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Member for Ashgrove

Queensland Government

Minister for Environment and Resource Management

Ref CTS 05943/11

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

To Whom It May Concern:

Please find attached the Queensland Government's response to the 2011 Senate Inquiry into the Wild Rivers (Environmental Management) Bill 2011.

The Queensland Government opposes the private senator's bill introduced by Senator Scullion. It is the Queensland Government's view that the Bill, if brought into effect, would render the *Wild Rivers Act 2005* and the benefits it provides for Indigenous employment, sustainable development and protection of natural values, inoperable. Further, the Bill, if passed, would set a dangerous precedent for Commonwealth intrusion into lawful state environmental protection – for a law that was taken to the people of Queensland on three occasions as an election commitment.

The attached submission provides a critique of the Bill focussing on those issues raised in debate. I would also like to refer the committee to the Queensland Government's submission to the House of Representatives inquiry into issues affecting Indigenous economic development and review of the Wild Rivers (Environmental Management) Bill 2010. Together, these submissions emphasise the reasons the Queensland Government does not support the Wild Rivers (Environmental Management) Bill 2011.

Should you require any further information, please do not hesitate to contact Mr Joshua Cooney, Principal Policy Advisor in my office on telephone (07) 3239 0844.

Yours sincerely

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Attachment 1

Queensland submission - Wild Rivers (Environmental Management) Bill 2011

Native title issues

The Bill appears to provide a power of veto for individuals and for all owners of Aboriginal land over any Wild River declaration. This provides a power beyond any held by freehold owners in declared Wild River areas. It is also not a power available under any other Act of Parliament, including for regulation of mining, land use planning or health.

Indeed, such a power is one not enjoyed by any other Australian citizen or community in any other place and its introduction raises serious implications for the responsible protection of the environment across Australia by elected Governments.

The Bill states in clause 4(3)(a) that it aims to 'protect the rights of traditional owners of Aboriginal land ...'. The Bill does not define the word 'rights' nor provide any framework for determining these 'rights', but it appears to offer protection beyond what is understood as native title rights or even traditional rights. In 'Definitions' (clause 3) Aboriginal land includes land where native title exists – under the principles of the *Native Title Act 1993* (Cth) this may include land where native title has not necessarily been resolved.

If the Bill is intended to extend the rights afforded to native title holders, a more appropriate mechanism would be amendment to the Native Title Act. This Act already provides the framework and processes to recognise and protect native title rights and interests – and is within the jurisdiction of the Commonwealth government to address.

There are also numerous inconsistencies between the Bill and the Native Title Act. For example, the Bill uses expressions that are not in the Native Title Act such as 'traditional owner' and 'native title land'. The Bill also defines land as including waters, which is directly inconsistent with the separate definitions of land and waters in section 253 of the Native Title Act. The provisions in the Bill are poorly drafted, and therefore largely unworkable.

Indigenous Consent

The Bill makes provision for the declaration of a Wild River only with the consent of Indigenous owners. Indeed, the Bill goes further, stating in clause 5: 'The development or use of Aboriginal land in a Wild River area cannot be regulated under the relevant Queensland legislation unless the owner agrees in writing.'

The Bill provides in clause 3 eight different definitions of 'owner', and does not indicate that a lack of consensus among them is acceptable. Accordingly, the resistance of any one 'owner' could have the power of blocking the wishes of any other owner, even including a majority of owners, effectively rendering 'consent' unworkable and therefore the Wild Rivers legislation, even if supported by communities, unworkable.

Such a power is not available to any other Australian citizen or community in a Wild River area or in any other part of our nation. For example, freehold rights of citizens in urban areas are subject to environmental regulation (for example, the clearing of vegetation for development requires a permit) and in certain cases, where the common good is concerned, compulsory acquisition of land.

Indigenous Land Use Agreements

The Bill's provision for owners' agreement (to a Wild River declaration) to be obtained under an Indigenous Land Use Agreement (ILUA) poses an unnecessary cost and time imposition on government and Indigenous communities.

Clause 6 of the Bill states that where native title exists, the agreement of an owner may be obtained by an Indigenous Land Use Agreement (ILUA). ILUAs are designed specifically 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 section 3 of the Bill are not native title holders. There will be multiple parties involved as 'owners', many of whom will have no native title rights and are not subject to ILUAs.

For example, the Native Title Act sets out a list of subject matters for ILUAs. An ILUA must cover a matter relating to the native title rights and interests to be registered. Therefore, an ILUA could not be negotiated with an owner who was not a native title holder unless it also dealt with native title rights and interests.

This increases the complexity and time required to negotiate such agreements. Also, the making of a Wild River declaration is not a future act[1]; therefore any agreement on a Wild River declaration, as proposed by the Bill, would not be dealing with native title rights and interests.

Even if an ILUA were an appropriate vehicle for such negotiation, the State's experience is that the development of ILUAs can be very time consuming, sometimes taking years to successfully reach agreement. The Bill sets out time limits for achieving consent of six months for existing wild river declarations – meeting such a timeframe is virtually unachievable.

ILUAs are also costly. The parties usually require specialist legal advice and help in drafting the agreement and there are costs involved in authorising the ILUA in accordance with the Native Title Act requirements.

The National Native Title Tribunal, which is responsible for helping parties negotiate and register ILUAs, states:

> 'ILUAs are not always the best way to proceed. For example, the requirements of an ILUA can be too complex or time-consuming for

[1] Proposed activities or developments that may affect native title are classed as 'future acts' under the Native Title Act

someone wanting to do an individual future act which has little impact on native title.'[2]

Wild River declarations are not a future act and do not impact on native title, therefore ILUAs are not an appropriate mechanism for demonstrating consent.

Impact of the Bill on State's Rights

As a sovereign State, the Parliament of Queensland has the power to make laws for the peace, welfare and good government of the State in all cases whatsoever. This full plenary power[3] for the State to legislate is provided for in both in section 2 of the *Constitution Act 1867* (Qld) and section 2 of the *Australia Act 1986* (Cth). This legislative power, when combined with the State's responsibility for environmental protection from the Commonwealth Constitution, has been successfully used by the Queensland Government to protect and regulate the use of the environment through appropriate legislation.

There is no express power in the Commonwealth Constitution for the Federal Government to legislate in respect of environmental protection. The States have therefore been primarily responsible for enacting legislation for environmental protection through the regulation of activities and development. The State of Queensland has a successful regulatory regime for environmental protection. However and since the 1970s, the Federal Government has used other heads of power, such as the external affairs power, to legislate an additional layer of environmental regulation and protection (see for example the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)).

The effect of the consent provisions in the 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 Indigenous owners of the land is obtained. This is an intrusion into the lawful legislative powers of the State by the Commonwealth and overrides the legislation of a democratically elected Parliament.

The Queensland Government is concerned the Bill, if passed, would set a dangerous precedent for Commonwealth intrusion into lawful State environmental protection legislation and erode the 'cooperative federalism' that has taken place between the Commonwealth and the States' for environmental matters.

To date there are not many examples where the Commonwealth has sought to override a State's environmental protection legislation. For example, the Commonwealth's Environment Protection and Biodiversity Conservation Act utilises bilateral agreements with the States for the joint assessment of certain projects. The Environment Protection and Biodiversity Conservation Act does not oust the jurisdiction of the States' for the assessment of environmental impacts of activities, but it is a complementary layer of assessment, and only in defined cases where the

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[2] Page 7, *Steps to an indigenous land use agreement*, National Native Title Tribunal, at http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Booklets/ILUA_steps.pdf

[3] Excludes however the power to engage in relations with countries outside Australia

Commonwealth has power to regulate the environment pursuant to other heads of power under the Commonwealth Constitution.[4]

The Queensland Government maintains that it is not appropriate for the Commonwealth to override a legitimate State law. The passing of the Bill would erode the State's legislative powers and threaten a cohesive natural resources and environmental management system.

Specific drafting issues relating to the Wild Rivers (Environmental Management) Bill 2010

Inadequate scrutiny of key details.
The collapse of Wild Rivers under clause 7 (transitional provision) of the Bill could lead to the collapse of employment for people managing Wild River areas; for example, the highly successful Wild River Rangers program.

The Bill addresses this to some extent by stating the Commonwealth Government should provide employment to those people in accordance with details specified in the regulations—but with no regulations available for examination it is unclear whether the employment proposed by the Commonwealth would amount to fair compensation for the termination of rangers' current employment. In particular:

- In the absence of the regulation, it is not clear over what period the Wild River Rangers will be guaranteed employment.
- It is not clear whether the terms and conditions of employment will align with those currently provided to Wild River Rangers, and if the community-based approach will continue.
- No guidance is given in the Bill about the duties to be performed under Commonwealth employment.
- The Wild River Ranger program has an accompanying training, mentoring and support structure funded by the Queensland Government. It is not clear whether the Bill also guarantees this supporting framework.

Termination of employment by an Act of Parliament and compensation for it is a very significant issue. Adequate parliamentary scrutiny is essential, but the lack of care in the Bill's construction denies the opportunity to give it thorough consideration.

While, in response to the uncertainty the Bill has created for Wild River Rangers Queensland has committed to making the 40 existing Wild River Ranger positions permanent, should the Bill be given effect, it would call into question the commitment to an additional 60 positions, denying communities employment opportunities.

Inadequate transitional provisions
The Bill provides that current Wild River declarations will lapse after six months from the introduction of the Act—unless a new declaration is made with the agreement of the owner of the Aboriginal land (clause 7).

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[4] For example, the Commonwealth may use the external affairs power to regulate the environment in accordance with Australia's international treaty obligations.

No transitional provisions are included in the Bill to deal with the adverse effect that this clause may have on individuals who are already carrying out development.

Considerable uncertainty will be created if a new declaration is to be negotiated (under the terms of the Bill), as it may be different from the current declaration. Developments that are underway may face uncertainty while a new declaration is negotiated. Those carrying out development will face up to six months of uncertainty and still find their development must cease or be amended to comply with any new declaration. The Bill does not protect rights already accrued or provide compensation if they are lost.

Power to make regulations

The Bill sets out that Parliament will have the power to make regulations to:

(a) seek the agreement of an owner under the proposed Act
(b) negotiate the terms of the agreement
(c) give and evidence the agreement (which would suggest the form that the agreement must be in order to prove that an agreement is in place).

No such regulations are available for scrutiny.

Only six months is provided in the Bill to reach agreement on Wild Rivers declarations before the current declarations cease to have effect. With such a short timeframe it is essential all details surrounding the process of seeking agreement, negotiating the agreement and having the agreement in the approved form are known at the outset. If not, valuable time would be lost starting a process that ultimately may not comply with the proposed regulations.

Inadequate time for negotiation of agreements

It appears, by default, the Bill must cause the collapse of a Wild River declaration in those cases where an ILUA is required.

As noted above, the Bill provides only six months to reach agreement with the owners of Aboriginal land before the existing Wild River declaration collapses (clause 7). Also noted above, the Bill states that where native title exists, the agreement of an owner may be obtained by a registered body corporate or an Indigenous Land Use Agreement (ILUA) (clause 6).

The National Native Title Tribunal states parties must allow a minimum of six months simply for the registration of an ILUA[5]:

> 'A further six months should be allowed as a minimum once an application to register the ILUA is made to the Tribunal. The Registrar must notify certain people and organisations of the application to register the ILUA and in the case of area and alternative procedure agreements, must also notify the public. Time must also be allowed for any objections to the registration of the ILUA to be considered.'

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[5] Page 3, *ILUA or the right to negotiate process?* National Native Title Tribunal, at http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Booklets/ILUA%20or%20the%20right%20to%20negotiate%20December%202008.pdf

It is the experience in Queensland that ILUAs take between 12 and 18 months to negotiate. Reasons include:

- genuine differences of view in the Indigenous community
- other things occurring in the community that impact on the pace and outcome of the negotiations
- the location for meetings (native title holders may not live in the Indigenous community).

This means that, even with regulations in place at the outset, it is virtually impossible, according to the best available advice, to develop an ILUA, negotiate and draft its terms of reference, register it, gain consent of native title holders for the ILUA to act on their behalf, and negotiate and reach agreement over Wild River declarations, all in the six months allowed under the Bill.

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

The Bill allows for regulations to define the process for seeking and negotiating agreement with an owner (clause 8). This means any changes to that process can also occur by regulation. This precludes 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. Further, if the Queensland Government were to seek agreement from owners, the requirements for the process could be changed by a regulation with inadequate consultation.