annum over an initial 20 year period.

It was noted at the time that development of this concept was (and remains) dependent on more detailed technical and commercial assessment, environmental approvals and, most significantly, consultation with the Aurukun community and the Wik and Wik Way native title holders.

Only one other shortlisted party, Australian Indigenous Resources Pty Ltd (“**AIR**”), submitted a proposal for consideration by the Government.

Further meetings were held with the Queensland Government following submission of our proposal with some revisions made in February 2014 in response to queries. Despite these revisions, Glencore was advised on 11 March 2014 that the Queensland Government was discontinuing the bidding process without selecting a preferred proponent for the resource.

The Government indicated that it would be prepared to continue discussions with interested parties regarding the resource⁵ which we elected to do. This included a meeting, on 3 July 2014,

¹ A consortium of Tipperary Corporation, Billiton Aluminium Australia BV and Aluminium Pechiney Holdings Pty Ltd

² <http://statements.qld.gov.au/Statement/2004/4/20/government-legislates-to-cancel-aurukun-lease>

³ <http://statements.qld.gov.au/Statement/2010/6/30/chalco-development-agreement>

⁴ <http://statements.qld.gov.au/Statement/2013/4/23/deputy-premier-announces-aurukun-shortlist>

⁵ <http://statements.qld.gov.au/Statement/2014/3/12/bauxite-bids-fail-to-deliver-for-cape-indigenous-groups>

between Glencore's global head of Aluminium, Andrew Caplan, and the then Queensland Deputy Premier, Jeff Seeney. During this meeting we provided an overview of our aluminium business as well as the rationale for our interest in the Aurukun bauxite resource, particularly its geographic and geopolitical location.

We recognised the interest of the Queensland Government in the timely progress of assessment and development of the resource and further discussions took place to better define a development pathway that would meet the Government's desired commitment to advance the Project.

Following those discussions, Glencore was advised by the Queensland Government on 28 August 2014 that the Competitive Bid Process would be reinstated and, based on Glencore's original project proposal, we had been selected as the Preferred Proponent for the development of the Aurukun bauxite resource⁶.

We were asked to re-commence negotiations for an agreement and were also advised that the conditions of the Competitive Bid Process would continue to apply "*until the execution of the Aurukun Agreement...or it is earlier terminated by the State*".

Glencore undertook negotiations with the State between September and November 2014 before being issued with a final version of the "Aurukun Agreement" which was executed by Glencore on 16 December 2014. The State countersigned the agreement on 5 January 2015.

Following the Queensland election on 31 January 2015, the new Queensland Government confirmed its support for our selection⁷.

Development pathway

An Aurukun Agreement is a pre-requisite for a party to apply for a Mineral Development Licence ("MDL"), under the *Mineral Resources Act 1989* ("MRA"), over the Aurukun bauxite resource.

A MDL is a form of resource authority that typically permits its holder to conduct geoscientific programs, mining feasibility studies, metallurgical testing and marketing, and environmental, engineering and design studies.

The MDL, if granted, will enable more detailed assessment of the numerous factors that will determine the commercial viability of any mining project. If viability can be established, taking into account technical, commercial, environmental and community elements, a proponent could then apply for a mining lease to commence construction and operations.

Under the applicable regulatory framework, the MDL cannot be granted by the State unless:

- The applicant holds the appropriate environmental authority under the *Environmental Protection Act 1994*; and
- The State has complied with the native title requirements as described in the *Native Title Act 1993* ("NTA").

⁶ <http://statements.qld.gov.au/Statement/2014/8/28/government-to-drive-for-community-benefits-from-aurukun-mine>

⁷ The Australian, 29 July 2015, page 6.

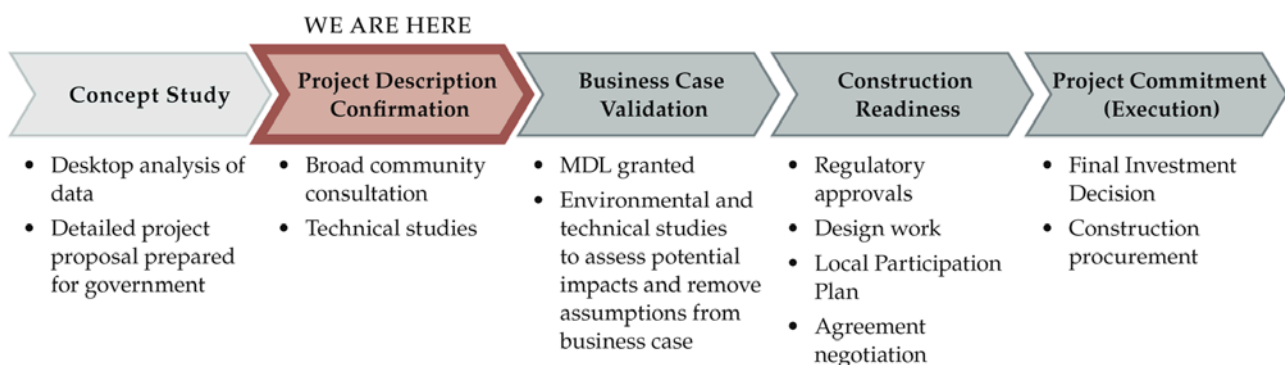
Under the terms of the Aurukun Agreement, Glencore agreed to submit its application for a MDL within seven business days of the execution of the Agreement. Accordingly, we submitted an application to the Department of Natural Resources and Mines (“DNRM”) on 12 January 2015.

As at the date of this submission, the MDL is yet to be granted as the regulatory requirements are still to be finalised (discussed further below).

As a result, Glencore’s technical work on the Project remains at a very early stage. While we have been able to progress some analysis of options, we have not commenced any field activities (e.g. drilling, surveys etc) in the resource area.

An overview of the pathway to development that we have proposed is set out below.

Our proposed development involves a five stage process:



Community engagement

Critical to this pathway will be building broad based community support for the proposed project.

Since execution of the Aurukun Agreement with the State, Glencore has visited Aurukun on more than a dozen occasions and spent time talking with members of the Aurukun community, including a large number of Traditional Owners, as well as the organisations who work there.

We have been very pleased with the welcome and support that we have received during our regular visits to the community throughout 2015. These have enabled us to build on our understanding of the views and thoughts of Traditional Owners, in particular their strong desire to participate in any development of the Project.

During 2015, we have also been pleased to provide support to a range of programs and activities in the Aurukun community including the:

- Royal Flying Doctor Service’s *Ngoounk Mut Pam’ed* (Shade for Men) program;
- Aurukun’s entry in the 2015 Laura festival;
- SUPKids water safety program;
- Inaugural Aurukun Wik Rock Concert, featuring Christine Anu, in June;
- Aurukun “River to Ramp” Fun Run; and
- Aurukun Police and Citizens Youth Club’s literacy and numeracy programs.

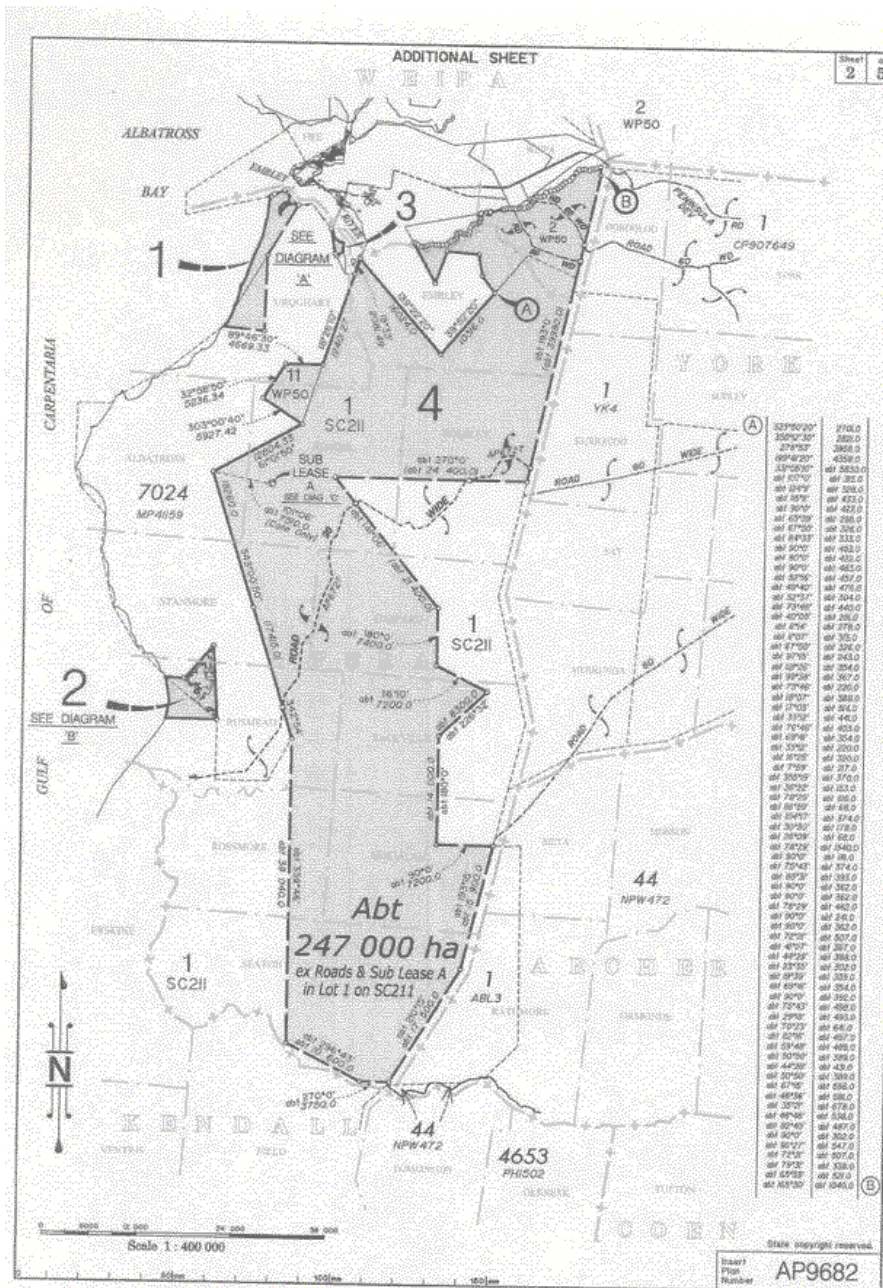
We recognise that the support of the Aurukun community will be vital to any future success.

Native title rights

Glencore acknowledges the Wik and Wik Way People as the traditional owners of the land where the Aurukun bauxite resource is located. In particular, we recognise their deep connection to their

country and culture that has been clearly demonstrated and apparent since our first visit to Aurukun in May 2013.

Over the past twenty years, the native title rights of the Wik and Wik Way People have been recognised by a number of Federal Court decisions. Relevant to the Aurukun bauxite resource, these rights over the resource area were recognised in October 2004⁸ with a map of the relevant determination area shaded below.



⁸ [2004] FCA 1306; http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1306.html

Pursuant to this determination and others that related to the land of the Wik and Wik Way people, NAK was nominated as the prescribed body corporate (“PBC”) to act as agent or representative of the Wik and Wik Way People who are the native title holders (or “common law holders”).

The functions of a PBC are described in the *Native Title (Prescribed Bodies Corporate) Regulations 1999*⁹ and include:

- managing the rights and interests of the common law holders as authorised by the common law holders; and
- consulting with the common law holders in accordance with regulation 8.

More information regarding the current native title regulatory framework is contained in **Appendix A**.

Engagement with Ngan Aak Kunch Aboriginal Corporation

A chronology of engagement and correspondence with NAK, from the commencement of the bidding process until the commencement of proceedings in the National Native Title Tribunal (“NNTT”), is set out below:

Date	Description
6 May 2013	Meeting with NAK and legal advisors (HWL Ebsworth) in Aurukun as part of RFDP process
23 May 2013	Meeting with NAK and legal advisors in Cairns as part of RFDP process
20 Jun 2013	Meeting with NAK and legal advisors in Aurukun as part of RFDP process
17 Jul 2013	Meeting with NAK and legal advisors in Aurukun as part of RFDP process
21 Aug 2013	Meeting with NAK and legal advisors in Aurukun as part of RFDP process
Sep 2013	Glencore visits Aurukun at invitation of NAK for land handover ceremony
28 Aug 2014	Letter from Glencore to NAK (via new Contact Person at CYLC) to advise of the current status and that, if agreement was reached with the Government, we would seek to reach agreement with NAK to allow work to progress under a MDL
23 Sep 2014	Email from NAK Contact Person to Glencore advising that directors “ <i>would like to extend an invitation to you seeking a meeting in Aurukun either later this month or early next month</i> ”
24 Sep 2014	Letter from Gilbert & Tobin Lawyers to Glencore advising that: <ul style="list-style-type: none"> • they had been instructed to act for CYLC and NAK “<i>in relation to the Aurukun Bauxite Project</i>”; • there was an ILUA between NAK and Aurukun Bauxite Development Pty Ltd (“ABD”) that was dated 18 September 2014; • as a result, “<i>the State of Queensland will act inconsistently with the ILUA if it proceeds with Glencore as the preferred proponent for the Project</i>”.

⁹ Regulation 7, PBC Regs

Date	Description
	<ul style="list-style-type: none"> • NAK had <i>“insufficient information about the proper standing of Glencore in the Project and accordingly they are not yet in any position to enter into any discussions with Glencore”</i>.
29 Sep 2014	Letter from Glencore to Gilbert & Tobin requesting a meeting with NAK in October <i>“to enable us to meet new directors, revisit our discussions from last year and listen to the views of the NAK directors in respect of the Project”</i>
17 Oct 2014	Letter from Gilbert & Tobin to Glencore advising that <i>“the ILUA is an exclusive agreement in relation to the Aurukun Bauxite Project and it provides, among other things, that our client will not negotiate, enter into discussions or enter into agreement with any other person in relation to the development of the Aurukun Bauxite Project.”</i>
12 Nov 2014	Letter from Glencore to Gilbert & Tobin noting <i>“we remain keen and willing to meet with your client at a mutually convenient time and place to outline our proposed approach and seek your client’s views”</i>
18 Nov 2014	Letter from Gilbert & Tobin to Glencore confirming that NAK <i>“will not negotiate, enter into discussions or enter into an agreement with any other person in relation to the development of the Aurukun Bauxite Project”</i> and that <i>“it would be inappropriate for Glencore to attempt to engage with the community in Aurukun”</i>
16 Dec 2014	Glencore executes Aurukun Agreement with the State of Queensland
5 Jan 2015	State executes Aurukun Agreement with Glencore
12 Jan 2015	Glencore submits application for MDL to Department of Natural Resources and Mines (<i>“DNRM”</i>)
19-20 Jan 2015	Glencore visits Aurukun
2 Feb 2015	Letter from Glencore to NAK (via CYLC and Gilbert & Tobin) providing an update on Project status and repeating an invitation to meet to discuss the Project
13 Feb 2015	Letter from Glencore to DNRM requesting use of the expedited procedure under the NTA for the purpose of progressing Glencore’s application for a MDL
9 Mar 2015	<p>Letter (dated 26 Feb) from Gilbert & Tobin to Glencore advising:</p> <ul style="list-style-type: none"> • The ILUA had been registered on 25 February 2015; • <i>“the ILUA provides for the exploration, mining and export of beneficiated bauxite within RA315 by a joint venture between NAK and ABD”</i>; • any grant of mineral rights by the Queensland Government <i>“inconsistent with that registered ILUA, such as the grant of a mineral development licence to Glencore, will be invalid under the NTA”</i>; • <i>“the Directors of NAK will not, therefore, be meeting with representatives of Glencore”</i>
10-12 Mar 2015	Glencore visits Aurukun
16 Mar 2015	<p>Letter from Glencore to Gilbert & Tobin noting:</p> <ul style="list-style-type: none"> • The State cannot be bound to an ILUA to which it is not a party; • The ILUA only validates the grant of a mineral right by the State to ABD

Date	Description
	<p>but cannot force the State to grant a mineral right to a particular party; and</p> <ul style="list-style-type: none"> The approach described was inconsistent with the application of the NTA in Australia.
18-20 Mar 2015	Glencore visits Aurukun
20-24 Apr 2015	Glencore visits Aurukun
23 Apr 2015	<p>Letter from CYLC to Glencore:</p> <ul style="list-style-type: none"> Advising that CYLC is the legal representative of NAK Seeking cessation of <i>“all efforts to contact Wik and Wik Way native title holders directly”</i> Insisting that <i>“all those wishing to use their land...engage with the native title holders as a group through its legal representative”</i>
28 Apr 2015	Native title notification issued by DNRM to CYLC and NAK stating that the State considers the grant of the MDL to be an act <i>“attracting the Expedited Procedure”</i>
29 Apr 2015	<p>Letter from Glencore to CYLC:</p> <ul style="list-style-type: none"> Seeking clarification regarding representation of NAK; Noting previous requests to meet with NAK had been rejected; and Stating intent to continue engagement with community members but was not purporting to negotiate regarding native title rights.
13 May 2015	Notification date for purposes of expedited procedure
11-15 May 2015	Glencore visits Aurukun
2-7 Jun 2015	Glencore visits Aurukun
21-23 Jul 2015	Glencore visits Aurukun
14-16 Aug 2015	Glencore visits Aurukun
28 Aug 2015	Letter from CYLC to Glencore seeking further information regarding the proposed MDL work program
1 Sep 2015	Letter from Glencore to CYLC seeking clarification of representation
4 Sep 2015	Letter from CYLC to Glencore confirming that that CYLC was instructed to act on behalf of NAK in relation to Glencore’s MDL application while Gilbert & Tobin was separately retained to <i>“act on various matters arising in relation to the Queensland Government’s award of Preferred Proponent status to Glencore”</i>
8 Sep 2015	CYLC, on behalf of NAK, submits an objection in the NNTT to the application of the expedited procedure
11 Sep 2015	Letter from Glencore to CYLC providing further information regarding MDL work program
21 Sep 2015	Letter from CYLC to Glencore providing copy of objection filed

In relation to the above chronology, we note the following:

- ABD was, and remains, a related party of Australian Indigenous Resources Pty Ltd (“AIR”), one of the unsuccessful bidders in the Government’s 2013 competitive bidding process;
- Based on the advice from Gilbert & Tobin it would appear that the ILUA was executed three weeks after the announcement of Glencore’s selection by the Queensland Government as the preferred proponent for the resource;
- The expedited procedure is a process that applies to exploration authorities (exploration permits or mineral development licences) that don’t cause major ground disturbance or significantly affect native title rights and interests, such rights being protected by the Native Title Protection Conditions¹⁰ that attach to the resource authority; and
- Proceedings before the NNTT remain ongoing with the matter likely to proceed to a decision regarding use of the expedited procedure in coming weeks.

Recent attempts at discussion

While information on the MDL work program was being exchanged, Glencore was advised in September 2015 that the NAK Board may now be prepared to meet with Glencore.

After seeking confirmation, we were advised by CYLC on 9 October that NAK had “*obtained a specific and limited release from ABD for the purpose of discussing with Glencore a benefits package for the Native Title Holders represented by NAK*”. It was also proposed “*that NAK will have in attendance at the first meeting with Glencore, NAK Board representatives, CYLC as NAK’s legal representatives, [and] advisors John Benson and Nick Stump*”.

Several attempts to schedule a meeting have been made but a range of community and scheduling difficulties has meant that it is yet to occur but is more likely to be scheduled in March 2016.

¹⁰ <https://www.business.qld.gov.au/industry/mining/land-access-environment/native-title/expedited-procedure/protection-conditions>

3. Economic development of the Aurukun bauxite resource

Australia's bauxite industry

Bauxite has played, and continues to play, a significant role in Australia's minerals industry. In 2014, Australia was the world's leading producer of the product¹¹.

The majority of Australia's bauxite has traditionally been processed domestically – refined into alumina and smelted into aluminium. However, in recent years *“processing costs have made some operations unviable”* and *“there has been a move by industry to Direct Shipping Ore and bauxite mines aimed at supplying alumina refineries in China are in development in Tasmania, the Darling Range and Cape York.”*¹²

Considerations for economic viability

The history of the Aurukun bauxite resource demonstrates the challenges faced in trying to bring a resource of this nature into development. Different bauxite resources will contain varying levels of aluminium oxide as well as impurities such as silica which must be removed in the refining process. Because bauxite from the Aurukun resource is unlikely to be consumed domestically, its development is heavily dependent on supply and demand factors in the global market.

Bauxite is typically sold on a contracted basis with bonuses/penalties applied to the product supplied. Accordingly, the development of the resource will depend on the ability of a particular customer/refinery to economically process the product, given its specific characteristics.

Economic development of the Aurukun bauxite resource must also have regard to the uncertainty on the supply-side that affects the commerciality of development.

Following the ban on the export of bauxite from Indonesia (previously the world's largest exporter of bauxite), which took effect in January 2014, Malaysia has emerged as a substantial bauxite supplier to Chinese alumina refineries. As a result, regulatory and commercial decisions in both countries¹³ will continue to have a clear and direct impact on the economic development of bauxite mines in Australia¹⁴, including the Aurukun bauxite resource.

Other locations, such as Fiji, Solomon Islands and Vietnam, have emerged as bauxite suppliers to China while Chinese groups are also investing in developing bauxite supply from Guinea.

Project development pathway

Glencore's work on the Project remains at a very early stage, particularly as we are yet to be granted the tenure necessary to conduct feasibility and environmental studies.

¹¹ http://www.ga.gov.au/metadata-gateway/metadata/record/gcat_21a2c93c-b691-d570-e053-12a3070a9f90/Australia%27s+Identified+Mineral+Resources+2015

¹² http://www.ga.gov.au/metadata-gateway/metadata/record/gcat_21a2c93c-b691-d570-e053-12a3070a9f90/Australia%27s+Identified+Mineral+Resources+2015

¹³ Including the recent three month ban imposed on bauxite mining in Malaysia:

<http://www.wsj.com/articles/malaysia-to-ban-bauxite-mining-for-three-months-1452081346>

¹⁴ <http://www.smh.com.au/business/mining-and-resources/alumina-targets-bauxite-exports-despite-malaysian-supply-boom-20150819-gj2p79.html>

Our approach is focussed on assessing the economic viability of development having regard to the market, technical, commercial, environmental and community elements which must all align before any project can successfully proceed.

This is consistent with any other resources project in the industry. If a project is considered to be viable, taking into account the above factors, a proponent would then seek a mining lease to commence development of the resource.

Alumina/Aluminium Department

Glencore's alumina/aluminium commodity department is involved in the marketing and processing of bauxite, alumina and primary aluminium.

We believe that with Glencore's unique business model, which gives us a presence at every stage of the commodity chain, we are best placed to assess commercial opportunities for the Aurukun resource in the bauxite market.

Glencore's supply sources and customer bases are highly diversified and demonstrate our reputation for strong relationships in these markets. Our breadth of experience and integrated role in production enables us to provide market-leading expertise in the flow of these commodities.

We believe that our position in the market will provide significant opportunities for production from a bauxite mine at Aurukun to respond, in an economically disciplined manner, to meet customer demand.

Our existing relationship with potential customers, particularly in China, will also enable us to undertake more detailed discussions regarding this resource when the current regulatory uncertainty is resolved.

4. Issues relating to native title rights and interests

Glencore considers that its experience in respect of the Aurukun bauxite resource has highlighted a number of issues and challenges relating to native title rights and interests.

These issues relate particularly to:

- The ability of a third party to impose a restraint on native title holders, without remedy, that prevents the exercise of a fundamental element of their native title rights, namely the right to negotiate;
- Compliance with obligations to consult with, and seek consent from, native title holders, in connection with the making of agreements, particularly the entry into the ILUA with ABD after our selection as preferred proponent had been announced by the Queensland Government and was known;
- The ability of PBCs to access adequate resources and expertise to obtain clearly independent advisory services in order to secure improved opportunities for development.

4.1. Restraints on the right to negotiate

On 24 September 2014, Glencore was advised that NAK had entered into an ILUA with ABD with respect to the Aurukun bauxite resource.

The ILUA with ABD was registered by the NNTT on 25 February 2015 (QI2014/087) and the available public extract¹⁵ notes that the parties to the ILUA (NAK and ABD) consent to the undertaking of the Project (including the grant of a MDL and a mining lease) for the extraction of bauxite at up to 10 million tonnes per annum.

Although it is not stated in the public extract, we were separately advised, on 17 October 2014¹⁶, that “*the ILUA is an exclusive agreement in relation to the Aurukun Bauxite Project and it provides, among other things, that our client [NAK] will not negotiate, enter into discussions or enter into agreement with any other person in relation to the development of the Aurukun Bauxite Project.*”

Gilbert & Tobin further asserted in correspondence dated 26 February 2015¹⁷:

As there is now a registered ILUA validating acts relating the exploration, mining and export of bauxite within RA 315 by the ABD/NAK joint venture, any grant of mining rights by the Queensland Government inconsistent with that registered ILUA, such as the grant of a mineral development licence to Glencore, will be invalid under the NTA.

We considered that statement to be inconsistent with how the NTA is applied in Australia with respect to mining rights for three reasons:

1. The registration of an ILUA operates to validate a proposed and specific “future act” (eg the grant of a mining lease to a party to the ILUA). Therefore, this ILUA can only

¹⁵ <http://www.atns.net.au/objects/EYVYWDSDHDET/A006749.pdf>

¹⁶ Letter from Gilbert & Tobin to Glencore

¹⁷ Letter from Gilbert & Tobin to Glencore

validate the grant of a mineral right to ABD by the State (if that was the “future act” that the State was proposing to take);

2. The State is not a party to this ILUA so cannot be bound by it and forced to grant a mining right only to a particular person¹⁸;
3. Taken to its logical extreme, it would mean that any native title holder could enter into an ILUA with a third party (or even a related party) to cover all mining rights within its determined native title area and, as a result, claim that the State may not grant any mineral right to another party.

In this case, the terms of the ILUA between NAK and ABD are sought to be used, in a manner inconsistent with public policy, to:

- Prevent native title holders from exercising their right to negotiate with Glencore under the NTA; and
- Prevent Glencore’s stated desire to seek an agreement with the native title holders.

Despite these obvious flaws, there is no mechanism for a third party (or even the NNTT) to question the validity of provisions contained in an ILUA. Under the NTA, only parties to the ILUA can raise queries with the NNTT or prevent registration.

We submit that the Senate Economics Reference Committee give consideration to this issue.

4.2. Interests of the native title holders

Under the NTA, PBCs, acting as agent for the native title holders, have obligations to consult with, and obtain the consent of, native title holders before making a decision to enter into an ILUA¹⁹.

Similarly, native title representative bodies, in providing facilitation and assistance functions to PBCs, are obliged to “consult with, and have regard to the interests of any registered native title bodies corporate, native title holders...who are affected by the matter”²⁰.

The inclusion of the “exclusivity” provision in the ILUA between NAK and ABD (which prevents the native title party from talking to other persons) is unusual and raises concerns about the manner of its inclusion on the ILUA.

In August 2015, it was reported that “the signing of an Indigenous Land Use Agreement with Aurukun Bauxite Development to mine a lucrative bauxite deposit by the CYLC was not done with the permission or consultation of the Wik Waya people who are the traditional owners of the land where the deposit is located”²¹.

¹⁸ Section 24EA, NTA

¹⁹ Regulation 8, PBC Regs

²⁰ Section 203BC, NTA

²¹ <http://www.cairnspost.com.au/news/cairns/aurukun-native-title-body-ngan-aak-kunch-has-been-in-damage-control-since-announcing-decision-to-sack-the-cape-york-land-council/story-fnjpusyw-1227467034242>

Glencore queries whether the entry into this ILUA on 18 September 2014²² had the requisite regard for the interests of the native title holders given that:

- Glencore had been announced as the preferred proponent on 28 August 2014 and the State advised that it would be working with Glencore to finalise commercial arrangements²³;
- The only party eligible to apply for a MDL over the Aurukun resource, pursuant to the MRA, would be a person who is a party to an “Aurukun Agreement” with the State²⁴;
- Glencore wrote to the directors of NAK (through their contact person at the Cape York Land Council) on 28 August stating:

As “preferred proponent” the Government has invited us to participate in further discussions to finalise a Development Agreement with respect to this resource

...

In order to obtain a Mineral Development Licence (“MDL”) we will be seeking an agreement with NAK, on behalf of the Wik and Wik Way people, to cover our proposed activities for this phase

- Notwithstanding the above (presumed) knowledge, NAK agreed to enter into an ILUA on 18 September (and presumably received advice to do so) which:
 - was with a party (ABD) that would not be an “eligible person” under the MRA and could not apply for a mineral right over the Aurukun bauxite resource;
 - consented to both a MDL and a mining lease being granted over the resource; and
 - gave away the right of native title holders to negotiate²⁵ in respect of a proposed “future act” (ie the grant of a MDL to Glencore) that may affect their native title;
- We were advised on 23 September 2014²⁶ that the directors of NAK wanted to meet with us in October only for further correspondence on 24 September²⁷ that stated that directors could not meet with us.

We submit that the Senate Economics Reference Committee should further inquire into the facts and circumstances that occurred between 28 August 2014 and 18 September 2014 having regard to statutory obligations under the NTA and the rights of native title holders.

4.3. Adequate resources for prescribed bodies corporate

Our experience with this Project has demonstrated the importance of ensuring access by native title groups to the necessary resources to perform their role, in particular, access to clearly independent advice. This is aligned with Glencore’s commitment to global standards in the resources industry particularly in working with indigenous people.

²² <http://abdmMining.com.au/wp-content/uploads/2015/02/ABD-Media-Release-NS-17-September-2014.pdf>

²³ <http://statements.qld.gov.au/Statement/2014/8/28/government-to-drive-for-community-benefits-from-aurukun-mine>

²⁴ Part 2, Chapter 5, MRA

²⁵ Subdivision P, Division 3, Part 2, NTA

²⁶ Email from NAK Contact Person, Jim Davis, to Glencore

²⁷ Letter from Gilbert & Tobin to Glencore

Our engagement with communities is integrated into all stages of our operations and we seek to maintain an open dialogue with our local communities.

As a member of the International Council on Mining and Metals (“ICMM”)²⁸, Glencore has committed to following a set of 10 principles (and supporting position statements) that make up the ICMM Sustainable Development Framework.

While nation-states have the right to make decisions on the development of resources according to applicable laws, successful mining and metals projects require the broad support of a proponent’s host communities.

Although the need for broad support does not grant a particular group the right to veto a project, nor does it require unanimous support, we do believe that seeking consent from Traditional Owners comprises a process and an outcome.

The ICMM describes this process as enabling Traditional Owners to be²⁹:

- *able to freely make decisions without coercion, intimidation or manipulation;*
- *given sufficient time to be involved in project decision making before key decisions are made and impacts occur; and*
- *fully informed about the project and its potential impacts and benefits.*

Based on our direct discussions and observations, and recognising our responsibility for facilitating such a process, we do not believe that this opportunity has been provided to NAK and the Wik and Wik Way People.

In August 2015, there were public reports that directors of NAK had removed CYLC as their representative.

NAK director Lavinia Ahlers stated *“we want to stand independently as our own organisation”*³⁰. Fellow NAK director Roy Chevathen, appointed by Wik Way families, stated *“They make the decisions for us and then tell us about them and that’s not what we want from our consultants and legal advisors”*³¹.

However, on 4 September 2015, we were advised by CYLC that:

- *“reports in the Cairns Post...that CYLC no longer acts for NAK are incorrect;*
- *CYLC was instructed “to act on behalf of NAK in relation to the application of the expedited procedure to the grant of Mineral Development Licence 2001”; and*
- *Gilbert & Tobin had been retained “to act on various matters arising in relation to the Queensland Government’s award of Preferred Proponent status to Glencore”.*

We must accept such advice however we note that since mid-2014 there have been several changes to the persons and parties providing advice to NAK:

²⁸ <http://www.icmm.com/>

²⁹ Position Statement on Indigenous People and Mining, <http://www.icmm.com/document/5433>

³⁰ <http://www.cairnspost.com.au/news/cairns/aurukun-native-title-body-ngan-aak-kunch-has-been-in-damage-control-since-announcing-decision-to-sack-the-cape-york-land-council/story-fnjpusyw-1227467034242>

³¹ The Australian, 28 July 2015, *Wik go it alone over land use*

- From 16 June 2014, Mr Philip Hunter (NAK's long term lawyer from HWL Ebsworth) was replaced as the registered contact person for NAK by Mr Jim Davis (from CYLC)³² who was subsequently replaced in December by Mr Philippe Savidis (also from CYLC)³³;
- On 24 September 2014 we were notified that Gilbert & Tobin *"have been instructed to act for Cape York Land Council...and Ngan Aak Kunch... in relation to the Aurukun Bauxite project"*.
- On 23 April 2015, we were advised that *"Cape York Land Council...is the legal representative of the Ngan Aak Kunch Aboriginal Corporation"*.

While we clearly accept the right of NAK to retain whoever they choose as their legal advisors and contact point, we are aware that persons with close affiliation to CYLC have also been prominent in supporting ABD's proposal to obtain rights over the Aurukun bauxite resource.

While Glencore respects the rights of these individuals to express a public opinion on the Aurukun bauxite resource, we have concerns about the perceived independence of advice being provided to NAK given that:

- CYLC's Chair has pursued an advocacy role with government³⁴ and media³⁵ on behalf of ABD;
- CYLC and ABD representatives have co-attended meetings with Government officials and ministers regarding their proposal³⁶
- Persons affiliated with CYLC (who are not Traditional Owners) have made strong and incorrect claims about the process by which Glencore was selected as the preferred proponent and/or stated their support for ABD^{37,38,39}

This is in stark contrast with the views being expressed directly to us by senior traditional owners from the Wik Way people who are telling us that they welcome Glencore's presence in Aurukun and want to work with us to see if the opportunities from the Project can be realised through an inclusive and participatory process.

³² <http://register.oric.gov.au/document.aspx?concernID=104097> (document dated 14 August 2014)

³³ <http://register.oric.gov.au/document.aspx?concernID=104097> (document dated 11 February 2015)

³⁴ <http://www.cabinet.qld.gov.au/ministers/diaries/assets/april-2015/anthony-lynham.pdf>

³⁵ <http://www.theguardian.com/australia-news/2015/jun/29/newman-government-acted-like-the-kgb-in-mine-bid-say-traditional-owners>

³⁶ <http://cabinet.qld.gov.au/ministers/diaries/previous-cabinet/assets/july-2014/seeney-diary-july-2014.pdf>;
<http://www.theaustralian.com.au/news/nation/fury-over-oneday-aurukun-bauxite-mine-bid/news-story/c20b47d2919ee4db4a449f3d11ade67e?login=1>

³⁷ <http://www.cairnspost.com.au/business/indigenous-leaders-alarmed-that-glencore-given-green-light-to-develop-aurukun-bauxite-deposit/story-fnjpusdv-1227040840542>

³⁸ <http://www.theaustralian.com.au/opinion/queensland-aurukun-development-plan-a-flawed-decision/news-story/56b6a78236486f5293ff81e1c39c1122>

³⁹ <http://www.theaustralian.com.au/opinion/columnists/the-hopes-of-the-wik-people-have-been-cruelly-dashed/news-story/467522704a27c4d4cda6498e7f4845f3>

We submit that the Senate Economics Reference Committee should consider:

- **The adequacy of current measures for ensuring independence of advice for native title holders having regard to international standards of agreement making with Indigenous people⁴⁰; and**
- **The availability of, and access to, sufficient resources and expertise for PBCs to properly represent the views of native title holders and make the most of opportunities, such as economic development, that represent the aspirations of the Traditional Owners.**

⁴⁰ With reference to the UN Declaration on the Rights of Indigenous People was adopted by the United Nations General Assembly in September 2007 and endorsed by the Australian Government on 3 April 2009, http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

5. Process for finalisation of a mineral development licence

The current state of the development process for the resource (including grant of the mineral development licence) has been described above.

As noted earlier, the restraint placed on NAK by ABD prevented any discussions from taking place between NAK and Glencore regarding the Project (which may have enabled the earlier grant of a MDL if an agreement had been reached).

Although NAK has recently indicated that it has obtained a limited release from ABD and is now able to meet with us, we remain unable to further progress the Project as a result of:

- The objection, lodged by the CYLC, on behalf of NAK, to the use of the expedited procedure by the State (currently before the NNTT); and
- High Court proceedings, commenced in June 2015 by Gilbert & Tobin, on behalf of NAK, which challenge the validity of certain provisions of the MRA that are relevant only to the Aurukun bauxite resource (which leaves uncertain the legislative framework applicable to development of the resource).

Following NAK's objection to NNTT regarding the use of the expedited procedure in September 2015, directions were issued by the NNTT with the parties exchanging statements of contention and a determination on whether to list the matter for hearing by the end of February.

In order for the State to grant the MDL, these proceedings must be determined by the NNTT or withdrawn.

Glencore is not a party to the proceedings brought by NAK in the High Court against the State of Queensland however we understand⁴¹ that the focus of the case relates to section 231K of the MRA which excludes the jurisdiction of the Supreme Court of Queensland under section 370 of the MRA to determine the validity of the grant of a relevant mineral development licence.

Should section 231K be invalidated (and section 370 enlivened), the Supreme Court "*may hear and determine any proceeding challenging or otherwise relating to the validity of any grant that has been made pursuant to this Act...or any other Act relating to mining*".

We do not believe that the operation of section 370 will be relevant to the execution of the Aurukun Agreement between the State and Glencore however it may be used to make a further challenge to the validity of the grant of the MDL.

If such a challenge is made (whether on behalf of NAK or some other party), we would expect that challenge, despite grant of the MDL, to further delay progress on the Project.

⁴¹ By reference to the Transcript of Proceedings [2015 HCATrans 205]

6. Opportunities for benefit

The potential development of the Aurukun bauxite resource offers significant opportunities for Traditional Owners, and the Aurukun community, to benefit.

6.1. Current benefits

During our work in Aurukun throughout 2015, we have placed particular significance on supporting local business and employment wherever possible. This includes:

- Using accommodation provided by the Aurukun Shire Council;
- Purchasing food from the local store and café;
- Hiring vehicles from a local business;
- Hiring boats and local drivers from APN Cape York;
- Engaging Traditional Owners when we are invited to visit their country; and
- Engaging a local consultant to undertake a survey of regional business capacity and skills.

We have also contributed to various community programs and initiatives as described earlier in section 2.

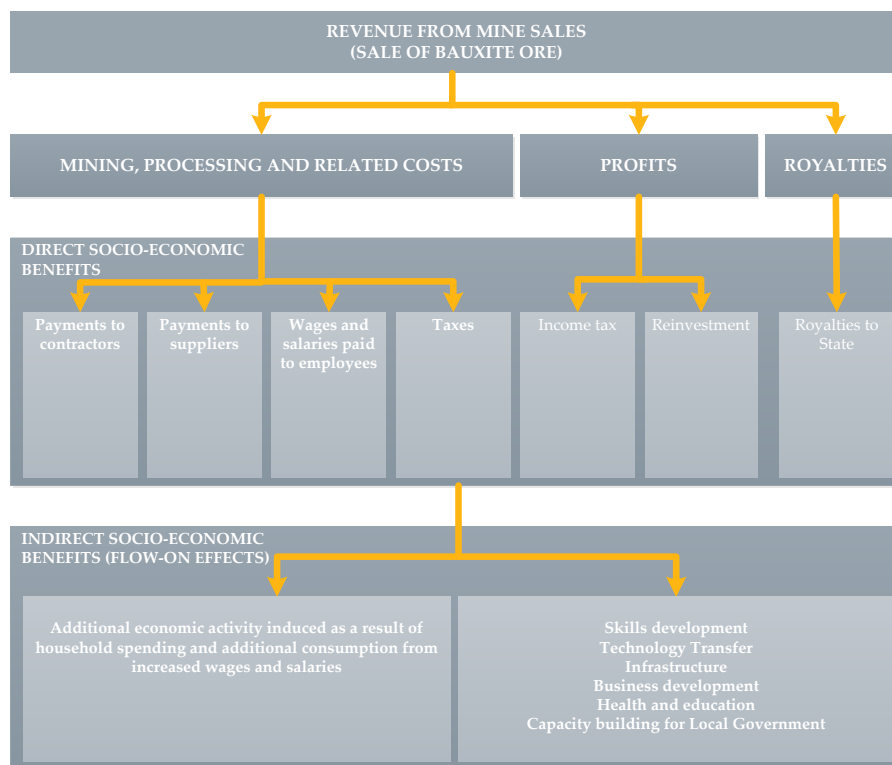
If we have the opportunity to start the studies that are part of the MDL work program, we would expect there to be employment opportunities that will be a part of various study “campaigns”.

6.2. Potential future benefits

We consider that the sources of potential future opportunities and benefits from the Project would likely follow a pattern that is typical for large mining projects.

There are three main direct channels for economic benefits to be distributed, namely: mining and processing and related costs; profits; and royalties.

This flow of benefits is represented below.



Additional indirect benefits would also arise through funding of community development programs via the payment of royalties. This is likely to include investments in key social services and infrastructure in high need areas such as health and education.

Economic benefit from Aboriginal freehold

If the Project was developed, NAK, on behalf of the native title holders, would receive revenue from the State under the *Aboriginal Land Regulation 2011* (as the holders of Aboriginal freehold title under the *Aboriginal Land Act 1991* (“**ALA**”)).

The ALA provides⁴² that if the State receives a royalty under the MRA in relation to land that is Aboriginal land, the trustee (ie NAK) is entitled to a prescribed percentage of that amount which must be applied for the benefit of the Aboriginal people for whose benefit the land is held and particularly for those that are affected by the activities to which the royalty relates.

The *Aboriginal Land Regulation 2011* sets out the prescribed amounts.

Benefits from native title rights

The native title rights held by NAK, on behalf of the Wik and Wik Way People, provide a further opportunity for benefits to flow to Traditional Owners.

Any such benefits would typically be agreed through the negotiation of an Indigenous Land Use Agreement between NAK and Glencore (although a right to negotiate process under the NTA is also available).

In our proposed Principles of Agreement that were provided to NAK in August 2013, and reflecting our earlier discussions with NAK, we recognised that benefits to Traditional Owners needed to be holistic by comprising a range of topics including:

- ***Cultural integrity*** – respecting and protecting the connection of Traditional Owners to their land and seeking an ongoing partnership that includes participation in project design and building cross-cultural understanding
- ***Environmental and social impact assessment*** – undertaking a process that is inclusive of Traditional Owner interests and provides equal access and opportunity to be heard
- ***Economic benefit*** – ensuring that it is fair and reasonable (having regard to impact) and is distributed equitably, transparently and with accountability
- ***Community benefit*** - collaboratively identifying objectives and priorities for community investment and creating shared value through sustainable benefits to the community and our business
- ***Engagement*** – ensuring mechanisms are in place to inform, respond, consult and partner with community members, particularly Traditional Owners, regarding the Project

Further discussions of these topics has been prevented by the restraint placed on NAK regarding engaging with Glencore about the Project.

⁴² Section 203, ALA

Local workforce and business opportunities

One of the major benefits of the Project at the local level would be through direct and indirect employment in the Project.

The ASC and community leaders have indicated that they would like to see opportunities for Traditional Owners and community members to be employed during both construction and operational phases of the Project.

The ASC and community leaders also indicated, during Glencore's discussions with them, that they not only wanted to be consulted about environmental management strategies, but also about the ongoing monitoring of impacts resulting from mining operations. This is an opportunity that would support employment and training for local Indigenous people in areas other than production and operator roles.

Our original Project proposal (for a six million dry product tonne per year operation) envisaged an operational workforce requirement of up to 250 people therefore a key part of our early work on the Project will be to develop our local participation plan with a strength based analysis of Aurukun and surrounding communities.

While we have initiated a scan of local business capacity and skills, we can only further advance our potential plan when we have more certainty regarding the Project and through the involvement of a wide range of stakeholders, including NAK.

Current status

Although we discussed a number of these topics with NAK directors in 2013 as part of the RFDP process, further discussions since our selection as the preferred proponent have been prevented by the restraint placed on NAK regarding engaging with Glencore about the Project.

We have also sought to engage with the relevant Remote Jobs Communities Program provider for Cape York, which is Cape York Employment (part of the Cape York Partnerships Group). However, until we have some more certainty regarding timeframes and pathways to development, our correspondence has been only at a high level.

7. Any other related matter

Regulatory risk

The resources industry in Australia is going through a challenging period with significantly lower commodity prices than in recent years. In that environment, the need for greater certainty and transparency within the Australian regulatory process is even more pronounced, as competition for global capital increases.

Other than its geographic location and resource endowment, Australia has traditionally benefited from a positive perception as a well-regulated jurisdiction within a strong legal framework.

The terms of reference provided to this inquiry before the Senate Economics Reference Committee are very broad with the only public comments reflecting its purpose being those of Senator Canavan, who noted that *“some local community members have approached me to say a senate inquiry could help get to the bottom of these disputes”*⁴³.

While we welcome the Senate’s interest in the Project, we believe that, in order to provide greater transparency, the basis for undertaking this inquiry should be well articulated in any report from the Committee such that the resource industry generally may gain greater assurance as to Australia’s regulatory processes for resource development.

⁴³ <http://www.theaustralian.com.au/national-affairs/state-politics/cape-york-aurukun-mine-inquiry-into-governments-glencore-pick/news-story/ecac00ebf34707202177f89c8638b52e?login=1>

8. Appendices

Appendix A – Regulatory framework

Appendix A – Regulatory Framework

This Appendix provides an overview of key regulation applicable to the Aurukun bauxite project.

1. Mineral Resources Act 1989

Resource authorities

Before you can explore or mine for minerals in Queensland, you must hold the appropriate resource authority, issued under the *Mineral Resources Act 1989*⁴⁴. A resource authority is generally issued for a specific mineral, a specified area or for a specified period of time and can take the form of:

- A *prospecting permit* – to prospect, hand-mine and peg a mining lease or claim on the available land specified in the permit
- An *exploration permit* – to prospect, conduct geophysical surveys, drilling and sampling and testing of materials
- A *mineral development licence* – to conduct geoscientific programs, mining feasibility studies, metallurgical testing and marketing, and environmental, engineering and design studies
- A *mining claim* – to conduct small scale mining operations such as prospecting and hand-mining
- A *mining lease* – to machine-mine for specified minerals and conduct other activities associated with mining or promoting the activity of mining

Generally speaking, in applying for a resource authority you must describe the area you are applying for, describe your proposed activities and provide evidence of your financial and technical capability to perform those activities.

In addition, the Department of Natural Resources and Mines (“DNRM”), as the responsible agency, cannot issue a resource authority unless:

- The applicant holds the appropriate environmental authority under the *Environmental Protection Act 1994*; and
- The State has complied with the native title requirements as described in the *Native Title Act 1993*

Additional approval requirements can also be expected depending on the nature of the activities to be performed as part of the mining activities (eg approvals for use of roads or the taking of water). More information about the application process can be found in guidelines published by DNRM⁴⁵.

Aurukun provisions

⁴⁴ <https://www.business.qld.gov.au/industry/mining/applications-compliance/applying-resource-authority/minerals-coal-authorities>

⁴⁵ https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0003/217893/mining-lease-guide.pdf

There are unique provisions contained in the MRA which related only to the Aurukun bauxite resource. These provisions are found in Part 2 of Chapter 5 (regarding the grant of mineral development licences) and Part 2 of Chapter 6 (regarding the grant of mining leases).

These provisions vary some of the ordinary sections of the MRA that apply to the process for grant of a mineral development licence of mining lease.

Specifically they provide that:

- only a person who is a party to an “Aurukun agreement” with the State is eligible to apply for a mineral development licence for “an Aurukun project”⁴⁶; and
- only the holder of a mineral development licence for an Aurukun project can apply for a mining lease for that project⁴⁷.

These provisions were incorporated into the MRA by the *Mineral Resources and Other Legislation Amendment Act 2006* with its objective stated to be:

*To facilitate the commercial development of the Aurukun bauxite deposit providing legislative assurance for a simplified process to achieve certainty of mining tenure for the preferred bidder. In promoting the development of the Aurukun Resource, the State is seeking to optimise economic, social and financial outcomes for the benefit of the State and the local region including the Indigenous Parties.*⁴⁸

The stated understanding of the Government at the time, with respect to the rights of the native title holders, was that the amendments “do not diminish the party’s rights in any way and are being done to facilitate the commercial agreements that are being negotiated”.

2. Environmental Protection Act 1994

Mineral Development Licence

Under the EPA, the holder of a MDL must obtain an environmental authority for the proposed activities pursuant to Chapter 5 of the EPA.

Glencore applied to the Department of Environment and Heritage Protection (“DEHP”) for an environmental authority in respect of its proposed MDL activities in July 2015.

Glencore was issued with the necessary authority on 17 August 2015 (EPSX0339343415) which will take effect when the relevant tenure (ie the MDL) is granted. The conditions applicable to the environmental authority were the standard conditions contained in the *Code of environmental compliance for exploration and mineral development projects*.

Mining Lease

A mining lease may only be granted where the applicant for that lease holds an environmental authority for the activities proposed to be carried out. This would involve making a site specific application for an environmental authority under section 124 of the EPA.

⁴⁶ Section 231B, MRA

⁴⁷ Section 318AAB, MRA

⁴⁸ Explanatory Notes, <https://www.legislation.qld.gov.au/Bills/51PDF/2006/MROLAB06Exp.pdf>

Under a normal application process, DEHP may require the applicant for the environmental authority to provide an EIS for the activity, however this is not applicable if the application relates to a coordinated project that is declared under the State Development and Public Works Organisation Act [section 143, EP Act]

There are two types of coordinated project declarations [section 26, SDPWO Act]:

- requiring an environmental impact statement (EIS); or
- requiring an impact assessment report (IAR).

In either case, DEHP remains the government department responsible for issuance of the environmental authority.

3. Native Title Act 1993

Native Title Organisations

The *Native Title Act 1993* (“NTA”) provides for a range of different organisations to play a role in the operation of Australia’s native title framework. These organisations include:

- Native Title Representative Bodies (“NTRBs”) – organisations recognised by the Federal Minister and funded by the Australian Government to perform functions to assist native title groups in a specific region pursuant to Part 11 of the NTA;
- Registered Native Title Bodies Corporate (“RNTBCs”) – prescribed bodies corporate whose name appears on the National Native Title Register as the bodies which hold and/or manage native title on behalf of Traditional Owners once native title has been determined to exist;
- Prescribed Bodies Corporate (“PBCs”) – a corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* nominated by native title holders to hold and/or manage their native title once a native title determination is made (and become RNTBCs after that determination); and
- Native Title Service Providers (“NTSPs”) – funded under a Program Funding Agreement to do the same work as NTRBs in areas where NTRBs have not been recognised.

Native Title Representative Bodies

The functions of NTRBs are set out in Division 3, Part 11 of the NTA, including:

- Facilitation and assistance functions (section 203BB)
- Certification functions (section 203BE)
- Dispute resolution functions (section 203BF)
- Notification functions (section 203BG)
- Agreement making functions (section 203BH)
- Internal review functions (section 203BI)

These functions are to be performed in a manner that, among other things, promotes effective consultation with Aboriginal and Torres Strait Islander peoples living in the area for which it is the NTRB, having particular regard to opportunities for Aboriginal and Torres Strait Islander people to participate in its process and the extent to which its processes involve consultation with those people.

The NTA imposes additional obligations on NTRBs in respect of the performance of its facilitation and assistance functions (which include providing assistance to native title holders in negotiating Indigenous Land Use Agreements⁴⁹), in particular that the NTRB must “consult with, and have regard to the interests of, any registered native title bodies corporate, native title holders or persons who may hold native title who are affected by the matter”⁵⁰.

In the case of the Aurukun bauxite resource, the Cape York Land Council is the relevant NTRB.

Prescribed Body Corporates

When the Federal Court makes a determination of native title, it identifies those people that are the native title holders (or “common law holders”) and requests that these holders nominate a prescribed body corporate (“PBC”) for the purpose of performing certain functions under

- The NTA; and
- The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (“PBC Regs”)

The functions of a PBC are described in the PBC Regs⁵¹ and include:

- managing the rights and interests of the common law holders as authorised by the common law holders;
- holding money in trust for the common law holders;
- investing or otherwise applying money held in trust as directed by the common law holders;
- consulting with the common law holders in accordance with regulation 8 of the PBC Regs; and
- performing any other function relating to the native title rights and interests as directed by the common law holders.

All members of the PBC are required⁵² to be either persons who have native title rights and interests in the relevant area or persons that other members have agreed can also be members of the PBC.

In the case of the Aurukun bauxite resource, Ngan Aak Kunch Aboriginal Corporation (“NAK”) was nominated as the PBC to act as agent or representative of the common law holders of the native title, the Wik and Wik Way People.

Future acts

The grant of any resource authority over land that is subject to native title is classified as a “future act” under the NTA and triggers an obligation to address potential impacts on native title rights and interests.

Various processes exist to address native title rights, which depend on the type of resource authority being sought and the work to be undertaken⁵³. These processes include:

⁴⁹ Section 203BB, NTA

⁵⁰ Section 203BC, NTA

⁵¹ Regulation 7, PBC Regs

⁵² Regulation 4, PBC Regs

- **Private Indigenous Land Use Agreement** – an agreement between native title holders and applicants for resource authorities about how land and waters in the agreement area will be used and managed in the future;
- **Expedited procedure** – a process that applies to exploration authorities (exploration permits or mineral development licences) that don't cause major ground disturbance or significantly affect native title rights and interests;
- **Right to negotiate ("RTN") process** – which enables registered native title parties to negotiate with the applicants for the resource authorities about how the proposed activities will affect their native title rights and interests and, if agreement cannot be reached, to seek assistance from the NNTT; and
- **State Indigenous Land Use Agreement** – where a pre-existing and registered indigenous land use agreement has been established by the State and to which the holder of the resource authority can be bound.

Expedited procedure

A future act is defined by section 237 of the NTA to be an act attracting the expedited procedure if:

- (a) *the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders...of native title in relation to the land or waters concerned; and*
- (b) *the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders...of the native title in relation to the land or waters concerned; and*
- (c) *the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.*

Where the Queensland Government adopts the expedited procedure, it does so on the basis that the State will attach the Native Title Protection Conditions to the relevant resource authority upon grant⁵⁴.

Indigenous Land Use Agreement

The NNTT describes an ILUA as “a voluntary agreement between a native title group and others about the use of land and waters”⁵⁵.

An ILUA may be subject to any conditions agreed by the parties (other than conditions that contravene any law)⁵⁶. If a PBC exists for the relevant area, the ILUA is considered to be a “Body Corporate ILUA”.

⁵³ <https://www.business.qld.gov.au/industry/mining/land-access-environment/native-title/application-processes-overview>

⁵⁴ <https://www.business.qld.gov.au/industry/mining/land-access-environment/native-title/expedited-procedure/protection-conditions>

⁵⁵ <http://www.nntt.gov.au/ILUAs/Pages/default.aspx>

⁵⁶ Section 24BE, NTA

Any party to a Body Corporate ILUA may then apply to the Registrar of the NNTT to have the ILUA registered on the Register of Indigenous Land Use Agreements⁵⁷.

A Body Corporate ILUA must be registered by the NNTT⁵⁸ unless, within one month of the ILUA commencing:

- Any of the parties to the agreement advise the NNTT Registrar that they do not want the agreement to be registered
- A native title representative body for the area advises the NNTT Registrar that certain requirements (involving the PBC notifying the representative body of its intention to enter the agreement) were not met, and the Registrar is satisfied that those requirements were not met.

The effect of registration is that the ILUA become binding on all persons holding native title in relation to any of the land or waters in the area covered by the ILUA (section 24EA, NTA) and is binding on other persons who are a party to the ILUA.

PBC decision making and consultation

A PBC is obliged, under regulation 8 of the PBC Regs, to consult with, and seek the consent of common law holders in particular circumstances.

Relevantly, regulation 8(1)(b) requires that a PBC, for a decision to enter an Indigenous Land Use Agreement, consult with, and obtained the consent of, the common law holders in accordance with the PBC Regs before making a decision to enter such agreement.

The process for seeking consent will clearly vary across different groups of native title holders.

Regulation 8 provides that if a particular decision making process applies under traditional laws and customs, then that process must be used to seek consent or if no particular process applies, that the process of decision making agreed to for decisions of the kind sought shall be used.

Consultation on, and consent to, a decision is deemed by regulation 9 of the PBC Regs to have taken place if there is a document:

- signed by at least five members of the PBC who are each an affected common law holder (ie whose rights and interests would be affected by the proposed decision); and
- which certifies that the common law holders have been consulted about, and have consented to, the proposed decision in accordance with regulation 8

4. Aboriginal Land Act 1991

In addition to native title rights, additional rights to the land where the Aurukun bauxite resource is located have been granted to the Wik and Wik Way people under the *Aboriginal Land Act 1991* (“ALA”). As the holders of the Aboriginal freehold title in the land, the trustee of that freehold right is considered to be the owner of a “reserve” for the purposes of the MRA.

This means that a party seeking to undertake activities on the land under the MRA would typically, after grant of the resource authority but before commencing activities, enter into an

⁵⁷ Section 24BG, NTA

⁵⁸ Section 24BI, NTA

agreement with the relevant landowner (ie the trustee of the land) to establish any additional conditions for access to the land and any compensation for loss of value.