Opening Statement to the

Senate Legal and Constitutional Affairs Committees

Wild Rivers (Environmental Management) Bill 2011

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Thank you for the opportunity to hear the views of the Queensland government on the Wild Rivers (Environmental Management) Bill 2011 and to once again address the misconceptions about Queensland's Wild Rivers framework and its perceived "impacts on the interests of Aboriginal people in the management, development and use of native title land".

This is the third Inquiry into this matter. The initial Senate Inquiry in June last year, after considering 37 submissions and 2 public hearings, recommended that the Senate should not pass the Bill, citing that it "was not persuaded that the Queensland Act substantially interferes with the current or future development aspirations of Indigenous or other landowners in Wild River areas" and that, even if it did, the Bill before the Senate did not provide "the comprehensive and considered solution needed to economically and socially empower indigenous communities in wild river areas". The Bill has not changed in this regard.

The second Inquiry – the House of Representatives Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010 – has held a significant program of hearings in Canberra, Cairns, Weipa, Bamaga, Brisbane and even on country on the Kaanju homelands, and is currently considering 39 submissions. This inquiry has yet to report its findings to the Australian Parliament.

Queensland does not support this Bill and has made its concerns about the Bill known to each of these Inquiries.

Of paramount concern is the infringement of a state's rights to make laws that the Bill contemplates – and nothing in its minor redrafting since the last Senate Inquiry has served to quell that concern.

As a sovereign State, the Parliament of Queensland has the power to make laws, as provided for in both the *Constitution Act 1867* and the *Australia Act 1986*. This power, combined with the State's constitutional responsibility for environmental protection, has been successfully used to protect and regulate the use of the environment through a range of Queensland legislation.

There is no express power in the Commonwealth Constitution for the Commonwealth Government to legislate in respect of environmental protection and the States have therefore been primarily responsible for enacting legislation for environmental protection through the regulation of activity and development. And that is what the Wild Rivers Act does – regulates and sets conditions on development that would adversely impact on the values of the river.

The effect of this Bill would be to undermine and remove the Queensland Parliament's power to protect and regulate the environment in areas declared as wild river areas unless consent of Aboriginal owners of the land is obtained.

This is interference into the lawful legislative powers of a State by the Commonwealth, setting out to override the legislation of a democratically elected Parliament –significantly, legislation taken as a transparent and open commitment to three State elections. If passed, this would set a dangerous precedent for Commonwealth intrusion into lawful State environmental protection legislation – not just for Queensland, but for any State.

These are not the only concerns about this Bill. The Bill appears to provide a power of veto for for owners of Aboriginal land over the effect of a declaration under the Wild Rivers Act. This provides a power beyond any held by other people in declared wild river areas, and is also not a power available under any other Act of Parliament, including for regulation of mining, land use planning or health, or education.

The drafting of the Bill can only lead Queensland to conclude that its intent is to ensure that its Wild Rivers framework fails.

By way of explanation, the Bill requires that the 'owner' of the 'Aboriginal land' must consent, in writing, for wild river declarations to remain, or be effective, providing for eight different definitions of owner.

Because of the historical displacement of Indigenous peoples, there will likely be disputes over who the owners are for different areas, and, the Bill does not provide for a mediation or arbitration process, nor appropriate review mechanisms, where reasonable attempts to obtain agreement do not result in the required 100% consensus of all "owners" of the "Aboriginal land".

Accordingly, the resistance of any one owner would have the power of blocking the wishes of the majority, effectively rendering consent unworkable and therefore the wild rivers legislation, even if supported by communities, unworkable, undermining the Aboriginal people's communal interest in the land which the Bill seeks to reflect.

The Bill's definition of what is "Aboriginal land", and who is the "owner" of that land, is extensive, and would include land where native title exists, as well as most of the multitude of the State's Aboriginal tenures, even land where native title has not been resolved.

This will give one group of Indigenous Australians rights over and above other Indigenous Australians, creating two classes of native title holders. This is unfair and would best be addressed by the Native Title Act. It is questionable what this policy is trying to achieve by extending Native Title in one part of Australia. Also, it will give veto over Wild Rivers, but not over any other developments such as mining. It is clearly not a genuine policy designed to redefine Native Title across Australia and for all Indigenous people.

Further, to obtain the written agreement of the native title party for land where native title exists, the Bill provides that an Indigenous land use agreement, an ILUA, may be used. ILUAs are designed to deal with native title matters and under the Native Title Act must meet specific requirements to be authorised and registered. Most categories of 'owner' in the Bill are not native title holders – and many of the 'owners', as defined, might not have no native title rights and cannot be subject to ILUAs.

Even if an ILUA were an appropriate vehicle for such negotiation, the State's experience is that the development of ILUAs can be costly and time consuming, generally taking years to reach agreement. The Bill sets out time limits for achieving consent of six months for existing wild river declarations. Developing an ILUA, negotiating and drafting its terms of reference, registering it, gaining consent of native title holders for the ILUA to act on their behalf, and reaching agreement over Wild River declarations, all in the six months allowed under the Bill, is virtually unachievable.

Consequently it must be assumed the effect of the Bill is that declarations will expire, even in areas where there is widespread support, where an ILUA is required.

For other 'owners', the Bill provides no guidance about the nature, substance or form of the required written agreement, instead relying on the exercise of a regulation power for any detail. This regulation is not presented with the Bill, precluding proper legislative scrutiny and parliamentary consideration of the ramifications of the process. It also places the Queensland Government in the untenable position of starting negotiations with owners to meet the six-month deadline without knowing the regulatory requirements.

With only six months provided to reach agreement before the wild rivers declarations cease to have effect, it is essential all details about the process for agreement are known before any Bill is passed.

Of even greater concern is the Bill's attempt at defining the "owner" of the "Aboriginal land", which is not consistent with any other Queensland legislation such as the Vegetation Management Act, and would see the inclusion of entities or individuals who traditionally, or otherwise, are not part of the group and the exclusion of individuals from the group who traditionally, or otherwise, are part of the group. For example:

- by including the trustee of a reserve for Aboriginal purposes under the *Land Act 1994*, then the Department of Communities, as the trustee of the reserve, must provide its written consent to demonstrate the consent of the Aboriginal people;
- by including the lessee of lease under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*, the lessee, who may or may not be a

traditional owner or native title holder for the land, must provide their written consent to demonstrate the consent of the Aboriginal people;

- by including the grantees of Aboriginal land under the *Aboriginal Land Act 1991* which is likely to be land where native title exists then the native title holders under the Commonwealth *Native Title Act 1993* also become the owner of the land for the Bill. The problem is that these two "owners" may not be the same individuals or entity; and
- by failing to specifically include any lessees of a trustees lease granted under the Aboriginal Land Act as an "owner", for example an Indigenous lessee of a 99 year homeownership lease on a Deed of Grant in Trust, effectively results in their exclusion as a class from the agreement group and instead hands their agreement making over to the trustee of the Deed of Grant in Trust.

How can this Bill work if the definition of Aboriginal people is not sufficiently clear and precise and, worse still, includes some individuals and excludes others from the agreement. It is also questionable whether the Bill demonstrates sufficient understanding of Aboriginal tradition and the way in which agreement is achieved from those empowered to speak for country.

Queensland's submissions have argued that the Bill fails its objective of protecting the interests of Aboriginal people within wild rivers areas to own, use, develop and control that land. The State's view is that this objective is best achieved, and is indeed consistent with, the planning and development arrangements called up through a wild river declaration.

Since the introduction of the Wild Rivers legislation, there has been substantial consultation with Aboriginal people and communities. Granted, this process has improved over time and will improve further with Minister Kate Jones recent announcement of the Sustainable Cape Communities initiative. This initiative will see the establishment of Indigenous Reference Groups, set out in the legislation, to provide legitimate and representative advice to the Minister from those nominated by communities to speak for country on wild river declarations. Interesting, this proposal was discussed and confirmed in writing with the Director of the Cape York Institute, Mr Noel Pearson in December 2009. However, in the absence of a response, the government has moved forward to ensure that communities themselves have strong input into any further declarations.

We ask the Commonwealth to work with Queensland in establishing enduring governance arrangements across the range of matters for consultation in the Cape, building capacity across communities to represent themselves in discussions about their land. And we respectfully ask that the Senate give these arrangements a chance before taking the place of the State legislature.

Queensland can only come to the conclusion that this Bill is not about what it purports to be, but is intended to render Queensland environmental law unworkable. If the Bill seeks to unite Aboriginal people in wild river areas, it is doing the opposite. If it seeks to provide certainty for development, then it is doing the opposite.

Wild Rivers simply puts a development assessment framework on development that would adversely impact on the values of the river system. This doesn't mean camping, grazing, tourism, dams for stock and domestic purposes, housing or market gardens can't occur. But it does mean open cut mining and large dams that would affect flow cannot occur in a high preservation area.

However, outside of the high preservation areas, development activities can proceed with minimal additional requirements. For example, open cut mining could occur in a preservation area subject to additional considerations to ensure that the natural values of the wild river are not adversely impacted. Importantly, essential developments such as residential buildings, roads, powerlines, water and sewerage treatment plants are not prohibited anywhere in a wild river area.

As outlined in our submission to the House of Representatives inquiry, there is no difference in the level and type of development applications being lodged and approved before and after the wild rivers legislation. There have been more than 170 development applications received by the Department of Environment and Resource Management and the Department of Employment and Economic Development and Innovation. Of these, more than 140 authorisations have been granted in relation to mining activities, riverine protection permits and approvals under the Vegetation Management Act and mining tenements.

There are, however, significant impediments to economic development in Cape York, including distance to markets, extreme climatic conditions, poor soils, reliable access to water, lack of infrastructure and skills shortages. Queensland has been working with communities to address these issues, acquiring more than 1.6million hectares of land since 1994, in collaboration with Traditional Owners. Some 617,000ha has been transferred to Aboriginal ownership and 575,000ha of new national park has been finalised, with formal joint management arrangements being established for all new and existing national parks on the peninsula.

Were the Bill to be enacted, and the wild river declarations become ineffective, then the consequential uncertainty created, seems to offer little towards the policy objective of protecting the traditional owners of Aboriginal land within wild rivers areas to own, use, develop and control that land. Indeed, because the Bill is ambiguous and not drafted in a sufficiently clear and precise way, the exact opposite outcome is extremely likely.