12 April 2011

Tim Watling
Inquiry Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600
Via email: eewr.sen@aph.gov.au

Dear Mr Watling

Re: Inquiry into the *Wild Rivers (Environmental Management) Bill 2011*

Please find enclosed the Wilderness Society's submission to the above Inquiry. The submission comprises two components.

The first component is a concise summary of the problems we see with the *Wild Rivers (Environmental Management) Bill 2011*, currently before the Senate. This analysis indicates that the Bill is highly unworkable, and we do not believe that making simple amendments would resolve all of these critical issues.

The second component is a link to our submission to the House of Representatives Standing Committee on Economics' *Inquiry in Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010*, given that Inquiry is examining an identical Bill to that tabled in the Senate. This submission is a 6-part series of reports under the overarching theme of 'Protecting Rivers, Supporting Communities'.

This submission to the House of Representatives' Economics Committee covers key issues as follows:

- Report 1: Summary Report and Recommendations
- Report 2: Queensland's *Wild Rivers Act 2005*
- Report 3: Environmental Regulation in Queensland
- Report 4: Cape York Peninsula Policy Settings
- Report 5: Sustainable Development on Cape York Peninsula
- Report 6: Indigenous Rights and Wild Rivers

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As that earlier Submission argues, there is absolutely no justification for Federal intervention on the *Wild Rivers Act 2005*, and outlines in detail why the Wild *Rivers (Environmental Management) Bill 2010* introduced by Opposition Leader Tony Abbott should not be supported by the Australian Parliament. Of course the same applies to the Bill introduced into the Senate by Senator Nigel Scullion, which is a replica of the Abbott Bill. The Wilderness Society maintains that important matters of ensuring the sensible protection of our healthy river systems, supporting sustainable Indigenous economic development, and enhancing Indigenous rights across all regulatory areas are issues that the Australian Parliament should properly prioritise in place of Mr Abbott's and Mr Scullion's poor public policy.

Our submission to the House of Representatives' Economics Committee also highlights the enormous economic potential for Cape York from environmental protection and associated eco-tourism and commercial activity, particularly around a future World Heritage listing. We indicate that the Queensland Government could improve the Wild Rivers initiative to formalise a negotiation process, build in cultural recognition, and enhance the Indigenous Wild River Ranger program.

This earlier House of Representatives inquiry submission as a whole can be located at:
http://www.aph.gov.au/house/committee/economics/WildRivers/submissions/Sub032.pdf
and the individual reports can be downloaded at:
http://www.aph.gov.au/house/committee/economics/WildRivers/subs.htm

Finally, the Wilderness Society has previously made a detailed submission to a Senate Inquiry on an earlier version of the *Wild Rivers (Environmental Management) Bill (2010)*. We would strongly encourage members of the Senate Standing Committees on Legal and Constitutional Affairs to revisit this submission as the issues raised remain pertinent to the advisability and workability of the current bill being examined. A copy of this previous Senate Submission is available at:
https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=3f9b1026-08bf-48d7-bc66-0c945751ccfe

We would be very happy to expand on any of the issues we have raided.

Yours Sincerely

Lyndon Schneiders
National Campaign Director
The Wilderness Society

Wilderness Society Submission to the Senate Standing Committees on Legal and Constitutional Affairs on the *Wild Rivers (Environmental Management) Bill 2011* (Scullion Bill currently before the Senate)

1. Introduction

The *Wild Rivers (Environmental Management) Bill 2011* seeks to circumvent the Queensland *Wild Rivers Act 2005* and the *Native Title Act 1993* to deliver a veto to a limited set of Indigenous interests. A standard test of good public policy and legislation is whether it is capable of addressing a real policy issue, and whether it is an appropriate way to address it.

Based on our own analysis and advice received from Traditional Owners from Cape York and other parts of Queensland, the Wilderness Society believes the Bill currently before the Senate fails this important test. It fails to articulate why special measures are required, and why remedies cannot be used under existing Acts such as the *Wild Rivers Act* and the *Native Title Act*. If there are Indigenous policy issues with respect to economic opportunity and advancement of internationally recognised rights to be resolved, it would be more appropriate and practical to seek reform through the *Native Title Act*, as well as seek further relevant changes to the *Wild Rivers Act* at the State level.

The Bill fails to address the principles of the UN Declaration on the Rights of Indigenous People (UNDRIP) in a fair and consistent manner. In doing so, the Bill moves the goal posts for political purposes. The Bill suggests it draws moral argument from the UNDRIP, but does nothing to clarify, extend or codify Indigenous rights, or explain where and how any infringement of these rights have occurred. It serves merely to support those who believe a wild river declaration stops economic development.

The Bill invokes the race powers of the Australian Constitution at a time when the provisions are under question regarding constitutional recognition of Indigenous Australians. They maintain and enable a paternalist approach by Government to Indigenous people based on their racial heritage, while neglecting substantive and universal advancement of the rights of Indigenous peoples under a consistent and equitable set of principles (with reference to international law).

The wild rivers scheme has proceeded on the basis that the Wild Rivers Act and the declarations made under it are lawful, and it is supported by intergovernmental public policy. Any extension of Indigenous rights under Australian law must proceed from a well-founded articulation of the principles and issues. The continuing lack of explanatory notes and legislative detail are arguably a sign that the case for the Bill has not been made.

There are a number of serious deficiencies with the Bill as a whole, and major concerns with regard to specific clauses, including conceptual confusion, definitional problems (perhaps most acutely around the meanings of ‘owner’ and ‘agreement’ which will result in certain organisations and entities as well as an individual being able to exercise a veto over Wild River declarations), and the inevitable disruption and disputation that will follow any attempt at its practical implementation. The following analysis points to these and a number of other issues, and highlights the overall unworkability of the Bill.

2. Specific problems and concerns with the bill

***Clause* 1 - Short title**

The bill states that it be cited as the *Wild Rivers (Environmental Management) Act 2011*.

Problems and concerns

Despite its title, the Bill says and offers nothing on environmental management of wild river areas - in fact, it will lead to the undermining of catchment-scale (or whole of basin) river protection.

The intent of the bill is clearly to stop declarations from being made or retained over Aboriginal lands - it has no environmental purpose.

The name of the bill is therefore highly misleading, and should be understood by its intended application. That is, for example, 'a Bill to establish a veto mechanism for Indigenous interests in Cape York over Wild River declarations'.

***Clause* 3 - Definitions**

The bill states in Clause 3:
Aboriginal land means:
(a) Aboriginal land under the *Aboriginal Land Act 1991* (Qld);
(b) land where native title exists;
(c) a lease under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld);
(d) deed of grant in trust land under the *Land Act 1994* (Qld) granted for the benefit of Aboriginal people;
(e) a reserve under the *Land Act 1994* (Qld) for a community purpose that is, or includes, Aboriginal purposes;
(f) freehold, or a term or perpetual lease under the *Land Act 1994* (Qld), held by, or in trust for, an Aboriginal person or an Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
(g) the Aurukun Shire lease under the *Local Government (Aboriginal Lands) Act 1978* (Qld).

Problems and concerns

This provision brings all lands - under tenures owned or controlled by any Indigenous interest in a wild river area, or with a native title interest in the land - into the ambit of the veto mechanism.

This creates a 'class' of interests based on race rather than traditional ownership and customary tenure, and thereby uses the device of the race provisions of the Constitution to override a valid Sstate Act. It also narrows the scope of the race provision to just one section of Aboriginal Australia - to Indigenous people living in a wild rivers area in Queensland..

There are serious concerns regarding this, including that it -

- Subverts the native title of Traditional Owners
- Empowers non-representative bodies to make decisions
- Creates a precedent for property holders to veto a valid environmental regulation
- Fails to extend the principle of a veto to all Indigenous people over all land use and regulation

***Clause* 3 - Definitions**

The bill states in Clause 3:

land includes waters.

native title land means land in which native title exists.

Problems and concerns

This clause extends the concept of native title to a veto power over lands in which native title exists, but which may or may not be owned or controlled by Indigenous people - for example, a pastoral lease held by a non-Indigenous person is usually land in which native title exists. It also covers Indigenous-held land in which the Traditional Owners and the Indigenous land holder may not be one and the same.

The Native Title Act provides the means by which native title rights and interests are to be negotiated. These rights attach to specific Traditional Owners and the native title claim group, and not Indigenous interests in general or by race.

Common law and statutory Native Title are well defined. This Bill is not consistent with the relevant jurisprudence and legislation with respect to Native Title. If the Native Title Act limits the rights of Indigenous people it should be amended to reflect the current international consensus on these rights.

The principle of Free Prior and Informed Consent (FPIC) also attaches to these traditional land owning groups, either individually or through their freely chosen representatives under Aboriginal laws and customs. It is a principle that underpins the right to self-determination. The Bill fails on this test as it continues the practice of Government intervention, does nothing of itself to support self-determined Indigenous development, and gives a head of power to structures and organisations imposed on Traditional Owners under other legislation or through private and unaccountable arrangements.

***Clause* 3 - Definitions**

The bill states in Clause 3:

"owner means:

(a) for Aboriginal land under the *Aboriginal Land Act 1991*(Qld)—the grantees of Aboriginal land under that Act;

(b) for land where native title exists—native title holders under section 224 of the *Native Title Act 1993*;

(c) a lease under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld)—the lessee;

(d) deed of grant in trust land under the *Land Act 1994* (Qld) granted for the benefit of Aboriginal people—the grantee;

(e) a reserve under the *Land Act 1994* (Qld) for a community purpose that is, or includes, Aboriginal purposes—the trustee of the reserve;

(f) for freehold held by, or in trust for, an Aboriginal person or an Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)—the registered proprietor under the *Land Title Act 1994* (Qld);

(g) for a term lease or perpetual lease under the *Land Act 1994* (Qld) held by, or in trust for, an Aboriginal person or an Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)—the lessee;

(h) the Aurukun Shire lease under the *Local Government (Aboriginal Lands) Act 1978* Qld)—the Aurukun Shire Council."

Problems and concerns

The Bill states that it aims to "protect the rights of Traditional Owners of Aboriginal land…" but does not define these rights, nor provide any framework for determining these rights, except by reference to Indigenous Land Use Agreements (ILUAs) under the *Native Title Act 1993* (NTA). Which begs the question: why is the Native Title Act not able to address the rights and interests of these Traditional Owners?

The Bill conflates Traditional Ownership with every conceivable Aboriginal tenure or interest in land, interests which are not at their core Traditional Ownership or Native Title. It establishes a new form of property rights for Indigenous landholders.

This section also buttresses the power of local councils and regional Indigenous bodies (who would both qualify as "owner" under the proposed definition) at the expense of local Traditional Owners and actual native title holders and claim groups.

See also comments in *3 Definitions: Aboriginal land* above

***Clause* 4 - Constitutional basis and object of Act**

(1) This Act relies on:

(a) the Commonwealth's legislative powers under 31 paragraph 51(xxvi) of the Constitution; and

(b) any other express or implied legislative power of the Commonwealth capable of supporting the enactment of this Act.

(2) It is the intention of the Parliament that this Act be a special measure for the advancement and protection of Australia's indigenous people.

(3) In particular, it is the intention of the Parliament that:

(a) this Act protect the rights of traditional owners of Aboriginal land within wild river areas to own, use, develop and control that land; and

(b) should the enactment of this Act result in the loss of employment by persons employed or engaged to assist in the management of a wild river area then the Commonwealth Government should provide employment to those persons in accordance with details specified in the regulations.

Note: Paragraph 51(xxvi) of the Australian Constitution provides that the Parliament has power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws".

Problems and concerns

This provision is likely to prove to be a trigger for constitutional uncertainty and disputation. Primary responsibilities of land and water management are vested in the States. The Bill is a direct intervention by Commonwealth in the Queensland Parliament's powers to regulate for environmental protection. Unlike the Tasmanian Dams case, the intervention power does not relate to the actual policy in question or have a basis in international law.

This is a significant intrusion into the lawful role of State legislatures, and would also undermine natural resource management. Importantly, the case for intervention has not been

made - and the Bill will result in a high level of legal uncertainty and, in all probability, a drawn out legal and constitutional challenge.

Clause 4(3) of the Bill inadequately deals with the potential loss of Indigenous employment. It does not guarantee any term of employment for the Indigenous rangers, whether a Traditional Owner community-based approach will continue, or any training that accompanies the program. Significant development uncertainty will be created and resources potentially wasted if new wild river declarations have to be negotiated in places where they already exist. The end result will be Loss of ranger jobs and increased development uncertainty.

***Clause* 5 - Agreement of owner required**

The bill states:

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.

Problems and concerns

The form of agreement proposed in this bill in fact equates to a 'veto'. The theory and practice of FPIC needs to be properly defined in the Australian context before it is applied on a political basis to suit the preferences of one side of the argument over wild rivers. There needs to be certainty so that conservation measures *can* proceed *without* interference with Indigenous rights.

A second problem with this clause is how it undermines a holistic, catchment-wide approach to managing development activities. Wild river declarations provide this, but the Bill would allow valid whole-of-catchment regulation to be fragmented by sub-catchment vetoes.

This will lead to piecemeal river management, and may result in serious harm to water quality, plant and wildlife many kilometres downstream, or barriers stopping movement of fish upstream or downstream. In other words, with a veto mechanism in place, destructive development is the default position over maintaining a health river system.

***Clause* 6 - Obtaining agreement of native title holders**

The agreement under section 5 of an owner of land where native title exists may be obtained by the registration:

(a) under section 24BI of the *Native Title Act 1993*—of an indigenous land use agreement (body corporate agreement) which includes a statement to the effect that the parties agree to an area of land being regulated; or

(b) under section 24CK or 24CL of the *Native Title Act 1993*— of an indigenous land use agreement (area agreement) which includes a statement to the effect that the parties agree to an area of land being regulated.

Problems and concerns

There are a number of inconsistencies between the Bill and the NTA. Firstly, the Bill uses terms that are not in the NTA, such as "Traditional Owner" and "native title land". Secondly,

the Bill also defines lands as waters, which is directly inconsistent with separate definitions of land and waters in section 253 of the NTA.

The *Wild Rivers Act 2005* and the process of declaring a wild river are not "Future Acts" under the NTA, so do not require Indigenous Land Use Agreements (ILUAs). If wild river declarations were Future Acts, they would automatically be captured by the Future Acts provisions of the NTA. However, the Bill adopts ILUAs as the agreement mechanism regardless, imposing a 6-month limit to gain written consent from Traditional Owners.

The Bill has been constructed simply to nullify existing wild river declarations, and make new ones impossible regardless of community support, as the process of lodging an ILUA itself (i.e. just starting the process) takes a minimum of 6 months.

It also extends standing and decision powers to a range of property interests that are usually only marginal to the resolution of native title claims.

There are a number of inconsistencies between the Bill and the NTA. Firstly, the Bill uses terms that are not in the NTA, such as “Traditional Owner” and “native title land”. Secondly, the Bill also defines lands as waters, which is directly inconsistent with separate definitions of land and waters in section 253 of the NTA.

If the Bill is intended to extend the rights afforded to native title holders, a much more appropriate mechanism is the NTA**.** The Native Title Act is the place for reform. Through this means the UN Declaration on the Rights of Indigenous People (UNDRIP) could also be applied consistently to all land and water policy areas across Australia, and all native title groups - and national / community interest tests could also be applied. In addition, new public policy could be developed to encompass the full suite of UN recognised rights, and could form a component of constitutional recognition.

***Clause* 7 - Transitional provision**

Despite section 5, a wild river declaration made before the commencement of this Act continues to apply to Aboriginal land to which it is expressed to apply until the earlier of:
(a) for an area of Aboriginal land—a new declaration is made with the agreement of the owner of the Aboriginal land; or
(b) when 6 months elapse from the commencement of this Act.

Problems and concerns

This provision makes it unclear whether a declaration is removed in whole or only in part, if there is no agreement or six months pass without agreement.

A declaration is of one piece, and its regulatory intention will be impaired or impeded if a veto is used or the time period lapses without agreement.

There are no good faith provisions that would bind the Indigenous parties equally with the State party in any negotiations.

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8 Regulations

(1) The Governor-General may make regulations for the purposes of this Act.
(2) Without limiting subsection (1), the regulations may prescribe procedures:
(a) for seeking the agreement of an owner under this Act; and

(b) for negotiating the terms of the agreement; and
(c) for giving and evidencing the agreement; and
(d) for the continued employment of all existing Aboriginal people and other people in the implementation in the purposes of this Act.

Problems and concerns

This illustrates that the Bill is not thought out, but is a political reaction. The NTA already provides the ways and means, and supporting structures, to enable an agreement process - effort should be put to reforming the NTA if its provisions and procedures do not adequately reflect the rights of Indigenous people in land. This would also have the benefit of applying consistently across policies and geographic areas, and without favour to one view or another.

3. Summary comments

The Wilderness Society believes this Bill is badly constructed and confusing. Key terms and concepts are poorly defined and nonsensical, and the processes it proposes are unworkable and ill-advised. If implemented, the Bill would result in bad policy outcomes, as well as legal uncertainty. This Bill is a rehash of an earlier Bill, which suffered from major problems. The attempt to address a small number of those problems has resulted in an even worse piece of proposed legislation, particularly when it comes to defining who the bill seeks to provide veto powers to and how they would be exercised.

If this Bill were to be passed by the Senate, and then introduced to and subsequently passed by the House of Representatives, the Australian Parliament would be undermining vital environmental protection at the state level. The undoing of Wild River protections would unquestionably lead to destructive development taking place in culturally and ecologically sensitive areas, in and surrounding some of the last free flowing rivers left on the planet.

The Wilderness Society has no doubt that the bill is really intended to ensure Wild River declarations become impossible to make, and to revoke existing ones. It remains the Wilderness Society's view that this bill has been introduced for largely political purposes, and that it serves no good social, economic or environmental policy imperative other than one designed to allow industrial development in high-conservation-value, free flowing rivers.

END.