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Committee Secretary
House of Representatives Standing Committee on Economics
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Email: economics.reps@aph.gov.au

Dear Secretary

Re: Inquiry into Indigenous Economic Development in Queensland and Review of the Wild Rivers [Environmental Management] Bill 2010

Thank you for the opportunity to comment on this bill.

Executive Summary

This submission from Balkanu Cape York Development Corporation and the Cape York Land Council (CYLC) addresses the Terms of Reference for the Inquiry. In summary we submit that:

1. The injustice of the Queensland Wild Rivers legislation is not confined to the exercise of native title rights and interests on country for Indigenous people. The injustice of the Queensland legislation is a critical issue on various forms of Aboriginal land tenure where the unnecessary and arbitrary removal of rights and opportunities has already occurred or may occur in the future. The removal of rights on Indigenous lands has been done in a manner that would not be applied to non-Indigenous freehold landholders elsewhere in Australia. That removal of rights directly and severely impedes Indigenous economic development opportunities, which is the subject of the Committee's inquiry

2. In many cases Indigenous tenures on Cape York have come about through the negotiation of native title agreements settled in good faith with the State Government. These land settlements were for the economic benefit of the native title holders. It is

nonsensical for the Commonwealth and State Governments to claim that the arbitrary removal of economic development rights on Indigenous lands which are bestowed through native title agreements does not impact on native title.

3. The passing of the Wild Rivers [Environmental Management] Bill would enable Indigenous groups to negotiate conservation arrangements which balance their environmental, economic, social and cultural needs. The passing of the Bill would ensure the Queensland Wild Rivers Act is administered consistent with the UN Declaration on the Rights of Indigenous Peoples, which the federal Labor government committed Australia to supporting in an historic speech by Indigenous Affairs Minister Jenny Macklin in federal Parliament on April 3, 2009.

4. The Wild Rivers [Environmental Management] Bill does not overturn wild river declarations and does not overturn the Wild Rivers Act. The Bill provides that the development or use of native title land and Aboriginal lands in a wild river area cannot be regulated under the Wild Rivers Act unless the owner agrees in writing. In operation, this is an exemption in the absence of agreement.

5. Landholder consent arrangements are not uncommon, and are the norm on Indigenous lands. Consent is sought on Indigenous lands at both the Commonwealth and State levels for conservation schemes similar to Wild River declarations, such as national parks, nature refuges and Indigenous protected areas. Under Queensland legislation, some third parties such as mining interests have a veto power over conservation schemes such as Conservation Agreements and Nature Refuges.

6. The passing of the Wild Rivers [Environmental Management] Bill will have minimal impact on environment protection on Cape York. There is sufficient environmental regulation through State and Commonwealth legislation to ensure the protection of free-flowing rivers and biodiversity on Cape York, particularly in relation to mining, dams and intensive agriculture, without the need for the Wild Rivers Act. There has been little threat identified to the natural values of Cape York Rivers – including those already declared as wild rivers. An agreement-based approach to environmental management is much preferred to a heavy-handed regulatory approach under the Wild Rivers Act.

7. The future of Cape York relies on building a diverse economy in which environmental assets are protected, but options for economic development are not unnecessarily and unreasonably prohibited or constrained. Cape York's Indigenous people require an economy that is not reliant on Government transfers. Tourism opportunities on Cape York are limited and studies have shown that conservation schemes such as World Heritage listing in themselves often make little difference to visitor numbers and trends.

8. The conservation value of Indigenous lands is one of the few assets that Indigenous people have. That asset is increasing in value. However opportunities for Indigenous people to participate in ecosystem services markets are being removed by poorly considered government regulatory schemes. The economic value of one of the few assets that Indigenous people have is being taken by State laws with little recompense.

9. The Cape York Regional Organisations have pressed for a solution to this matter. Attached to this submission is the document *"Land Use and Conservation Management in Cape York, Proposed Solution and Implementation Plan"* which was presented to federal Indigenous Affairs Minister Jenny Macklin and Environment Minister Peter Garrett in April 2010.

INTRODUCTION

The comments and observations made in this submission are confined to the Cape York Peninsula area. This submission should be considered in conjunction with the submissions and material previously provided by Balkanu, CYLC and Cape York Institute to the Senate Inquiry into the Wild Rivers [Environmental Management] Bill 2010 and our submission to the Queensland Premier's Integrity and Accountability Review. Those documents have been submitted to this inquiry and are posted on the Senate committee website.

The Aboriginal people of Cape York want to utilise their land for purposes ranging from traditional practices to economic development in ways consistent with the principles of ecologically sustainable development. The Cape York Regional Organisations envisage the development of a vibrant integrated economy on Cape York, with Aboriginal people involved in a wide variety of economic activities. There is grave concern that the land use restrictions imposed by the Wild Rivers Act, combined with other legislation such as the Vegetation Management Act - potentially overlain with World Heritage listing - will severely restrict the options and opportunities for sustainable development. The flawed process for the declarations of the Archer, Lockhart and Stewart Basins as wild rivers areas has severely undermined the goodwill between key stakeholders built through making a history of conservation schemes on Cape York.

Over the last few decades strong working relationships have been established between Indigenous groups, the Queensland government and conservation bodies through the negotiation of respectful conservation agreements on Cape York. This body of good work started with the signing of the Cape York Heads of Agreement (CYHA) in the late 1990s, and the work undertaken with the Cape York Tenure Resolution Program and the Cape York Heritage Act.

The tenure reform model through State Land Dealings sets the framework for the negotiation of a conservation solution on Cape York. The recent decision of the Queensland Government and conservation groups to support the excision of land from the Munkan Kaanju National Park has been very well received. Cape York Indigenous groups are firmly of the view that sound conservation outcomes can be achieved on Cape York through negotiation rather than through compulsory blunt instruments such as Wild River declarations.

Cape York Indigenous Regional Organisations believe it is possible to manage the Cape York region within a sustainable, multiple land use framework that both conserves the region's natural and cultural values and allows for economic development. This can be achieved through a process of respectful negotiation and with the consent of traditional (property) owners. The narrow land use framework envisaged in the Wild Rivers Act layered by World Heritage listing is antipathetic to sustainability, as it restricts the ability of traditional owners to use their land and other resources responsibly for their own economic and social benefit.

A diverse, integrated economy is inherently more robust and sustainable than an economy that comprises a restricted number of sectors. A diverse economy is less prone to seasonality, provides greater economies of scale, offers more opportunities for small business, provides more choice of employment and enables transfers of skills and technology.

In 2009, ACIL Tasman conducted an assessment of the Wild Rivers Act. Its report *"Wild Rivers Act, an Economic Reading of the Precautionary Principle"* (attached) found:

> "The Wild Rivers Act 2005 (the Act) is designed to protect the Cape York environment. The way it does so has severe consequences for the Cape York economy

and as a result increases the risk of perverse consequences for the environment. Specifically, the Act invokes the precautionary principle. In doing so the Act disassociates itself from the well established practice of Ecologically Sustainable Development (ESD) built up through the institutions of the United Nations (UN), World Conservation Union (IUCN), and Council of Australian Governments (COAG). The Act is also inconsistent with formal commitments made by the Queensland Government through the Cape York Heads of Agreement.

"ESD is founded on the three inseparable concepts of economic development, environmental conservation and intergenerational equity. The ESD formulation is no one element is more important than another. Wild Rivers explicitly dismisses ESD. The purpose of the legislation is to narrowly preserve designated wild river natural values."

The ACIL Tasman report assessed the severity of the Act's application of the precautionary principle. The assessment found that the Wild Rivers Act is highly restrictive in that the Wild Rivers Act is:

- Tougher than ecologically sustainable development
- Injurious to property rights
- Unnecessarily restricts future development options
- Does not allow for assessment of non-environmental values of the costs of options forgone; and
- Increases the risk of poor conservation outcomes.

ACIL Tasman also states in its report:

"An observable feature of environmental concern in Australia generally is that people are more prepared to preserve an environment for which they bear few costs of adjustment. Environments at great distance from the bulk of the population are most likely to fall into the category of preservation to the exclusion of development, precisely because the bulk of the population does not have to bear the cost of foreclosing development options. Conservation is cheap at a distance because there are no apparent trade-offs."

In its submission to the Senate Inquiry, The Wilderness Society (TWS) refers to the views of the Canadian Courts in relation to Indigenous people and conservation:

"Importantly, the Canadian Courts placed an emphasis on Indigenous peoples' direct involvement in conservation management. The Courts have held that a legitimate legislative objective of conservation overriding Indigenous interests is only met where Indigenous people had been consulted (and not just informed) and, moreover, were unable or unwilling to implement appropriate measures themselves... the Aboriginal right takes precedence over the rights of others and should be occasioned as little interference as possible to achieve the regulatory objectives."

This statement is potentially misleading as it does not go on to also refer to the need for compensation to be addressed as part of the justification phase for regulatory measures which infringe Aboriginal and treaty rights protected under s.35(1) of the Canadian Constitution Act 1982. It also fails to observe that conservation measures must be demonstrably justified on the basis of adequate scientific evidence.

Ultimately the pressing need on Cape York is for better environmental management rather than further regulation. The current approach to natural resource management on Cape York is not only producing sub-optimal developmental outcomes, but also inadequate conservation

outcomes. A new approach is needed to deal with a variety of ongoing region-wide environmental problems. Key issues are under-resourcing, captivity to fragmented and short-term funding cycles that preclude integrated and long-term environmental outcomes, and the need for improved expertise and capabilities. Regulatory over-reach cannot compensate for inadequate environmental management systems.

Despite substantial government budgets, funding levels are still insufficient given the size of Cape York and its remoteness. Cape York National Parks have historically been under-funded and a massive increase in current staffing levels is needed. Insufficient funding is evidenced by the ongoing feral animal, weed and bio-security problems faced in the region's national parks. Mere regulation is helpless to achieve the required improvement in environmental quality.

Indigenous ranger programs are also suffering from inadequate staffing levels. Ranger programs suffer from short-term and intermittent funding cycles, which prevents the long-term planning needed to deal with ongoing environmental threats, and the job stability needed to develop long-term careers for Indigenous people. It is unconscionable that the State should threaten Indigenous groups with the removal of ranger programs in response to the Wild Rivers [Environmental Management] Bill. It is also believed that the State Government robs one Indigenous program to pay for another, rarely increasing the aggregate number of Indigenous positions on Cape York. The Wild River Rangers program on Cape York is merely a re-allocation of funding that otherwise would have gone to Indigenous employment in joint management of national parks. Payment for Ecosystem Services (PES) schemes driven by private investment have the potential to provide long-term sources of funding for environmental protection. Thus, development of PES schemes can provide better incentives for broad-based Indigenous involvement in conservation and land management outcomes and reduce the reliance of land management on Government transfers.

Consent arrangements between governments and landholders are not uncommon and with Indigenous landholders on Indigenous lands, the accepted norm. They exist at both the Commonwealth and State levels. The departure by the Queensland government from any consent arrangement with Indigenous landowners through the Wild Rivers process is at the heart of the conflict over its heavy-handed and onerous legislation, and raises important and serious questions for policy-makers in the Indigenous domain across Australia. If one state government feels it can so easily flout the processes painstakingly put in place to formalise and respect dealings with Aboriginal landholders, it bodes ill for all those of goodwill in the political and public sector who want to continue to progress, not retard, the emergence of strong and healthy Aboriginal communities. Examples of consent arrangements are included below under the subheading "conservation by agreement".

It is important to also point out that circumstances in relation to the Wild River declarations in other areas of Queensland are different to Cape York for the following reasons:

- There are large areas of Aboriginal lands impacted by wild river declarations on Cape York. Only a very small area of Aboriginal land was included in Wild River declarations outside of Cape York
- No areas of determined native title have been included in Wild River declarations outside of Cape York
- No Indigenous communities have been included in wild river declarations outside of Cape York; and
- The Gulf of Carpentaria does not have the threat of World Heritage Listing over the top of its wild river declarations.

An erroneous argument used by supporters of the Wild Rivers regime is that the legislation prevents potential environmental threats from large scale developments on Cape York. This line of attack is wrong on a number of fronts:

- The environmental threat from broad scale irrigation is limited as there are few areas of arable soil on Cape York suitable for broad scale irrigation. CSIRO has identified that some areas of brown and yellow earths and earthy sands exist on western Cape York which are suitable for irrigation, however water supply is likely not sufficient to support irrigated crops in much of this area
- The environmental threat from dams is limited as most of the topography west of the divide on Cape York is very flat and unsuitable for dams. The east side of the divide flows into the Great Barrier Reef World Heritage area and therefore any proposal to impact on the flow of a river would invoke Commonwealth legislation; and
- The threat from mining is also limited. The Cape York Land Use Study, conducted by the Queensland and Commonwealth Governments in 1997, found that much of Cape York does not have high mineral potential. Additionally, existing mining rights are also exempted from the Wild Rivers Act (in contradistinction to existing property rights of Aboriginal land owners and native title holders)

An inequitable situation has come about under the Wild Rivers Act where a powerful landholder on the Wenlock River lobbied heavily for a wild river declaration to achieve environmental protection specifically over their property and to address an environmental issue pertinent only to that property, with little consideration of the views and impact on landholders on the rest of the river catchment.

The Cape York Indigenous Regional Organisations assert that Wild River declarations affect native title either directly or indirectly (and not merely in the sense 'affect' is defined in the Native Title Act and are future acts under the Native Title Act 1993. The reasons for this include but are not limited to:

- The shield given to Native Title under s.44(2) of the Wild Rivers Act does not apply to actions under sections 42 and 43 of that Act
- Sections 42 and 43 of the Wild Rivers Act apply to lands where native title, including exclusive native title, exists and Indigenous lands which have come about through native title agreements with the State
- The native title shield is meaningless if the practical outcome of a declaration is an impact on native title
- Indigenous lands which have come about as a result of native title agreements fall under the regulatory scheme of wild river declarations (and those declarations deprive native title holders of the full benefit of those lands)
- Native title includes the right to speak for and make decisions about native title land. This right is ignored in the administration of the Wild Rivers Act
- Native title rights to engage with third parties about management of land and participate in PES schemes have been impacted by declarations under the WRA, particularly with the declaration of High Preservation Areas; and
- The putative intention that wild river declarations should not impact on native title, is contradicted by the fact that lands subject to exclusive native title determinations or arising from native title agreements, are included in wild river declarations.

The exceptional nature of a wild river declaration

The power to make wild river declarations under the WRA confers inappropriately broad and unchecked power upon the Queensland Minister for Environment and Resource Management.[1]

Wild river declarations are legislative instruments that are directed to the preservation of the natural values of rivers with all, or almost all, of their natural values intact.[2] The Act includes

[1] Under the *Administrative Arrangements Order (No.1) 2011* (Qld), made on 21 February 2011, the Minister for Environment and Resource Management is the Minister administering the WRA and the Department of Environment and Resource Management the responsible agency.

no mechanism for the review of a Ministerial decision that a river is one to which the WRA applies. In fact, there are few options available to landowners who do not agree that a river near their land has all, or almost all, of its natural values intact. The Act does not pay any regard to the cultural values of rivers and adjoining land, let alone concern itself with Aboriginal cultural heritage values.

The machinery by which wild river declarations are made is based upon that in the *Water Act 2000* (Qld) (WA) for making a water resource plan. In both cases, the process involves the following:

- a notice of the intention to prepare a draft plan is published[3]
- a draft plan is prepared which sets out various regulatory requirements and strategies[4]
- notice is given of the availability of the draft plan[5]
- consultation is considered when a final plan is prepared[6]
- a final plan is effective once it is approved by Governor-in-Council[7] and
- a report on consultation is prepared after the final plan is approved.[8]

Although a final water resource plan is subordinate legislation,[9] and so subject to the disallowance procedure under *Statutory Instruments Act 1992* (Qld) part 6 division 3, a wild rivers declaration is not subordinate legislation. Hence, the Minister's power under the WRA to declare a wild river area and prescribe the content of a wild river declaration is not subject to Parliamentary review. This offends the principle of proper regard to the institution of Parliament – a fundamental legislative principle under the *Legislative Standards Act 1992* (Qld).[10]

The unqualified power of the Minister is a concern also because of the breadth of its impact on the rights of owners of land including native title holders, the owners of Aboriginal freehold and the trustees of DOGIT land. The rights of those owners are subject to restrictions without compensation, appeal or due process. The impact of a water resource plan is upon the rights to use water, which are by their nature vested in the State[11] involving a lesser impact on private property right but with greater accountability arrangements, than exist under the WRA. The adoption of a procedure developed for the regulation of the State's own resource is inappropriate when applied to private property.

The effectiveness of current State and Commonwealth mechanisms for appropriate preservation of free-flowing river systems which have much of their natural values intact, including preserving biodiversity

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[2] This statement does not apply to the rivers in the Lake Ayre Basin. The WRA was amended by the *Water and Other Legislation Amendment Act 2010* (Qld) to remove this qualification for the rivers in the Lake Eyre Basin.

[3] WA s.40, WRA s.8.

[4] WA s.46, WRA s.12.

[5] WA s.49, WRAs.11.

[6] WA s.50(1), WRA s.13.

[7] WA s.50(2), WRA s.16.

[8] WA s.51, WRA s.38.

[9] WA s.50(3)(a).

[10] *Legislative Standards Act 1992* (Qld) s.4(4).

[11] WA s.19 which provides:

> **19 Rights in all water vests in State**
> All rights to the use, flow and control of all water in Queensland are vested in the State.

Rivers in Cape York, and their natural values, are well protected and preserved by a range of State and Commonwealth legislation. In many respects, a wild river declaration duplicates or complicates existing environmental protection measures.

The integrity of watercourses, and their vegetation, is protected under the WA.[12] The maximum penalty under the WA for unauthorised destruction of riparian vegetation, or excavation in a watercourse, is steep – $166,500 for an individual and $832,500 for a corporation.[13] Marine plants are protected under the *Fisheries Act 1994* (Qld) s.123.[14]

The *Environmental Protection Act 1994* (Qld) confers upon the Environment Minister a very broad power to make policies about environmental protection.[15] This power is more than adequate to protect the natural values of rivers throughout Queensland. The resort to the WRA demonstrates a failure of the State to properly implement, on a Queensland-wide basis, an effective environmental protection policy for water.[16]

Queensland's legislation for planning control is the *Sustainable Planning Act 2009* (Qld). In the two years before its enactment, the State's role in planning control was significantly increased. In addition to the traditional role of local government by way of planning schemes, the State now has a role in the development control process by way of:

- State planning regulatory provisions
- regional plans
- State planning policies; and
- standard planning scheme provisions.[17]

These various powers of the State could be deployed to advance the protection of rivers and their natural values (and in some cases, presently do so).[18] Indeed, the power to make a State planning regulatory provision may be invoked where there is a 'significant risk of serious

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[12] WA s.814.

[13] WA s.814 prescribes a maximum penalty of 1,665 penalty units. At the time of writing, the value of a penalty unit is $100: see *Penalties and Sentences Act 1992* (Qld) s.5. In the absence of a specific provision otherwise, a corporation is liable to a maximum penalty five times that prescribed for an individual: see *Penalties and Sentences Act 1992* (Qld) s.181B.

[14] *Fisheries Act 1994* (Qld) prescribes a maximum penalty of 3,000 penalty units for unauthorised destruction of marine plants.

[15] *Environmental Protection Act 1994* (Qld) chapter 2. Section 27(1) authorises the Minister to make a policy 'about the environment or anything that affects or may affect the environment'. The term 'environment' is defined by s.8 of the Act which provides:

> **8 Environment**
> Environment includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
> (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

[16] The *Environmental Protection (Water) Policy 2009* (Qld), and its predecessor, the *Environmental Protection (Water) Policy 1997* (Qld), are largely confined to water quality regulation and not, as they could be, directed to riparian health and catchment ecosystem protection.

[17] See *Sustainable Planning Act 2009* (Qld) chapter 2 (State planning instruments).

[18] For example, State Planning Policy 2/02 concerns development involving acid sulphate soils. Minimising and managing acid runoff does contribute to riparian health.

environmental harm or serious adverse cultural, economic or social conditions happening in a planning scheme area'.[19]

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is a source of authority for Commonwealth involvement in environmental management. For actions which may affect matters of national environmental significance, proponents must refer their proposals to the Commonwealth Minister for assessment. Matters of national environmental significance have direct relevance to the health of the rivers of Cape York. On the east coast, rivers flow into the Great Barrier Reef Marine Park, an area of national environmental significance. Cape-wide, biodiversity and threatened species, ecological communities and habitat are matters of national environmental significance.

Barriers to economic development and land use by key stakeholders including Indigenous and non-Indigenous dwellers; and those in the mining; pastoral, tourism, cultural heritage and environmental management sectors.

Over the last decade, Cape York Indigenous Regional Organisations have worked with their corporate partners through Jawun (Previously Indigenous Enterprise Partnerships) to develop the local economy. The work involved:

- The establishment of the Cape York Business Development unit of Balkanu and the establishment of Cape York Business Hubs
- The Welfare reform work of the Cape York Institute and Cape York Welfare Reform Partnerships
- Jawun's five-week secondment program in which secondees from organisations such as Westpac, The Boston Consulting Group, KPMG and IBM work with Balkanu and individual enterprises. Work undertaken includes conducting feasibility studies, business models for potential business ideas, and providing direct advice and assistance to entrepreneurs; and
- The Westpac Fellows Program, under which Westpac employees are placed with an Indigenous Regional Organisation in the Cape for twelve months.

This extensive engagement between the Regional Organisations, Indigenous enterprise and the corporate sector has yielded important insights into the obstacles facing long-term sustainable enterprise on Cape York. Jawun, in its report *Jawun: A unique Indigenous corporate partnership model. Learnings and Insights 10 years On*, identified ten key hurdles for establishing sustainable enterprise on Cape York. They are:

1. Low education levels prevent Indigenous people from entering the labour force
2. Low employment levels mean that few individuals have developed on-the-job learning to successfully manage a business
3. The characteristics of the local economy inhibit sustainable business development: the economy is too small to create a "virtuous economic cycle", and the geographic isolation of small communities translates to higher costs for goods and services and for businesses seeking to compete domestically
4. Welfare reform needs to properly remove the "welfare pedestal" that encourages people to obtain welfare and remain on it
5. Many Indigenous enterprises cannot access capital

[19] *Sustainable Planning Act 2009* (Qld) s.20(2). See also s.20(3).

6. Collectivist Indigenous enterprises have had mixed success; the balance between the benefits of communalism and the successful features of capitalism must be weighted carefully

7. Intense mentoring of individual Indigenous business persons can be an effective mechanism for developing Indigenous entrepreneurs, but is highly resource intensive

8. The role of "social enterprise" in Cape York should not be underestimated, and should arguably form part of Balkanu's mandate

9. Complexity and quantum of land regulation is limiting the development of enterprise; and

10. Other regulatory complexity is limiting economic development.

CYLC has also identified key requirements for economic development which include governance reform of land trusts, and home ownership.

The centrality of governance and effective institutions to economic development is well recognized in international economic literature (see, for example, North, D. C. 1990. *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press). and North, D. C. 1991. Institutions. *Journal of Economic Perspectives*, 5(1): 97-112. [Professor Douglass North was a 1993 recipient of the Nobel Prize in Economics]). Governance is central to Indigenous economic advancement and the need to improve land trust and Aboriginal land trustee arrangements is critical.

The promotion of home ownership on Cape York is a vital economic tool for personal and community advancement. Home ownership is an asset accumulation strategy which also serves economic, social and normative ends.

For many years Balkanu operated the concept known as Business Hubs. This was undertaken in partnership with the Queensland Government and Westpac, and provided for on-ground and intense support of Indigenous business across Cape York from offices in Weipa and Cooktown. Funding for the Business Hubs initiative and the partnership with Westpac was withdrawn by the Queensland Government following the April 2009 declaration of the Cape York Wild Rivers. The Business Hubs initiative which local support is provided continues to be a preferred approach to supporting Indigenous economic development on Cape York.

Options for overcoming or reducing those barriers and better facilitating sustainable economic development, especially where that development involves Indigenous people. Options for improving environmental regulation

The Cape York Indigenous Regional Organisations are striving to address the barriers to Indigenous economic development through their welfare reform, education, tenure reform, land management and business development initiatives. This section, divided into eight main areas, focuses on the ways to overcome and reduce those barriers to economic development which particularly relate to land management and environmental management while identifying options for improving environmental regulation of free-flowing rivers.

1. **<u>Indigenous self determination and free, prior and informed consent</u>**

Sustainable economic development will only be achieved where Indigenous people are properly and fully engaged in framing environmental and economic development solutions for their land, and are empowered to manage and make their own decisions about their land. Wild River declarations over Indigenous lands amount to the compulsory acquisition of Indigenous

peoples' rights to speak for and make decisions about their country. Fundamental to overcoming barriers to sustainable development and ensuring sound environmental protection and management is respect for the principle of self-determination. Indigenous communities must be allowed and enabled to determine the environmental and economic development solutions which best suit their circumstances.

The United Nations Declaration on the Rights of Indigenous Peoples states:

> "*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development"

Article 19 of the Declaration states:

> "States shall consult and co-operate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them"

Environmental regulation must empower Indigenous groups to manage their land and must not remove the responsibility for decisions about land from Indigenous landholders.

2. Conservation by agreement

Cape York Indigenous people have expert experience achieving conservation arrangements by agreement. Over the last decade, they have reached native title agreements through ILUAs for the declaration of National Parks (NP), and achieved conservation agreements under the Nature Conservation Act (NCA). Some of those agreements are complex and cover many communities and land areas. The architects and supporters of the Wild Rivers legislation who argue it would be difficult to obtain agreement from communities along Cape York rivers know little about the history of agreement-making on the Cape. They peddle such ideas as a cover for what is nothing more than an outrageous trampling of the rights of Indigenous peoples.

Consent arrangements at the Commonwealth and State level include:

Commonwealth

- Having endorsed the UN Declaration on the Rights of Indigenous Peoples, if the situation arose the Commonwealth would be expected to comply with Article 19 of the Declaration and seek free, prior and informed consent of Indigenous landholders before implementing conservation schemes which remove their rights and economic development opportunities. It would also be expected that the Government honour its endorsement of the Declaration by supporting the passage of the Wild Rivers [Environmental Management] Bill, which has at its heart a commitment to the principle of free, prior and informed consent
- Consent of landholders is sought before the declaration of a World Heritage area
- Recent Commonwealth practice is that Indigenous Protected Area applications must be in accordance with the wishes of the traditional landowner, and these areas are managed in accordance with international guidelines
- Under the EPBC Act, Commonwealth National Parks are only declared over Indigenous lands with the consent of the landholder and a leaseback arrangement.

- The Director of National Parks must go through the traditional owners if there is disagreement over management of the Uluru, Kakadu, or Booderee National Parks
- In a Commonwealth reserve which is Aboriginal land, the board of management which has an Indigenous majority effectively has a consent right over a management plan for the area. The Director of National Parks may give the Minister a management plan only if the Board (if any) agrees (s.370(1)).

Queensland

- Native title consent is required for the creation of a protected area on Cape York such as National Park Cape York Peninsula Aboriginal Land. This is achieved through an Indigenous Land Use Agreement (ILUA)

- Where a National Park is concerned, the consent of the owner of the land is required in accordance with the terms of an Indigenous Management Agreement between the State of Queensland and the Land Trust, for various conservation and management measures. These conservation measures include:

    - Constructing infrastructure
    - Fire management
    - Granting permits to take, use, keep or interfere with natural or cultural resources
    - Research and monitoring, that does not require a permit, relating to cultural resources.

- Other than where there is an urgent conservation requirement, Nature Refuges under the NCA are not declared without the consent of the landholder (whether Indigenous or non-Indigenous)

- Under s.45 (2) of the NCA, the Minister must not enter into a conservation agreement without the written consent of various third parties including mining interests

- There are consent provisions under the Mineral Resources Act in relation to mining on Indigenous lands

- Landholder consent arrangements apply in relation to the declaration of an area of High Nature Conservation Value or an area vulnerable to land degradation under s.19F of the *Vegetation Management Act 1999 Qld.*

- A lease, agreement, license, permit or other authority over, or in relation to, land in a national park (Cape York Peninsula Aboriginal Land) can in most cases only be issued or given with the consent of the land trust (s.42AD Nature Conservation Act); and

- Under the *Sustainable Planning Act 2009 Qld*, landholder consent is required where land is proposed to be developed other than for minor developments. The consent of the owner of the land is also required for making an application for a material change of use of premises or reconfiguring a lot (s263).

Conservation Agreements under the NCA provide an example of the style of agreement which could be used for river protection on Indigenous lands without the need for heavy-handed regulation. Development activities on Indigenous lands require the consent of the Indigenous landholder. Thus, the landholder is capable of reaching binding agreements with the State, and potentially third parties, about activities to be undertaken and environmental protection measures to apply to those activities. As an example, landholders can agree not to clear riparian vegetation or not to build within a certain distance from a river. The Running Creek

Conservation Agreement between the Lama Lama Land Trust and the State and the Mt Croll Conservation Agreement between the Toolka Land Trust and the State include provisions prohibiting the landholder consenting to mining without the consent of the Department of Environment; prohibit dams other than for domestic use and cattle use; and require that water flow, supply, quantity and quality is reasonably maintained.

There is little in a wild river declaration that could not be better achieved through agreements with landholders, whether Indigenous or non-Indigenous.

3. Regulatory complexity and unnecessary restriction and prohibition

It is essential that Government address the regulatory complexities confronting Indigenous people on Cape York, in particular relating to land tenure, land governance, environmental management and economic development.

These regulatory complexities are well illustrated in relation to the Lama Lama Land Trust and the Running Creek Nature Refuge area. The Running Creek Indigenous Land Use Agreement (ILUA) was settled between the State of Queensland and the Lama Lama People on 10 July 2008. The purpose of the ILUA was to provide for the area to be transferred as Aboriginal land with part of the Agreement area to be declared as National Park (Cape York Peninsula Aboriginal Land) and part to be declared Nature Refuge under the NCA. The ILUA was registered with the National Native Title Tribunal on 27 January 2009. Just three months later, on 3 April 2009, despite the request of the Lama Lama people that the declaration not proceed without their agreement, the Government declared the Running Creek Nature Refuge area a Wild River under the Wild Rivers Act (WRA).

The following provides a summary of the layers of legislative impost over Running Creek (Gorge Creek):

- Layer 1- The Vegetation Management Act applies to clearing of vegetation in the area. A range of other legislation such as the Water Act and Environment Protection Act also applies
- Layer 2- The Running Creek area is subject to a Conservation Agreement between the Lama Lama Land Trust and the Queensland Government, and has been declared a Nature Refuge. The Conservation Agreement sets out a strict conservation management regime
- Layer 3 - In April 2009 the area was declared a Wild River, and the Wild Rivers regulatory scheme was imposed over the Nature Refuge
- Layer 4 - As this area is in the catchment of the Great Barrier Reef World Heritage Area, the EPBC Act would apply to any activity that could adversely impact on the Commonwealth marine area such as dams, mining or intensive agriculture; and
- Possible layer 5 - Conservation groups are lobbying for the area to be considered for World Heritage listing, which would layer more regulation.

Wild River declarations unnecessarily prohibit or restrict activities within a wild river area. Such activities include (but are not limited to):

- Clearing vegetation for a domestic vegetable garden within 1km of a river
- Establishing a market garden within 1km of a river
- Aquaculture within 1km of a river; and
- Unnecessary restrictions on building houses, outstations and tourism infrastructure within 1km of a river.

When coupled with other legislation applying to Cape York, the Wild Rivers scheme imposes a complex regulatory regime which, due to the isolation of Cape York, involves much higher transaction costs than would apply in more settled areas of Australia. Obtaining legal and scientific advice on Cape York is expensive, and field inspections of sites can involve several days' travel costs. It is critical that such transaction costs are not unnecessarily or unreasonably imposed. It is noteworthy that landholders in the proposed Lake Eyre Basin Wild River Area will not be burdened with a 1km High Preservation Area (HPA) along the riparian zone of rivers and creeks. Also we are not aware of any rural property holders anywhere else in Australia that have such onerous restrictions placed on their capacity to generate income from their land.

4. An options-based approach grounded in the sound principles of ESD.

Many Indigenous people point out they do not know the aspirations of their children or grand children, and that if there is no current or foreseeable threat to the environment, then why unnecessarily limit their options through the imposition of the Wild Rivers regime?

The ACIL Tasman report recommended that Cape York traditional owners seek to fully explore the power of an options-based framework in land use decision-making. An options-based framework would re-balance the central equilibrium that underpins ESD which is missing in the Wild River Act - namely economic development, environmental conservation and intergenerational equity. Intergenerational equity is both forward and backward looking. The wild rivers regime gives comprehensive protection to persons and entities that have established their development rights before the imposition of a wild river declaration. Indigenous people have been comprehensively excluded from development opportunities in the past. Intergenerational equity requires that the identification of economic development opportunities for the Aboriginal people of Cape York proceed at the same time as the identification of reasonable and relevant environmental protection.

In contrast to the WRA, the Environmental Impact Assessment process under the Environment Protection Act, for example, provides a mechanism for considering mining projects which is consistent with the principles of ESD and enables the consideration of the environmental, social and economic implications of a project. This approach is preferable to the narrow approach of the WRA.

Environmental regulation must be based on a demonstrated need and demonstrated threat to the environment and even then it must not unnecessarily remove economic opportunities and future options. Where there is no need and no threat, opportunistic legislation which removes Indigenous economic opportunities and future options is iniquitous, harsh and out of step with a whole-of-government approach to Indigenous land management rights and welfare reform policy-making.

5. Integrity and transparency in government decision-making processes

There is a pressing need to improve the integrity and transparency of government decision-making processes in relation to environmental legislation on Indigenous lands, most recently demonstrated by the framing and introduction of the WRA.

Concerns about the integrity and transparency of Government decision-making have been set out in a submission by Balkanu of 16 September 2009 to the Premier's Integrity and Accountability Review. This document has been submitted to the Inquiry and is posted on the Committee's website.

A lack of integrity and transparency in Government decision-making, and the lack of review rights to decisions, has denied Indigenous groups procedural fairness and removed their rights.

In particular, the Indigenous Regional Organisations have serious concerns about the declarations of the Archer, Lockhart and Stewart Basin Wild River areas, including:

- The apparent failure of Minister Robertson to follow the legal process as set out in the WRA in making the Wild River declarations, including his apparent failure to give due consideration to submissions from Indigenous groups
- The failure of Government to follow its own processes, as set out in the Executive Council Handbook
- Confusion about whether the declarations were actually made by Minister Craig Wallace and declaration notices approved by Governor-in-Council before the March 2009 Queensland State election
- The silence of the Government through the 2009 election period about its intention to declare the Cape York wild rivers. The government then declared the wild rivers immediately after the state election.
- Evidence that senior officers of the Department of Environment and Resource Management were complicit in relation to breaches of legal process and government procedure, and breached the Department's code of conduct; and
- The long and unreasonable delays of government in releasing documents under the Freedom of Information and Right to Information legislation.

6. Misuse of the "precautionary approach"

There is a need to ensure that the "precautionary approach" is implemented objectively and in a manner consistent with Australia's international obligations as prescribed in the *Rio Declaration on Environment and Development 1992*, and not used to attain political outcomes. The inconsistent use of the "precautionary principle" is demonstrated in the following example.

In their submissions on the proposed wild river declaration of the Stewart, Archer and Lockhart River Basins, traditional owners took issue with HPAs being taken to the full extent of one km each side of a wild river and major tributaries. Traditional owners were concerned that the 1km buffer was arbitrary and not based on the characteristics of the rivers and creeks. Minister Robertson responded in the Consultation Report for the Stewart Basin that:

> "The department, in reviewing the proposed HPAs, has considered the state of the natural values of the proposed wild rivers and adopted a **precautionary approach** in determining the width of the high preservation areas. Accordingly it was decided to keep the width of the high preservation areas at one km for the declared wild rivers and major tributaries except for Breakfast Creek – see below. Suggestions that the width of the high preservation areas should be relative to the size of the stream ignore the potential for developments such as mining or agriculture to have greater relative impacts on the waterways".

Then in a media statement on 18 October 2010, Minister Robertson said he had used the "precautionary approach" to justify a 500m buffer on the Wenlock River in relation to mining:

> "Mr Robertson said a **precautionary approach** was taken in determining the final high preservation area around the Wenlock River."

On the one hand the Minister refused requests by Indigenous people to reduce the HPA below 1km on most of the Archer, Lockhart and Stewart Basin wild river areas, justifying this decision on the "precautionary approach" and the threat of mining (even where mining is prohibited under the Nature Conservation Act); but on the other hand the HPA was reduced to 500 meters in relation to a mining project on the Wenlock River and justified by a "precautionary approach".

This unscientific and haphazard application of the precautionary principle by the Minister has resulted in the ludicrous outcome on the Archer, Stewart and Lockhart rivers that a low impact market garden is prohibited within 1km of the rivers on the grounds that a lesser HPA would open up the possibility of a threat from mining or agriculture.

7. Review and appeal provisions within environmental legislation.

In the debate of 25 September 2005 on the Wild Rivers Bill, MP Henry Paluszcsuk stated:

> *"The minister must consider all submissions before making a decision on whether or not to declare a wild river and, once a declaration is finalised, the minister must prepare a consultation report.* ***There is also an appeal process under the normal process of judicial review.*** *This process is far from unique".*

In April 2009, following the declarations of the Archer, Lockhart and Stewart Basin wild river areas, CYLC requested from the Minister for Resource Management statements of reasons under the *Judicial Review Act 1991* in respect of (a) the Governor-in-Council's approval of the Archer, Lockhart and Stewart River declarations; and (b) the decision by the Minister (or his predecessor) to make the declarations. Contradicting Mr Paluszcsuk's claim, Minister Robertson responded by letter declining to give reasons on the basis that his decision to make the declarations, and the Governor-in-Council's decision to approve them, were decisions of a legislative character rather than an administrative character and therefore were not decisions to which the *Judicial Review Act* applied. Legal advice to Balkanu is that there are virtually no opportunities for the review of decisions in relation to Wild River Declarations, the Wild Rivers Code and Property Development Plans. As the Wild River Declarations and the Wild Rivers Code are statutory instruments, they are also not subject to parliamentary debate or disallowance.

It is essential that legislation provide opportunities for Indigenous landholders to seek merit reviews and be given rights of appeal to environmental decisions over their land.

8. The terminology and longer-term intentions of the Wild Rivers Act

There are two critical issues in the terminology used by the WRA. Firstly, the term "wild" and secondly the term "preservation". Traditional owners fiercely object to the use of the term "wild" because of its connotations of "wilderness" which means uninhabited region, and "terra nullius" which denies the reality of the continuing occupation and use by Indigenous people of their traditional lands. Indigenous groups rightly assert that the use of the term "wild" is offensive, but it continues to be used as a campaign tool by conservation groups to promote a repugnant public perception of uninhabited and undeveloped land.

Wild River declarations also deem whole river catchments as "preservation areas". Indigenous people have a legitimate concern that over time conservation groups and the Government will seek to increase regulation of wild river areas to align with the "preservation" terminology. As an example, the term "preservation" zone is used in the Commonwealth-managed Great Barrier Reef Marine Park to denote "no-go" areas, where a person cannot enter the Preservation Zone in the marine park unless they have written permission, and extractive activities are strictly prohibited. The response of the State to the matter of "preservation areas" in the Consultation Reports issued by Minister Robertson was instructive and alarming: (see p. 29 Stewart Basin Consultation Report):

> *"Furthermore, "preserve" is analogous with both maintain and protect, and its use is therefore appropriate, as it indicates these management areas are not only to be protected, but also to ensure their present condition is maintained. The use of the term*

preservation in naming the management areas is consistent with the objective of the Wild Rivers Act, to preserve the natural values of a river basin".

The response by the Minister in the consultation report re-affirmed fears within Cape York Indigenous communities that ultimately there is an intention under the WRA to preserve – unchanged - almost 80% of Cape York. It was never the intent of the WRA to preserve the natural values of a "river basin": the purpose of the Act was to preserve the natural values of "Wild Rivers".

8. Environmental regulation should be based on objective science

The Second reading speech by Minister Robertson to the *Wild Rivers Bill* on 24 May 2005 states: "The scope of this bill is limited to those rivers that have all, or almost all, of their natural biophysical values intact". Henry Palaszczuk, his successor as Minister for Natural Resources and Mines, stated in September 2005 that: "only rivers that meet the necessary criteria will be nominated for wild river status". Prior to nominating a river for declaration under the WRA, the Minister "assesses the natural values of the river" material circulated by the Department of Environment and Resource Management states.

Of the thirteen Cape York rivers declared as "wild"on 3 April 2009, there was almost no supporting evidence provided by the Department of Environment and Resource Management for nine of them (Balclutha Creek, Running Creek, Breakfast Creek, Massey Creek, Rocky River, Chester River, Nesbitt River, Love River and Kirke River). There was a lack of consistency, transparency and scientific rigour in deciding which rivers fell under the scope of the WRA. Neither the assessment conducted by the Minister to determine whether a river qualified for nomination as a wild river or the methodology used for this assessment has been made public.

It is of a great concern that in nominating and declaring the Cape York wild rivers, there was no objective and transparent scientific assessment of the river conditions. There was little attempt before the declaration of the rivers to engage with traditional owners, who hold valuable and, importantly, the most up-to-date information about the condition and use of Cape York rivers. The Minister's decisions were apparently based on the often misleading, biased and at times false information provided by the Department. Balkanu has previously raised issues about the provision of misleading or inaccurate information by the Department of Natural Resources and Water which is contrary to the DNRW code of conduct under the *Public Sector Ethics Act 1994* (Qld) (DNRW 2007: 34).

It is noteworthy that in relation to those rivers nominated for Wild River declarations in the Lake Eyre Basin, the requirement that the rivers "have all or almost all of their natural values intact" has been abandoned through an amendment to the WRA. The Minister will no longer be required to assess whether the rivers in that area qualify as "wild rivers".

Cape York Indigenous Organisations have been told by departmental officers that it is the responsibility of the Indigenous landholders to conduct the necessary studies to justify a reduction in HPAs, thus placing the onerous financial responsibility on those who have the least funding. The onus must be on the State to obtain the necessary science to support the need for regulation and to justify its HPA zones; it is outrageous that it becomes the responsibility of Indigenous people to counter arbitrary decisions of a Minister.

10. <u>Regulatory impact statements</u>

Wild River Declarations and the Wild Rivers Code are statutory instruments rather than subordinate legislation. As statutory instruments, there is no requirement to conduct a

Regulatory Impact Assessment. The objectives of the regulatory impact assessment process are to ensure:

- that the costs and benefits associated with the making of subordinate legislation and alternatives to regulation are fully assessed
- that regulatory proposals are adequately detailed to relevant stakeholders; and
- that only those regulations which present the most effective response to a policy problem are adopted.

As Regulatory Impact Statements are not required, there is no transparent assessment of the economic and social impacts of Wild River declarations. It is critical that actions which stand to have considerable impact on stakeholders have a regulatory impact assessment.

The potential for industries which promote preservation of the environment to provide economic development and employment for Indigenous people

This submission focuses on four specific areas: (1) tourism; (2) Land Management and ecosystem services; (3) Aquaculture; and (4) market gardens.

1. **Tourism in Cape York**

The culture-rich landscape and vast expanse of the Cape, from Coen to Weipa and to the northern most tip, challenges and inspires travelers to this region. Close to 60,000 people visit Cape York each year. When compared with approximately 160,000 visitors to Kakadu National Park and 350,000 to Uluru National Park, these are small numbers. Tourism is often held up as the panacea for Cape York, underpinning a utopian "conservation economy", but this is not the reality for most Cape York Indigenous people.

Impediments include:

- The heavy seasonality of tourism (most of the area is inaccessible during the wet season)
- Tourism is a volatile industry, subject to a range of influencing factors such as the global economy, fuel prices, extreme weather events and pandemics
- Many Indigenous people aspire to pursue employment outside the tourism industry
- The average tourist to Cape York is a free and independent traveler who usually arrives self-contained with food, beverages, equipment and accommodation
- There is a lack of tenure security – difficulties in attracting investment
- Many international travelers have little flexibility to spend the amount of time needed to explore the vast Cape York region; and
- The majority of existing operators providing tourism services on the Cape are largely Cairns-based (so most of the income leaves the wider Cape region).

The people of Cape York require genuine business opportunities *in situ* to attract tourists and cultivate a valuable economic return from tourism. Progress is being made in keeping the tourism dollar in the region; however for the projects in place to succeed it is essential the people of Cape York have real ownership of the process. A major initiative invented and currently being designed and formulated by Cape York Indigenous people is the Dreaming Track. The goal of this inspirational project is to create a 2000km long trail (or series of trails)

from Mossman Gorge to Cape York. A feasibility study conducted by Balkanu and the Department of Environment and Resource Management has found that the concept is strongly supported by traditional owners of Cape York, and that it is technically achievable. The project will generate significant interest from domestic and international tourism markets, and will put Cape York firmly on the international tourism stage. As an aside, this is an example where partnerships between the Indigenous people of Cape York and government can achieve remarkable results which will have enormous benefits for generations to come.

The complex administrative nature of Indigenous land in Cape York creates impediments to issuing commercially viable and legally enforceable leases needed by prospective tourism investors. While Balkanu is working to bring some resolution to this issue, it is of considerable concern that the additional burden of the complicated and unnecessary requirements of the Wild Rivers legislation will result in investors looking elsewhere.

It is an unsubstantiated claim by supporters of the Wild Rivers legislation that the Wild Rivers regime will be a great marketing tool for Cape York. There is no evidence that the wild river declarations in 2007 and 2009 resulted in an increase in visitor numbers. A recent study by Gillespie Economics for the Commonwealth Department of the Environment, Water, Heritage and the Arts on the "*Economic Activity of Australia's World Heritage Areas*" reveals that World Heritage listing resulted in little change in visitor numbers after World Heritage inscription. The report states:

> "For Shark Bay, Naracoorte and Purnululu, there is no discernable change in visitation levels following WH inscription. For Kakadu, visitation levels do seem to have rapidly increased a couple of years after the first stage of WH listing. The second inscription was in the middle of a period of rapid growth in visitation levels with no change to this pattern after inscription. The third inscription was followed by an increase in visitation and then a gradual declining over time since 1995. For Uluru-Kata Tjuta National Park, WH listing was during a period of rapid growth in visitation, with no change in growth after inscription".

Tourism will be an important part of the Cape York economy, but it is important that Cape York develop a diverse and resilient economy and not become over-dependent on tourism.

2. Land management and ecosystem services

The globally and nationally significant ecosystems of Cape York should have the potential to deliver considerable benefits to Indigenous landowners from participation in Payment for Ecosystem Services (PES) markets. PES schemes can provide a new source of income for land management and conservation for Indigenous people while promoting sustainable ecosystem management.

The three main emerging billion-dollar ecosystem service markets are in carbon, watersheds and biodiversity. To enable participation in these growing markets appropriate legal, policy and institutional frameworks must first be put in place.

A key component of PES market design is the principle of additionality – the environmental benefit delivered must be caused by the payment. Onerous regulatory instruments and areas of weakness in forms of tenure stifle participation in PES markets, as the environmental benefits that can be realised by PES intervention are circumscribed by the presence of existing restrictions. A characteristic of PES is that the environmental benefits must be able to be accurately quantified. The sheer volume of regulation on the Cape makes quantification of benefits difficult, and reduces the value of ecosystem services by erecting a labyrinth of red-tape that must be successfully navigated before sustainable development can take place.

Wild Rivers legislation impedes Indigenous participation in ecosystem service markets by diminishing the commercial value of ecosystems and eroding their competitive position in PES markets. For example, it is of major concern that the declaration of HPAs such as the Aurukun Wetlands will make it more difficult to source philanthropic and corporate funding for the management of such areas. Once an area has been declared a HPA, there is little additionality and the potential sponsors then regard it as the Government's responsibility to fund the management of such areas. The removal of additionality through protection under a HPA limits the ability of Indigenous groups to engage in a PES scheme over those areas. This issue is already becoming apparent where Indigenous groups have agreed to Nature Refuges over their land through a Conservation Agreement. Philanthropic and corporate sponsors are expressing reluctance to fund activities in such areas, as funding is regarded as the responsibility of Government.

Current policy approaches to native title take a limited view of Indigenous resource rights, and native title rights generally. Rather than treating native title as conferring comprehensive rights similar to ownership, the dominant approach has been to view native title as a bundle of rights, with each needing to be particularised and proved in isolation. The consequence of this narrow approach to determining the content of native title rights has been the 'freezing' of native title rights through a rigid fixation on traditional activities undertaken by Indigenous owners, rather than recognising the adaptation of these activities to modern conditions. The Cape York Regional Organisations would assert that a native title right includes a right to engage with the PES market to source adequate funding for the management of their lands, and that this right should not be arbitrarily interfered with.

Much of the Indigenous estate on Cape York is designated for conservation purposes, primarily as national parks and nature refuges. National parks are managed in accordance with the cardinal principle to provide for the 'permanent preservation of the area's natural condition and the protection of the area's cultural resources and values'. The scope to achieve the additionality needed for PES markets is marginal. Similar problems arise in relation to nature refuges.

The *Vegetation Management Act 1999* (Qld) (VMA) regulates land clearing in Queensland, with a view to conserving remnant vegetation and vegetation in certain areas, as well as achieving a range of other environmental outcomes. Despite changes introduced through the *Cape York Heritage Protection Act 2007*, the ability of Cape York traditional owners to engage in vegetation clearing continues to be highly restricted. The consequence of such a stringent scheme of regulation is that the additional environmental benefit that ecosystem services can deliver is limited. For example, the opportunity to realise benefits from payment for carbon abatement through avoided deforestation is lowered, because deforestation is already largely prevented through the operation of the VMA. A similar scenario applies to payment for protection of biodiversity, because a core aspect of the ecosystem is already preserved.

Traditional approaches to land use and nature conservation based on establishment of protected areas have increasingly been criticised because they fail to adequately recognise Indigenous rights and contribute to uneven socio-economic development outcomes for Indigenous communities. The need to establish new paradigms for conservation on Cape York is pressing. The current conservation approach must be regarded as a critical impediment, as it leaves Aboriginal communities with marginal opportunities for development at the same time as it burdens them with huge management liabilities.

In the absence of changes to the policy framework, the opportunities for Indigenous participation in the conservation economy will continue to be marginal. An alternative integrated, participatory and community-based approach strongly focused on Indigenous land and resource rights is essential.

3. Aquaculture

The long history of Pearl Oyster farming in the far north of Cape York, and also off Western Australia and the Northern Territory, is an example of the potential of aquaculture to bring economic opportunities to otherwise remote tropical waters. Aquaculture is an ideal economic and employment opportunity for Indigenous communities. It is compatible with 'on country' land management and lifestyle activities and can also potentially provide a source of fresh protein for remote communities.

To date, Wild River declarations on Cape York have prohibited aquaculture within a HPA - that is, within 1km of a wild river and its major tributaries. The blanket prohibition of aquaculture in a HPA is based on the premise that aquaculture cannot be carried out in an environmentally responsible way, a view founded on historical production techniques employed in countries where expansion is not regulated. That view fails to acknowledge the continual advancement in techniques. In Australia, the industry has come a long way from the early days where environmental concerns were well-founded.

Discussions with personnel from CSIRO's Marine and Atmospheric Research Unit have confirmed that aquaculture is a 'high potential' industry for Cape York communities which in the future can become economically viable and environmentally sustainable using ever-improving technologies and design. The Unit highlights the following potential for a viable aquaculture industry in Cape York:

- The area has significant potential in the aquaculture industry given its favourable climate, accessibility and the abundance of high-demand native species. Species with the most potential to be farmed are native to Cape York, thereby reducing a key environmental concern
- Mapping by CSIRO finds many Cape York areas (including earmarked and declared Wild Rivers) are considered optimal for aquaculture farming including the Wenlock, Archer, Ducie, Lockhart, Stewart and Pascoe rivers
- Optimal areas identified for aquaculture are close to rivers and estuaries and therefore within HPAs
- Cape York is ideally located to take advantage of the massive Asian market demand for both fresh and processed seafood products, with ports and airports at Weipa, Cooktown and Cairns; and
- As the demand for seafood increases along, coupled with efficiencies in production and process methods within the aquaculture industry and continued improvement in addressing environmental issues, Cape York is in a prime position to embrace this economic opportunity.

CSIRO research funded by the Australian Government (Kearney et al 2003) demonstrates that by 2050, domestic seafood demand will be six times greater than our current annual production and that Aquaculture will likely be the only mechanism to increase seafood production since the peaking of, total wild-caught production in the early 1990s. The research on the biological reality of seafood production underpins other work that shows investment in aquaculture will increase over the coming decades, as both domestic and international demand for seafood continues to grow. In the future, it is anticipated that both large and smaller scale aquaculture operations will become more viable in remote areas as prices rise quickly in response to increased market demand. The outright prohibition on aquaculture within a HPA should be removed and development proposals considered on their merit and managed in accordance with appropriate standards - just like they are in every other region in Australia where private property is held.

4. Market gardens, horticulture and domestic gardens within 1km of a river

Under the WRA, commercial market gardens and commercial horticulture are prohibited within a HPA. Where the establishment of a community or domestic vegetable garden requires the clearing of native vegetation, this activity is all but prohibited within a HPA. But it is the area which is within 1km of a waterway where soils and conditions are most suited to horticulture and gardens. This is an unreasonable restriction on commercial and domestic gardens which have little impact on the health and natural values of wild rivers.

The impact of existing environmental regulation and legislation in relation to mining and other relevant legislation on the exercise of native title rights and on the national operation of the native title regime; and the impact legislation in the form of the Wild Rivers (Environmental Management) Bill 2010 would have

The injustice of the Wild Rivers legislation applies to both the exercise of native title rights and interests and to the rights of Indigenous people under the various forms of Indigenous land tenures on Cape York. The scheme applying to native title holders and mining is well documented and therefore will not be set out in this submission. What is overlooked by the terms of reference of the inquiry, and by many others, are the rights that are held in relation to environmental regulation and mining on Indigenous tenures. In a previous section of this submission subtitled "conservation by agreement", various consent arrangements relating to conservation schemes at both the Commonwealth and State levels were set out. In this section the focus will be on clarifying the scheme applying to mining on Indigenous lands as this is an issue which appears to be confusing those who oppose the Wild Rivers (Environmental Management) Bill. Submission 20 to this Inquiry from the Western Rivers Alliance states *"Why pick on environmental regulation in seeking Traditional Owner endorsement over what occurs on Aboriginal lands? Why not mining and other developments?"*. This statement is wrong: the facts are that consent arrangements already apply to mining and other developments on Indigenous lands.

Mining tenure is created and administered under the *Mineral Resources Act 1989* (Qld) (MRA). The MRA confers significant authorities to the trustees of DOGIT land and Aboriginal freehold land because, in most cases, those tenures are designated as 'reserves' under the MRA.[20] The trustees are the 'owner' of those tenures.[21]

Although most land is subject to open access for mining under the MRA, access to a reserve requires the consent of the owner of the reserve. In the case of a mining lease, the lease cannot be granted without the consent of the owner of the reserve. MRA s.238 relevantly provides:

> **238 Mining lease over surface of reserve or land near a dwelling house**
>
> (1) Unless the Governor-in-Council otherwise approves, a mining lease may be granted over the surface of a reserve only if -
> (a) the owner of the reserve consents in writing to granting the lease; and
> (b) the applicant lodges the consent with the mining registrar before the last objection day ends.

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[20] MRA schedule, definition of 'reserve'. Not all Aboriginal land is taken to be a reserve under the MRA. *Aboriginal Land Act 1991* (Qld) s.87 describes when Aboriginal land is a reserve. This includes transferred land and granted land other than in respect of a mining tenement at the time of grant. Transferred land is the dominant form of Aboriginal land in Cape York.

[21] MRA schedule, definition of 'owner'.

All mining lease applications are subject to consideration by the Land Court to determine whether or not to recommend their grant by the Minister.[22] Any objections to the grant of a mining lease are heard as part of the same process. Where an owner of a reserve has refused to give consent for MRA s.238, the Land Court may, as part of its recommendation, recommend to the Minister that Governor-in-Council consent to the grant of the mining lease and under what conditions.[23] In this way, a refusal of the reserve owner may be overridden. Experience suggests the overriding of a reserve owner is not common practice.

Similarly, a mining claim over a reserve cannot be granted without the consent of the owner or the Governor-in-Council.[24] The refusal of an owner to consent to the grant of a mining claim can be the subject of a recommendation by the Land Court that the Governor-in-Council give overriding consent.[25]

The holder of an exploration permit or mineral development license cannot enter a reserve for mining purposes without the consent of the owner, or overriding consent of the Governor-in-Council.[26]

The power of a reserve owner to give, or withhold, consent is a vital aspect of the protection of Aboriginal land and the achievement of economic partnerships for appropriate mineral development. The Cape Flattery silica mine is an example of an agreement between a miner and a DOGIT council, as owner of a reserve, agreeing that consent should be given in exchange for environmental, social, employment and compensation commitments by the miner.

In Queensland's legislation for petroleum and gas operations – the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (PGPSA) – there is no authority for owners of DOGIT land or Aboriginal freehold comparable to that in the MRA. While the PGPSA requires petroleum and gas operators to notify, consult with and compensate owners affected by their operations, no consent analogous to that in the MRA exists for the PGPSA.

Petroleum and gas operations are not constrained in any way by the existence of a wild river declaration.

For mining and petroleum activities, the environmental protection framework centres on the Queensland *Environmental Protection Act 1999* (Qld) (EPA). The objective of this Act is to "*protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends*" (S.3). The Act states that in implementation of this, the "*protection of Queensland's environment is to be achieved by an integrated management program that is consistent with ecologically sustainable development*" (S.4). A phased approach to implementation is established through the Act, which recognises the need to identify environmental objectives, and determine and implement management approaches. The EPA provides a framework preferable to the WRA for the consideration of mining, as the EPA is consistent with the principles of ecologically sustainable development rather than narrowly focused environmental legislation.

The Wild Rivers [Environmental Management] Bill 2010 relates specifically to the Queensland WRA and will not impact on other environmental regulation or legislation in relation to mining. Other Commonwealth and State environmental legislation which applying to the

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[22] MRA s.268.
[23] MRA s.269(2)(b).
[24] MRA s.54.
[25] MRA ss.78(1)(c) and 79.
[26] MRA ss.129(1)(a)(i), 129(8), 181(4)(b), 181(13).

protection of the natural values of rivers and mining will continue to apply following the implementation of the Bill.

Recommendation

The legislation being considered by this committee will address an injustice which has been perpetrated on the Indigenous people of Cape York by the Queensland Government under pressure from powerful and well-resourced conservation lobby groups.

It is strongly recommended that the committee support the Wild Rivers [Environmental Management] Bill 2010, and in so doing honour the spirit and intention of the UN Declaration on the Rights of Indigenous Peoples endorsed on behalf of Australia by the federal government in April 2003.

Yours sincerely

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Gerhardt Pearson
Executive Director
Balkanu Cape York Development Corporation

.....

Richie Ah Mat
Chairman
Cape York Land Council

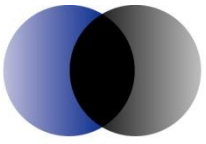
Attachments (3)
ACIL Tasman economics policy strategy
Economic Unravelling the Precautionary Principle
Land Use & Conservation Management in Cape York- Proposed Solution and Implementation Plan

Wild Rivers Act 2005

An economic reading of the precautionary principle

Prepared for Balkanu Cape York Development Corporation

August 2009



ACIL Tasman

Economics Policy Strategy

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Contents

List of boxes

List of figures

List of tables

Abbreviations

the Act	*Wild Rivers Act (2005)*
COAG	Council of Australian Governments
ESD	Ecologically sustainable development
HPA	High Preservation Area
PA	Preservation Area
PDP	Property Development Plan
UN	United Nations

Key messages

The Wild Rivers Act 2005 (the Act) is designed to protect the Cape York environment. The way it does so has severe consequences for the Cape York economy and as a result increases the risk of perverse consequences for the environment. Specifically, the Act invokes the precautionary principle. In doing so the Act disassociates itself from the well established practice of Ecologically Sustainable Development (ESD) built up through the institutions of the United Nations (UN), World Conservation Union (IUCN), and Council of Australian Governments (COAG). The Act is also inconsistent with formal commitments made by the Queensland Government through the Cape York Heads of Agreement.

ESD is founded on the three inseparable concepts of economic development, environmental conservation and intergenerational equity. The ESD formulation is no one element is more important than another. Wild Rivers explicitly dismisses ESD. The purpose of the legislation is to narrowly preserve designated wild river natural values.

This report assesses the severity of the Act's application of the precautionary principle by employing a tool developed by Productivity Commission staff. It assesses:

- trigger points for application of the principle
- whether cost benefit analysis is employed
- if precautionary action is required
- is a burden of proof imposed
- if liability for harm is assigned.

The assessment finds that the Wild Rivers Act is highly restrictive.

Box ES 1 **Key messages**

- Wild Rivers Act is tougher than ecologically sustainable development
- Wild Rivers Act is injurious to property rights
- Wild Rivers Act unnecessarily restricts future development options
- Wild Rivers Act does not allow for assessments of non environmental values or the cost of options foregone
- Wild Rivers Act increases the risk of poor conservation outcomes.

The development of an options based framework to articulate and quantify the impact of lost and restricted future options is recommended.

1 Introduction

1.1 Background

Cape York Peninsula contains the largest areas of natural environment in Eastern Australia within a land space slightly larger than Victoria. Unlike Victoria, which accommodates 5 million people at a high average standard of living, Cape York houses just 13, 000 people, the vast majority of whom live on welfare, and faces environmental challenges, particularly from feral animals, weeds and poor fire management too great for such a small number of unresourced people to handle.

The strategy of the Queensland Government and some conservation groups for handling the future of Cape York is profoundly pessimistic and risky. The strategy is to lock away much of the land by means of various legislation, in particular Wild Rivers legislation, with its connotations of land being devoid of human activity. This strategy assumes that the future of Cape York will be based on limited types of tourism and government transfers (green welfare) and that future residents will be unable to manage and develop land both to create wealth and preserve or indeed enhance the environment of Cape York.

An observable feature of environmental concern in Australia generally is that people are more prepared to 'preserve' an environment for which they bear few costs of adjustment. Environments at great distance from the bulk of the population are most likely to fall into the category of preservation to the exclusion of development precisely because the bulk of the population does not have to bear the cost of foreclosing development options. Conservation is cheap at distance because there are no apparent trade-offs. Most of Australia's consumer wealth is centred on Southern Australia while most of its mineral and other resource wealth is located in the North. The corollary of the North–South resource divide is a North–South division in Australia's environment conscience. A wealthy, prosperous and consumptive South demands the protection at any cost from development of whatever form of great tracts of sparsely populated Northern Australia.

Typically this protection takes the form of reservation of land in the conservation estate, where it can be used only for conservation purposes and for a limited range of other activities. Typically, this protection does not allow for the full exploration of all of the options for wealth creation and conservation.

1.2 Welfare Reform

Indigenous people make up more than 50 per cent of the population of Cape York. These communities are struggling to be free from passive welfare. An indication of the desire to be free from welfare is the Income Management trial, which commenced in July 2008 and aims to address passive welfare dependence and commit people in the communities of Aurukun, Coen, Hope Vale and Mossman Gorge to resume primary responsibility for the wellbeing of their family and their community. A key aim of the trial is to ensure that children are safe, fed and educated. In the second phase of welfare reform it is essential that sustainable local economies and employment are developed in Cape York.

Indigenous people have intimate connections with their land. They have both a desire and an obligation to protect cultural and natural values. But the people of Cape York also wish to utilise their land for economic purposes. They believe that this can be compatible with protecting other values of the land. Multiple use land management is also consistent with the principles of ecologically sustainable development adopted by the wider community and governments.

1.3 Indigenous estate

Cape York is majority owned and/or controlled by Indigenous people. In the near future, more than 6 million hectares will be under Indigenous management representing 45 percent of Cape York's 13.7 million hectares. Table 1 details the composition of Indigenous ownership and control.

Table 1 **Cape York Peninsula Indigenous estate[a] summary (hectares)**

	Current	Proposed	Total
National Parks	194,000	1,693,000	1,887,000
State Land Dealings	581,000	403,000	984,000
DOGIT	1,968,000	-	1,968,000
Land Trusts	758,000	-	758,000
Indigenous Pastoral Leases	147,000	432,000	579,000
TOTAL	**3,648,000**	**2,528,000**	**6,176,000**

a Wik and Wik Way Determination not included as it is predominantly the DOGIT land of Aurukun, Pormpuraaw or exists on other tenure; **b** Does not include the Yalanji NPs of Black Mountain, Cedar Bay, Daintree (Cape Tribulation), Mount Windsor and Hope Islands which are under Yalanji ILUA; **c** Does not include any proposed Nature Refuges for Future State Land Dealings

Note: DOGIT: Deed of Grant in Trust; ILUA: Indigenous Land Use Agreement

Data source: Balkanu Cape York Development (unpublished correspondence).

Conservation has long been an objective of Indigenous land owners in Cape York. More than a third of the total Cape York Indigenous estate is designated

for conversation purposes. Table 2 details the current and proposed allocation of conservation lands.

Table 2 **Cape York Peninsula Indigenous conservation[a] (hectares)**

	Current	Proposed	Total
National Parks	194,000	1,693,000	1,887,000
Nature Refuges	100,000	-	100,000
Reserves to be transferred	-	92,000	92,000
TOTAL	**294,000**	**1,785,000**	**2,079,000**

a Wik and Wik Way Determination not included as it is predominantly the DOGIT land of Aurukun, Pormpuraaw or exists on other tenure; **b** Does not include the Yalanji NPs of Black Mountain, Cedar Bay, Daintree (Cape Tribulation), Mount Windsor and Hope Islands which are under Yalanji ILUA; **c** Does not include any proposed Nature Refuges for Future State Land Dealings

Note: DOGIT: Deed of Grant in Trust; ILUA: Indigenous Land Use Agreement

Data source: Balkanu Cape York Development (unpublished correspondence).

1.4 Objectives

Balkanu Cape York Development Corporation, the Cape York Institute and Cape York Land Council are concerned that future potential options open to Indigenous land owners in Cape York are being unduly limited and therefore the work of welfare reform may be blunted.

Aboriginal people are no different to other citizens in that they cannot predict what their children or grand children may want to do with the land. Therefore, they do not want to unnecessarily foreclose options.

One potential source of limitation is the Wild Rivers Act 2005.

This paper seeks to:

1. Explore the use of the Precautionary Principle in the Wild Rivers legislation
2. Identify how the precautionary principle as interpreted in the Act affects the prospects for ecologically sustainable development in Cape York
3. Develop a precautionary ecologically sustainable development assessment framework for the Act
4. Identify cost and risk implications arising from the findings for environmental conservation and wealth creation.

Additionally, this paper outlines the argument for a better informed approach to the future development of Cape York by applying 'real options' analysis to ecologically sustainable development and land use decision making.

1.5 Options

The Aboriginal people of Cape York wish to utilise their land for purposes ranging from traditional practices to orthodox economic development in ways that are consistent with the principles of ecologically sustainable development. Balkanu envisages development of a vibrant integrated economy on Cape York, with Aboriginal people involved in a wide variety of economic activity. Balkanu is concerned that the land use restrictions being imposed by the Wild Rivers Act which may potentially be overlain with World Heritage listing will severely restrict the options and opportunities for sustainable development.

Balkanu believes that it is possible to manage the Cape York region within a sustainable, multiple land use framework that both conserves the region's natural and cultural values and allows for economic development. The narrow land use framework envisaged in the Act is antipathetic to sustainability, as it restricts the ability of traditional (property) owners to use their land and other resources responsibly for their economic and social benefit.

A diverse, integrated economy is inherently more robust and sustainable than an economy that comprises a restricted number of sectors. A diverse economy is less prone to seasonality, provides greater economies of scale, offers more opportunities for small business, provides more choice of employment and enables transfer of skills and technology.

2 Assessment framework

2.1 Uncertainty

The impacts of unknown and unforeseeable consequences plague decision-makers when they exercise authority. Risk management techniques have evolved to inform decision-making in the face of risk. These techniques rely on the assignment of probabilities associated with various courses of action and outcome, and review of those probabilities as new information becomes available. Assignment of probabilities infers a degree of certainty. Decisions clouded by uncertainty cannot reliably be informed by probabilities alone. Risk management techniques become ineffective in the face of uncertainty. If public policy is not to be determined through ignorance, a different set of tools must be deployed to inform decision-making. (Knight, 1921)

2.2 Precautionary principle

The inability to predict future outcomes, let alone ascribe probability distributions, requires fundamentally different approaches to decision-making.

One approach is the precautionary principle. Precaution is a natural response to uncertainty, particularly in light of dangerous and irreversible impacts of decision-making. A precautionary approach actively seeks to displace uncertainty as a justification to deferring action that avoids harmful and irreversible consequences of decisions.

The absence of proof of damage or harm has traditionally been used by industrial interests to dismiss valid concerns for the environment and human health arising from industrial development. Health impacts of toxic chemicals and environmental consequences of fishery stock depletion are common examples from the last century.

In recent times, however, environment advocates have sought to reverse the onus of proof and have argued for no development unless there is proof that there cannot be any harm.

The precautionary approach can be used in a variety of ways that do not lie at either extreme of the onus of proof spectrum and which provide ways to reduce uncertainty. A spectrum of policy responses exist that have potential application by decision-makers.

- Research that seeks to build knowledge and remove uncertainty

- Sensitivity analysis that examines a range of possible outcomes and their response to changes in key variables
- Flexibility that accommodates the advance of knowledge
- Regulatory processes that require extensive testing to demonstrate reliability of outcome
- Prohibition of potentially damaging activity.

Various attempts have been made to formally classify these responses. The typology initially developed by Cooney (2004) and subsequently modified by Weirer and Loke (2007) is a good example. Broad categories are as follows:

- **Flexible** applications seek to resolve uncertainty and not use uncertainty as a reason to avoid taking action. Weirer and Loke (2007) observe that cost-effectiveness may be a criteria for determining whether action should be taken
- **Moderately prescriptive** responses narrow the field of reference for decision-makers. Cost-benefit analysis and magnitude of impact are observed by Weirer and Loke (2007) to be less influential
- **Heavily restrictive** interpretations discard considerations of cost-benefit. An absolute threshold is frequently established to trigger action, regardless of scale or impact.

2.3 Ecologically sustainable development

Precautionary approaches to decision-making uncertainty are well established and have evolved as a mainstay of modern public policy. Precautionary approaches are also embedded in the concept of ecologically sustainable development (ESD), the widely accepted approach to jointly managing the environment and development. The three most important expressions of ESD applying in Australia are as follows.

2.3.1 Rio Declaration on Environment and Development

The Rio Declaration published by the World Conservation Union is possibly one of the most widely cited expressions of the precautionary principle in environment and development contexts (Cooney 2004). Principle 15 states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (United Nations Conference on Environment and Development, 1992)

Prominent in the Declaration are considerations of:

- The nature of the threat posed as 'serious or irreversible'

- Action cannot be delayed by a 'lack of ... certainty'
- 'cost-effective measures' should be deployed
- Action must be 'applied ... according to ... capability'

2.3.2 Intergovernmental Agreement on the Environment

In the same year of the Rio Declaration, Commonwealth, State and Territory heads of government formally signed an agreement defining Australia's commitment to the precautionary principle. The Agreement also articulated an equal and complementary commitment to:

1. Intergenerational equity
2. Conservation of biological diversity
3. Improved valuation, pricing and incentive mechanisms.

Consistent with the Rio Declaration, a particular emphasis was placed on cost effectiveness and proportional responses. Section 3.4 iii states:

> measures adopted should be cost effective and not be disproportionate to the significance of the environmental problems being addressed. (Australian Government, 1992)

2.3.3 National Strategy for Ecologically Sustainable Development

A national strategy for ecologically sustainable development was adopted by the Council of Australian Governments (COAG) in December of 1992. It further articulated the elements of the Agreement and established a core set of objectives:

- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
- to provide for equity within and between generations
- to protect biological diversity and maintain essential ecological processes and life-support systems. (Ecologically Sustainable Development Steering Committee, 1992)

The Core Objectives and Principles are replicated in Appendix A.

2.3.4 Cape York Heads of Agreement

The well defined international and national approaches to application of precaution were given specific local definition under the Cape York Heads of Agreement. Signed by the Cape York Land Council, The Wilderness Society, the Australian Conservation Foundation, the Cattlemen's Union and some years later by the Queensland Government, the Agreement stated:

> All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interest in the area. (Cape York Heads of Agreement, 1996)

The Agreement is at Appendix B.

2.4 How precaution is applied in ESD

Wierer and Loke (2007) count no less than 120 pieces of legislation and hundreds of 'non-binding policies' that invoke precaution in Australia. Most reference the Intergovernmental Agreement on the Environment.

The key question is to understand which version of the precautionary principle – between flexible and heavily restrictive – has been applied to ESD in Australia and specifically in Cape York under the Wild Rivers Act.

Table 3 **Comparison of Precautionary Principle applications**

	Flexible	Moderately-prescriptive	Heavily restrictive
Is there a threshold of threat for triggering application of the Principle? [a]	Yes. For example, 'significant', 'irreversible', 'serious' harm	Sometimes	No
Is an assessment of the costs and benefits of alternative actions required?	Usually. Cost effectiveness may be required	Not usually	No
Is precautionary action required?	No	Yes. Either required or 'justified'	Yes
Is the burden of proof assigned? [b]	No. Depends on other regulations	No. Depends on other regulations	Yes. Developer/producer bears the burden of proof
Is liability for harm assigned? [c]	No	No	Usually. Developer/producer bears liability

a Failure to satisfy the threshold test prevents the Principle being invoked but does not preclude precautionary action.

b The standard of proof is crucial in determining the practical effects of assigning liability.

c Liability is the legal obligation to provide compensation for damage resulting from an action for which the liable party is held responsible

Data source: (Weirer & Loke, 2007, p. 7).

A number of common features of the precautionary approach are evident and were catalogued by Weirer and Loke (2007):

- A threshold for action is frequently established, often 'serious' or 'irreversible'
- Assessment of the associated costs and benefits

- Whether action is required by decision-makers
- Reversal of the burden of proof onto proponents to demonstrate that harm will not arise
- Assignment of costs.

These five defining features form the basis of the assessment framework to be applied in this paper to the Wild Rivers Act and have been formulated with the three broad descriptive categories specified in section 2.2 (Table 3 summarises).

2.4.1 Threshold tests

A trigger for invoking the precautionary principle can often be identified. Flexible applications often require an acknowledgement that consequences be sufficiently severe and have a degree of likelihood of occurrence. By contrast, heavily restrictive versions have no such requirement.

The trigger for the Rio Declaration is 'serious or irreversible'. Weirer and Loke (2007) describe this terminology as flexible. The same terminology is adopted in the Intergovernmental Agreement on the Environment and accordingly is categorised as flexible.

2.4.2 Cost benefit analysis

Cost benefit analysis is a second test to determine the strength and intensity of precaution in policy, regulation and legislation. Assessment of cost effectiveness applies to the balanced consideration of potentially competing interests. Again the Declaration, Agreement and National Strategy as well as the Cape York Heads of Agreement acknowledge the equal importance of conservation, intergenerational equity and economic and social development. An absence of cost benefit analysis infers preference to one of the latter three elements.

Flexible versions place a requirement for the consideration of cost effectiveness. The Rio Declaration, Intergovernmental Agreement and the National Strategy all specifically cite the requirement for cost effect responses. Cost effectiveness infers that an exercise in cost benefit calculation is undertaken to determine whether action is cost effective. Heavily restrictive interpretations exclude consideration of cost effectiveness and adopt a narrower field of view.

2.4.3 Burden of proof

Reversal of the traditional burden of proof in relation to potential harm or damage in light of uncertain facts is a readily observed element of restrictive interpretations of precaution. Specifically, heavily restrictive versions require proponents to demonstrate that their proposed actions are entirely free from harm or damage. In contrast, flexible interpretations may not assign a burden of proof but rather simply remove uncertainty as a means of forestalling action to prevent harm.

Neither the Agreement nor Strategy reverses the burden of proof, requiring developers to demonstrate freedom from harm. The Agreement does however call for 'fundamental consideration' of 'biological diversity and ecological integrity'.

2.4.4 Costs

Consideration of cost is a contested area. Weirer and Loke (2007) discuss the assignment of liability in the event of damage. Heavily restrictive interpretations clearly assign liability to proponents while flexible applications may not directly. The Agreement applies the polluter pays principle and calls for developers to bear costs of 'containment, avoidance or abatement'. This paper more critically assesses the broader consequence of costs.

The specific incidence of cost is important. Some communities have greater capacity to bear costs. This fact explains differentiated expectations in climate change debates. First world nations, such as Australian and the USA are reasonably expected to incur greater costs now while rapidly industrialising nations, such as India and China, have lower expectations placed on them. Developing nations like Bangladesh have even lower capacities again. The Rio Declaration identifies this aspect when it states the qualification, 'according to their capabilities'.

Attendant to discussion of current costs is consideration of intergenerational cost burdens. Precaution seeks to reduce the costs of damage and harm borne by future generations arising from the present consumption of resources. Flexible versions of precaution that acknowledge the requirement for a balanced treatment of competing aims, such as conservation and development, are keenly aware of intergenerational cost burdens arising from actions that limit either. Also if sound ecologically sustainable development is stopped for minor environmental reasons, or for environmental effects that can be mitigated, future generations suffer a loss of potential income (part of which could have been used for environmental protection.

Costs also arise from distorted priorities. Heavily restrictive applications risk ignoring real and present dangers by placing too great an emphasis on distant and potential risks. Disproportionate responses that fail to deal with known and real risks now may impose significant costs on society.

Perverse consequences may also impose costs. Such consequences arise from heavily restrictive interpretations of precaution that mandate action, regardless of cost, in the event that the preventative or remedial actions taken are ineffective. Application of safety margins and improved information through research, evident in flexible approaches, may be more effective and minimise costs of action.

2.4.5 Conclusion

Well established Australian expressions of the precautionary principle explicitly seek to balance consideration of economic and environmental consequences of decision-making. Specific acknowledgement is made of the fact that economic development pays for conservation. Section 3.3 of the Agreement states that:

> The parties consider that strong, growing and diversified economies (committed to the principles of ecologically sustainable development) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner. (Australian Government, 1992)

The National Strategy for Ecologically Sustainable Development articulates a core set of objectives. Informing these objectives was a set of core principles that gave explicit voice to 'cost-effective and flexible policy instruments'. Significantly, the National Strategy specifically instructed COAG signatories to consider both the objectives and principles as a whole. Governments could not pick and choose individual elements that suited contemporary circumstances. All elements were of equally compelling importance and a 'balanced approach' should be adopted.

The National Strategy is highly consistent with the Rio Declaration and the Intergovernmental Agreement on the Environment in its application of the precautionary approach. A clear focus on cost-benefit and flexible policy defines the National Strategy as a flexible expression of precaution.

3 Applying the framework to the Wild Rivers Act

Initially six Wild River Basins were declared in Queensland with most situated in the Gulf of Carpentaria. Subsequently three Wild River Basins have been declared in Cape York comprising 13 individual Wild Rivers:

- Archer Basin Wild River Declaration 2009
  - Archer River
  - Love River
  - Kirke River
- Stewart Basin Wild River Declaration 2009
  - Stewart River
  - Massey Creek
  - Breakfast Creek
  - Balclutha Creek
  - Gorge Creek
- Lockhart Basin Wild River Declaration 2009
  - Claudie River
  - Lockhart River
  - Nesbit River
  - Chester River
  - Rocky River

The Wenlock basin is under active consideration with the consultation process now underway. A further eight Cape York river systems are scheduled to be declared throughout 2009 and 2010 (Queensland Government, 2009d).

3.1 Wild River definition

The Act establishes an entire water catchment as a single entity for the purpose of maintaining the river's natural values. Specific attention is paid to individual impacts and the aggregate impact on the river resulting from activities within the basin.

Within the catchment of a declared wild river are five key zones. The Wild Rivers Code defines them as follows:

- high preservation area (HPA) – an area within and immediately adjacent to the wild river, its major tributaries and any identified off-stream special features
- preservation area (PA) - the wild river area minus HPAs
- floodplain management area (FMA) - floodplain areas that have a strong hydrologic connection to the river system
- subartesian management area (SMA) - aquifer areas that have a strong hydrologic connection to the river system
- designated urban area (DUA) – known urban area, possibly with additional space identified for future urban expansion. (Queensland Government, 2007)

The Code details prohibited activities and allowable activities subject to restriction. Restrictions are greatest in the HPA which is an area extending up to one kilometre from the river or tributary subject to declaration (Queensland Government, 2009a)(Queensland Government, 2009b)(Queensland Government, 2009c).

3.2 Wild Rivers Act is precautionary

The Wild Rivers Act is clearly precautionary. Section three invokes precaution as a primary concept within the Act itself.

> ... having a ***precautionary approach*** to minimise adverse effects on known natural values and reduce the possibility of adversely affecting poorly understood ecological functions ... (s3, 3, (b)) (***emphasis*** added)

Additionally precaution is raised in the Stewart River Consultation Report in response to questions from the public about the High Preservation Areas being declared to the maximum possible extent.

> The department, in reviewing the proposed high preservation areas has considered the state of the natural values of the proposed wild rivers and adopted a ***precautionary approach*** in determining the width of the high preservation areas. (Queensland Government, 2009d) (***emphasis*** added)

3.3 Disassociation from ESD

The Wild Rivers Act specifically disassociates itself from ESD with the Explanatory Notes to the Act stating:

> The Acts that regulate these resources and activities generally do not set development limits at the catchment scale. Those Acts that do set limits, generally do so under the principles of ecological sustainable development (ESD), which permits a loss in natural values to achieve economic and social benefits. ***The level of preservation sought for wild rivers, which have all or almost all of their natural values intact,***

> ***is higher than for ESD*** but below that generally provided in a national park. (Wild Rivers Bill 2005: Explanatory Notes) (***emphasis*** added)

The Notes go on to establish the absolute importance of preservation:

> Hence it is necessary to clearly specify limits on resource allocations and activities ***for the purpose of preserving the natural values of wild river systems***. (Wild Rivers Bill 2005: Explanatory Notes) (***emphasis*** added)

The term 'preserve' has a different meaning to the term 'conserve'. Preservation does not permit any changes, while conservation allows the ongoing management and does contemplate change.

This effectively unbundles the three equally important core principles of the National Strategy for Ecologically Sustainable Development of economic development, intergenerational equity and biological diversity. This is in violation of the Queensland Government's COAG commitments.

The Act is precautionary in its approach and it specifically disassociates itself from the well founded principles of ESD in a number of ways.

3.4 Low threshold test

The Explanatory Notes recognise that pressure to develop Cape York is 'limited' and 'little' development has historically taken place:

> ... the level of future development is not expected to be high. Wild rivers tend to be in regions of the State where little development has occurred and ***generally have limited development pressure***. (Wild Rivers Bill 2005: Explanatory Notes) (***emphasis*** added)

Further the Notes go on to acknowledge that these modest development pressures are 'further limited' by existing vegetation clearing laws.

> Also future development in such areas is ***further limited by existing restrictions*** on vegetation clearing. (Wild Rivers Bill 2005: Explanatory Notes) (***emphasis*** added)

This establishes a very low threshold for action. Not only are there few expected threats of damage, but that these threats are currently being constrained by existing legislation and regulation.

The Act fails to acknowledge the significant impact that Welfare Reform will have on Cape York. Welfare Reform's focus on individual responsibility, reciprocity and incentives is designed to break widespread passive welfare dependence and boost individual economic independence. In support of this major reform, the Queensland and Australian Governments have contributed $100 million over four years. This commitment includes specific encouragement to communities and individuals to develop businesses that will

broaden the Cape's economic base, in line with the consistent ESD principles detailed in the Cape York Heads of Agreement.

On this test the Wild Rivers Act is highly prescriptive.

3.5 Precludes cost benefit analysis

The Explanatory Notes to the Act explicitly preclude consideration of ESD cost benefit analysis by stating:

> While wild rivers may contain or support other values, such as economic, social, scientific, educational and Indigenous, the ***Bill is intended to preserve the natural values*** listed above. (Wild Rivers Bill 2005: Explanatory Notes) (***emphasis*** added)

There is clear acknowledgement of potentially competing values, such as economic and social. However, the Act establishes the primacy of preservation, rendering the other values secondary and outside the scope of the legislation.

In expanding on the purpose of the Act, the Explanatory Notes introduce the concept of 'necessary development' without defining it. In the absence of cost benefit analysis, necessary development is clearly understood on purely conservation grounds:

> The aim of the Bill is to ensure that a declared wild river's environment is maintained in its largely natural state, and impacts from ***necessary development*** minimised. (Wild Rivers Bill 2005: Explanatory Notes) (***emphasis*** added)

This underscores the earlier observation that the Act unbundles the ESD package of equally important core objectives detailed in the National Strategy and the Cape York Heads of Agreement.

The Wild Rivers Act removes any consideration of elements outside natural preservation, including cost benefit analysis. It is heavily restrictive legislation.

3.6 Reverses burden of proof

A burden of proof is clearly established twice by the Act.

- Property development plan
- Ministerial decision making.

The Wild Rivers Code is very explicit in its application of precaution.

> When determining whether an application meets the required outcome, the assessment manager must take a precautionary approach that is, not use the lack of full scientific certainty as a reason for not imposing requirements or conditions to minimise potential adverse affects on the natural values. ***The onus lies with the applicant to demonstrate that a proposed development or activity meets the***

> ***required outcomes of the code.*** (Queensland Government, 2007) (***emphasis*** added)

3.6.1 Property Development Plan

A proponent of a prohibited development in a HPA can seek to have the prohibited development assessed by lodging a Property Development Plan (PDP). Approval of the Plan does not result in approval to proceed. Rather the approved PDP forms the basis for a change to the initial Wild River Declaration. Box 1 summarises the process.

Box 1 Property Development Plan approval process

1. Property Development Plan (PDP) created
2. PDP assessed (including scientific review by independent board)
3. PDP approved
4. Proposal for change in Wild Rivers declaration
5. Public consultation
6. Assessment of the public consultation and decision to proceed or not
7. Change in Wild Rivers declaration
8. THEN, application for development can now be accepted (and will then need to be assessed to ensure it meets any requirements under the relevant legislation).

Source: (Queensland Government, 2009d) and unpublished correspondence from Balkanu.

Consideration of a property development plan under the Wild Rivers Code is clearly proscribed. A proposal under a Plan must be assessed with reference to:

> ... the nature and extent of any other thing proposed to be done in addition to the activities, or the taking, that would result in a ***beneficial impact on the natural values*** of the relevant wild river ... (s31D, 1, (j)) (***emphasis*** added)

Not only must the proponent demonstrate that no harm will arise from the proposed development, the proponent must demonstrate a 'beneficial impact' on conservation values.

This narrowly defined beneficial environmental impact is well outside the scope of ESD. Well defined and accepted Australian interpretations of ESD place no requirement of proof on proponents. The Act is clearly highly restrictive, a finding reinforced with reference to Ministerial decision making.

3.6.2 Ministerial decision making

Any proposed amendment is then subject to the consideration of public submissions and ultimately ministerial decision. Once a property development

plan is considered by the relevant minister, the minister is required to ensure that the proposed amendment:

> ... will not have an overall adverse ***impact on the natural values*** of the wild river ... (s31E(b)) (***emphasis*** added)

And that further:

> ... the ***environmental benefits*** of the plan justify the approval of the plan ... (s31E(c)) (***emphasis*** added)

The proposed amendment must demonstrate that the property development plan has positive environmental benefits and not simply an absence of harm.

> A proposed plan would have to be submitted with a fee and assessed by an independent panel of scientists who are expert in hydrology, geomorphology, water quality, riparian function and wildlife movement. If I approve the plan, with or without conditions, I can then seek to amend the declaration through the current formal process, including public consultation and submission. Based on submissions, I will then make a decision whether to amend the declaration. If the declaration is amended the landholder will then have to submit applications for each development and go through the normal assessment process under the Integrated Planning Act or other relevant act. This means that the developments will have to meet the wild rivers requirements. Also, all developments on the property over the next 10 years have to be in accordance with the plan. This is to prevent the landholder later choosing to capitalise on the amended declaration and apply to do something else. (Weekly Hansard, 2007)

In terms of decision making the Wild Rivers Act is a highly restrictive interpretation of the precautionary approach.

3.7 Costly

The Act's heavily prescriptive approach precludes assignment of direct costs arising from damage to developers – the concept of polluter pays. Liability is irrelevant as many developments in HPA zones are simply prohibited. Allowable developments in HPA and PA zones are assigned liability for damage under existing legislation, for example the Environmental Protection Act (1994).

A broader range of cost considerations must also be taken into account when testing the severity of precaution in the Act (Cooney, 2004).

3.7.1 Cost burden

Wild Rivers specifically excludes consideration of costs beyond a narrow interest in loss of natural preservation values. While the Act specifically acknowledges the presence of other competing interests, it clearly disregards

them. In doing so cost associated with lost economic development opportunities and social exclusion are precluded from consideration in the operation of the Act. Decisions are made purely on the basis of environmental benefit. This places significant potential opportunity costs on society.

Indigenous peoples dominate the demographic makeup of Cape York. They are also prominent land owners controlling 581,000 hectares of Aboriginal Freehold land. Potentially significant opportunity cost will be imposed by limiting options to development in affected river catchments. The COAG endorsed 'Closing the Gap' initiatives demonstrate the impaired capacity of Indigenous communities to bear costs of regulation. In line with the Rio Declaration, the imposed costs of severely restricted development are not 'according to their capabilities'.

The Act is heavily restrictive in its disregard of Principle 15 of the Rio Declaration.

3.7.2 Intergenerational equity

Wild Rivers implicitly acknowledges intergenerational equity, though only in part. In as much as it seeks to preserve amenity for future generations. While it seeks to conserve Cape York's river catchments for future generations, it ignores the economic and social well being of these same future generations. Heavily restrictive conservation policy that is disassociated from ESD eliminates current development opportunities and also eliminates all future opportunities. ESD gives full voice to future generations by limiting current and future development that does not maximise welfare.

The singular focus on future enjoyment of the environment, at the expense of future economic and social welfare, makes the Act heavily restrictive.

3.7.3 Distorting regulatory priorities

There are two certain and serious threats to Cape York's biodiversity currently:

- Invasive weeds
- Feral animals

Cane toads, wild pigs and invasive grasses from Africa impose great current cost on Cape York. In large measure, Wild Rivers relies on existing legislation and regulation to deal with these environmental costs.[1] The Act instead seeks

[1] A trial of 20 Wild River Rangers is underway across the Gulf and the Cape with a total commitment of 100 rangers to eventually cover the entire Gulf and Cape declared Wild Rivers (Queensland Government, 2009d).

to restrict future development that the Explanatory Notes characterise as currently and historically 'limited'. It also recognises that development pressures are further limited by current vegetation clearing laws.

Many of the great environmental disasters of the past century have common industrial causes, for example:

- Mining in Bougainville
- Over-fishing of the cod stocks in the Grand Banks
- Clearing natural forests of the Amazon for grazing.

The Act purports to make provision for current and future mining, fishing and grazing. In the Second Reading Speech to parliament on 24 May 2005 the minister gave clear guidance that the Act provided 'enhanced opportunities' for grazing and fishing. Speaking to subsequent amendments to the Act during the Second Reading on 31 October 2006, the minister permitted minerals exploration and below ground mining.

What the Act does is prohibit and regulate a wide range of lower level activities. The Act seems disproportionate in its response to the actual threats posed to Cape York as opposed to distant and uncertain threats. This necessarily imposes costs.

3.7.4 Stifling sustainable development

The established Australian legislative and regulatory practice of ESD specifically seeks to minimise costs by allowing wide consideration of costs and benefits attributable to conservation, development and intergenerational equity and selecting options that maximise total benefits, net of costs.

Consistent application of ESD principles has, among other forces, contributed to the refinement of a range of economic valuation methodologies in the context of properly valuing the environment. These include:

- Market based techniques
  - Market Price Method
  - Productivity Method
- Revealed preference techniques
  - Hedonic Pricing Method
  - Travel Cost Method
  - Damage Cost Avoided, Replacement Cost, and Substitute Cost Methods
  - Benefit Transfer Method
- Stated preference techniques

- Contingent Valuation Method
- Contingent Choice Method
- Benefit maximisation.

Without the requirement to clearly articulate costs and benefits, the development and application of enhanced valuation methodologies may stifle adoption of best practice developments in ESD and valuation. The development of 'improved valuation, pricing and incentive mechanisms' is identified as one of the key principles of the Intergovernmental Agreement on the Environment. Of clearer impact are the costs associated with setting aside the application of well founded and universally agreed principles of ESD derived regulation.

3.7.5 Perverse consequences

Ignorance of cost effectiveness and a reliance on mandated and inflexible precaution may lead to perverse consequences where costs of precautionary measures exceed the costs of waiting to clarify uncertain impacts. There is a general failure to recognise that regulation under the Act imposes costs and benefits.

In the case of Cape York, the Explanatory Notes to the Act make clear the limited extent of development pressure. While some types of developments can pose serious and irreversible harm to the environment, some types of developments pose reversible and temporary harm. Consultations on the Stewart Basin declaration discuss this very concept as 'misdirection of resources' (Queensland Government, 2009d). Instead of referring to cost benefit assessment on a case by case basis, the Departmental response asserts that:

> Experience in other parts of Australia has shown that it is extremely expensive to rehabilitate degraded river systems. It is far more cost effective in the mid to long term to protect existing natural values than to rehabilitate or seek to replace lost natural values. (Queensland Government, 2009d)

Such a claim cannot be substantiated in all instances without reference to a case by case assessment of costs and benefits. In some instances the cost of rehabilitation may be significantly lower than the opportunity cost of precautionary preclusion.

Simply, the Act may make society worse off, including the remote and very poor Indigenous people of Cape York.

3.8 Summary of findings

The assessment of the Wild Rivers Act (Table 4) in regard to the severity of the application of the precautionary principle has found that it has:

- An extremely low threshold
- No consideration of costs and benefits
- A clear burden of proof is established
- Liability for costs is clear.

Table 4 **Assessment of Wild Rivers Act**

	Flexible	Moderately-prescriptive	Highly restrictive
Threshold of threat			☑
Costs and benefits			☑
Action required			☑
Burden of proof			☑
Liability assigned			☑

Source: ACIL Tasman.

The Wild Rivers Act is highly restrictive. These findings are supported by the Act's clear disassociation with the well defined Australian legislative and regulatory commitment to ESD.

4 Implications

4.1 Future options

The implications for the future of Cape York that arise because of the narrow interpretation of precaution in the Act are considerable.

The option to consume now or later (i.e. save) is a universal question of resource allocation. Options exist to consume now or later. Environmental consumption captures existence value as well as exploitation of resources to meet current needs for example, eating. Both result in utility. An almost infinite number of unique consumption combinations exist. Each unique combination consists of options to consume now or later. These consumption options naturally have consequences for future options. What is consumed now cannot necessarily be consumed later.

Indigenous land management can be characterised as maximising future options, that is current consumption always has an eye to future consumption. This strongly accords with the core objectives of ESD.

One particular matter is that many Indigenous people point out that they do not know the aspirations of their children or grand children. If there is actually no current or foreseeable threat to the environment which makes the Wild Rivers Act necessary why limit options?

4.2 Property rights

Property owners possess options. These options share the same conceptual underpinnings outlined above. Owners can develop their properties now or in the future, fully and partially. The same inter-temporal choice framework applies. Activity now may narrow the scope in the future.

Section 17 of the Act specifically recognises and protects property owners who have elected to develop their land already:

> This clause preserves existing rights of entities to carry out activities and take natural resources. (Wild Rivers Bill 2005: Explanatory Notes)

Activity that was being carried out prior to declaration and activity that was authorised prior to any declaration under the Act is allowed to continue despite the subsequent operation of the Act. The Queensland Government refutes claims that any rights are injured (Queensland Government, 2009d) but compensation issues aside, the very recognition of pre-existing rights implies that future rights may be degraded. This point is underscored by the fact that

PDPs across a range of activities in HPAs will not be accepted and are deemed to be improperly made.

Applying the options framework to these circumstances suggests that options already exercised are recognised and protected but future options as yet unexercised are not recognised are not protected. The rights to future options are injured.

4.3 Injury

In the instance of significant injury to property owners' range of future options, governments frequently compulsorily acquire the property. The Australian Government is constitutionally compelled to compensate property owners 'on just terms' when compulsorily acquiring property. While State Governments are not compelled to apply just terms compensation, they frequently do so (Nicholls, 2008).

When future options are only modestly injured, compensation is a cost effective alternative to compulsory acquisition. This recognises that future options are potentially impaired in the instance of government decision making. (Nicholls, 2008)

The Wild Rivers Act offers neither compensation nor compulsory acquisition, an aspect of the legislation that the Scrutiny of Legislation Committee commented on as follows:

> ... it appears to the committee that the only circumstance in which existing rights might potentially be adversely affected by a wild river declaration would be if a declaration affected freehold land. In such cases the general common law right of landowners of freehold land to use that land (subject to not causing "nuisances" to adjoining landowners) in whatever manner they see fit would probably be inhibited. (Scrutiny of Legislation Committee, 2005)

The Act employs a device under the Integrated Planning Act that mandates that certain development applications cannot be considered by the department or the minister.

Injury to the rights of property owners is particularly relevant under Wild Rivers. Declaration of Wild Rivers and the high preservation zone is made regardless of the property type. Future options available to affected owners are potentially severely curtailed, yet the State makes no offer of restitution for these lost options. This is particularly significant as options are being restricted while tenure resolution is underway through State Land Dealings.

Property owners are potentially faced with injurious impacts to their possible future options. The minister underscored this point in the Act's initial Second Reading speech stating:

> Very few activities will be permitted in the waterway itself or in the 'high preservation' area, including a buffer up to one kilometre wide on each side of the river. (Weekly Hansard, 2005)

The Act 'does not limit the matters the Minister may consider' (Wild Rivers Act 2005). It does however direct the minister to consider:

(a) the results of community consultation on the declaration proposal; and

(b) all properly made submissions about the declaration proposal; and

(c) any water resource plan or resource operations plan that applies to all or part of the proposed wild river area.

The Wild Rivers Act fails to recognise that Property owners have 'standing' and are not simply unrelated third parties to the legislation and its direct impacts. Third party voices are given equal treatment and the Act has no basis to establish or differentiate the voices. In a best practice guide published by the World Conservation Union, Cooney (2004) observes that issues of inappropriate incidence of cost burden are 'intimately tied to the question of who is involved and represented in the decision-making process'. Simply appearing as one of many individuals and organisations that participated in a consultation forum does not equate to involvement and representation in decision-making. Cooney then cautions against abuse of the precautionary principle that renders it merely as a 'rhetorical tool of convenience'.

These two points have particular resonance when considering the practical impact of a well funded, highly mobilised and vocal green constituency resident in southern Australia (i.e. Brisbane), that are granted equal standing to poorly resourced Indigenous land owners resident in remote Cape York.

5 Ecologically sustainable development options

The Wild Rivers Act (2005) applies a highly restrictive interpretation of the precautionary principle that unnecessarily limits property owners' future options. This section identifies a 'real options' framework that provides a practical theoretical alternative to understanding land use decision making in Cape York that is sympathetic to environmental conservation.

5.1 Current limitations

Future ESD options on Cape York are currently subject to significant and excessive restrictions. These include:

- legislation such as the Vegetation Management Act 1999
- the current nature of land tenure which is not conducive to the economic use of land.

5.2 Future limitations

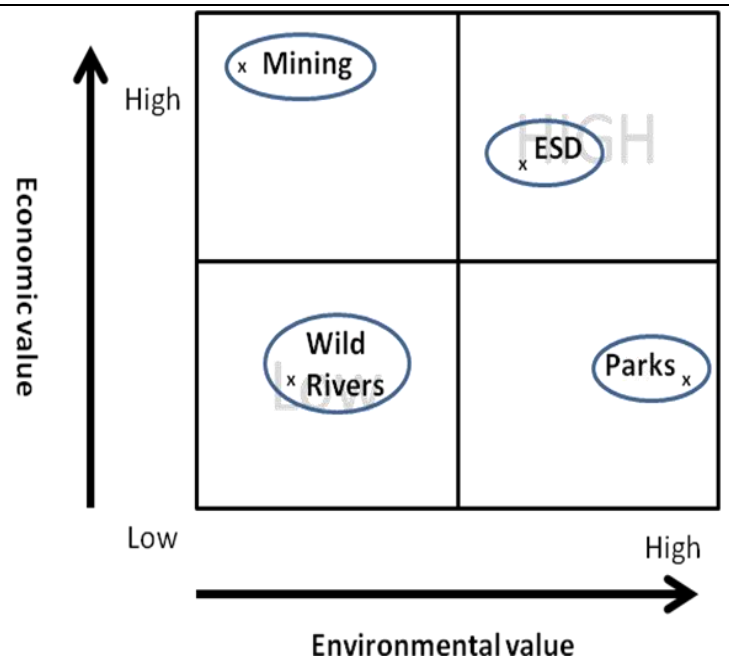
There is an ever expanding set of possible future limitations to ESD options in Cape York. The Wild Rivers Act sets a dangerous precedent by radically departing from the well established and widely understood Australian commitment to the principles of ESD and their equally important foundational concepts. Other possible future limitations to ESD options include:

- World Heritage listing (currently proposed by the State and Commonwealth Governments)
- Australian Heritage listing (proposed by Humane Society International)
- Climate change.

5.3 Maximisation

ESD actively seeks to maximise the range of potential future options available to land owners. It explicitly maximises both economic and environmental options. Figure 1 positions Wild Rivers and ESD in terms of maximisation of environmental and economic value. The upper right quadrant defines high economic value and high environmental value. The lower left quadrant identifies low economic and low environmental value. High economic and low environmental value is described by the upper left quadrant while low economic and high environmental value is defined in the lower right corner.

Figure 1 **Ecologically sustainable development assessment of Wild Rivers**



Note: ESD: Ecologically sustainable development; Parks: National parks

Source: ACIL Tasman

National parks maximise environmental options but explicitly limit economic options. The Act maximises neither. From an options perspective National Parks may restrict future potential land use options to a similar extent as mining. Mining has some irreversible destructive impacts on the environment. National Parks and the conceptual extension of natural value preservation on private land through Wild Rivers are in practice irreversible. Some governments are now reliant on green electoral preferences. Ascent to power would be blocked to political parties advocating the abolition of a National Park. The onerous legislative process specified in the Act for Wild River Declaration amendments is also likely to ensure practical irreversibility.

In light of this observation, development of a future options maximisation decision rule may potentially inform land use decision-making.

5.4 Option valuation

Adoption of an options perspective to land use management delivers an alternative framework for informing decision-making. Traditional economic valuation is heavily discounted in the presence of uncertainty and/or risk. Options frameworks provide an alternative. Financial option valuation techniques can be applied to the real world. These techniques explicitly give voice to uncertainty. All else being equal, the greater the level of uncertainty, the higher the value an option has.

Valuation of real options has many perspectives:

- **Insurance value** - Options that expire unexercised have value. In the same way that most car owners do not claim on their accident insurance, they none the less receive value from the knowledge that they are comprehensively covered in the event of calamity.
- **Forward options** - As science and technology advance, investments that previously made no financial sense may become beneficial with the application of new technology. Maintenance of future options has real value.
- **Growth options** - Traditional valuation tools undervalue investments that contain options to expand into new markets or products at later stages, based upon favourable outcomes in the initial stages. If the initial project is a pre-requisite for subsequent expansion, its valuation should take account of the option to expand. An extreme, but common, example of this is a feasibility study.
- **Option to delay** - The ability to avoid an action that could prove to be a mistake is what makes waiting valuable. The option to delay is most likely to be valuable when the firm has the rights to a project for a long time (for example, control over the natural resource).
- **Option platforms** - Platform investments create valuable follow-on contingent investment opportunities. For example, an R&D project may lead to further marketable products. Traditional tools can greatly under-value these options.
- **Learning options** - Learning investments are made to obtain information that is otherwise unavailable. The learning effort is designed to create the highest-valued information in the shortest amount of time (or to maximise the net value of the investment, taking into account the opportunity cost of time). Oil exploration is an example of a learning investment as it provides geological information on the likely size of the reserves.

- **Option to abandon** - The option to abandon enables containment of downside risk. Thus the option to abandon has value because projects can be scaled back or terminated if they do not measure up to expectations.
- **Shadow costs** - Standard valuation techniques may overvalue some projects because they fail to recognise the loss in flexibility that results in implementation if acceptance of one project eliminates options attaching to other projects. For example, building a plant in one city may eliminate the option to expand the capacity of plants in nearby cities.

5.5 Benefits of an options approach

The Wild Rivers Act is too narrowly focused. It assumes that the only potential risks are environmental. Welfare Reform has demonstrated the risks associated with a lack of development and social engagement. These risks have also been shown to be intergenerational.

An option based framework would:

- help rebalance the central equilibrium that underpins ESD and is missing in the Act, namely economic development, environmental conservation and intergenerational equity
- ensure that the costs of restrictive legislation are fully articulated and understood
- provide essential input into cost benefit considerations that are central to applying the principles of ESD to society
- inform the timing of decision making in light of uncertainty and risk
- ensure that knowledge and understanding is expanded to deal with uncertainty
- provide confidence that the value of options changes over time and that some options should be abandoned
- maximise social well being by maintaining the maximal number of future options for growth, conservation and future generations
- provide insurance against future uncertainty, especially in light of uncertain impacts of climate change
- ensure that the people of Cape York can take full advantage of the advance of technology and innovation
- generation of a virtuous circle of unforeseeable future options that dynamically expand the array of future possibilities
- expand the resource base available to better manage the environment into the future.

5.6 Recommendation

ACIL Tasman recommends that Cape York traditional owners seek to fully explore the power of an options-based framework in dealing with land use decision-making. This recommendation is based on:

- A clear finding that the Wild Rivers Act is heavily restrictive in its application of the precautionary principle
- The resulting injury to property rights
- The imminent threat posed to future potential ESD options by further legislation that uses Queensland's radical application of precaution;
  - departure from the well established Australian ESD framework
  - apparent contravention of existing COAG commitments.

Land owners should give active consideration to developing an options framework to:

- Inform their own decision-making
- Influence government to alter the manner in which land use policy decisions are made.

References

Arrow, K., & Fisher, A. (1974). Environmental Preservation, Uncertainty, and Irreversibility. *Quarterly Journal of Economics , 88* (2), 312-319.

Australian Government. (1992). *Intergovernmental Agreement on the Environment.* Retrieved April 30, 2009, from Department of the Environment, Water, Heritage and the Arts: http://www.environment.gov.au/esd/national/igae/index.html

Cape York Heads of Agreement. (1996). Retrieved April 30, 2009, from The Wilderness Society: http://www.wilderness.org.au/articles/agreement/?searchterm= cape york heads of agreement

Cape York Institute. (2009). *The economic potential of emerging markets for carbon and biodiversity for Cape York Indigenous people.* Cairns: Cape York Institute for Policy and Leadership.

Cooney, R. (2004). *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners.* Gland, Switzerland and Cambridge, UK: IUCN.

Ecologically Sustainable Development Steering Committee. (1992). *National Strategy for Ecologically Sustainable Development.* Retrieved April 30, 2009, from Department of the Environment, Water, Heritage and the Arts: http://www.environment.gov.au/esd/national/nsesd/strategy/index.html

Farrow, S. (2004). Using Risk Assessment, Benefit-Cost Analysis, and Real Options to Implement a Precautionary Principle. *Risk Analysis , 24* (3), 727-735.

Gollier, C., & Treich, N. (2003). Decision-Making Under Scientific Uncertainty: The Economics of the Precautionary Principle. *The Journal of Risk and Uncertainty , 27* (1), 77-103.

Knight, F. (1921). *Risk, Uncertainty and Profit.* New York: Augustus M Kelley.

Nicholls, D. (2008). *Compensation for Injurious Affection Caused by Planning Instruments - Is it Withing on the Vine?* Brisbane: Hopgood Ganim Lawyers.

Queensland Government. (2009a). *Archer Basin Wild River Declaration.* Brisbane: Department of Environment and Resource Management.

Queensland Government. (2009b). *Lockhart Basin Wild River Declaration.* Brisbane: Department of Environment and Resource Management.

Queensland Government. (2009c). *Stewart Basin Wild River Declaration.* Brisbane: Department of Environment and Resource Management.

Queensland Government. (2009d). *Stewart Basin wild river declaration consultation report.* Brisbane: Department of Environment and Resource Management.

Queensland Government. (2008). *Wenlock Basin wild river declaration proposal.* Brisbane: Department of Natural Resources and Water.

Queensland Government. (2007). *Wild Rivers Code.* Brisbane: Department of Natural Resources and Water.

Scrutiny of Legislation Committee. (2005, June 7). Alert Digest. *(7)* . Brisbane: Queensland Parliament.

United Nations Conference on Environment and Development. (1992). *Rio Declaration on Environment and Development*. Retrieved April 30, 2009, from UN Documents: Gathering a Body of Global Agreements: http://www.un-documents.net/rio-dec.htm

Weekly Hansard. (2005, May 24). Retrieved April 30, 2009, from Queensland Parliament: http://www.parliament.qld.gov.au/hansard/

Weekly Hansard. (2006, October 31). Retrieved April 30, 2009, from Queensland Parliament: http://www.parliament.qld.gov.au/hansard/

Weekly Hansard. (2007, February 22). Retrieved April 30, 2009, from Queensland Parliament: http://www.parliament.qld.gov.au/hansard/

Weirer, A., & Loke, P. (2007). *Precaution and the Precautionary Principle*. Melbourne: Productivity Commission Staff Working Paper.

Wild Rivers Act 2005.

Wild Rivers Bill 2005: Explanatory Notes. (n.d.).

Wild Rivers Regulation 2007.

A National Strategy for Ecologically Sustainable Development

The National Strategy for Ecologically Sustainable Development was prepared by the Ecologically Sustainable Development Steering Committee and endorsed by the Council of Australian Governments in December 1992. It states:

Core Objectives

- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
- to provide for equity within and between generations
- to protect biological diversity and maintain essential ecological processes and life-support systems

Guiding Principles

- decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
- where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
- the global dimension of environmental impacts of actions and policies should be recognised and considered
- the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
- the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
- cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
- decisions and actions should provide for broad community involvement on issues which affect them

These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. A balanced approach is required that takes into account all these objectives and principles to pursue the goal of ESD.

(Ecologically Sustainable Development Steering Committee, 1992)

B Cape York Heads of Agreement

THIS AGREEMENT is made on the fifth day of February 1996

Between

- the Cape York Land Council (CYLC) and the Peninsula Regional Council of the Aboriginal and Torres Strait Islander Commission (ATSIC), representing traditional Aboriginal owners on Cape York Peninsula, and
- the Cattlemen's Union of Australia Inc (CU), representing pastoralists on Cape York Peninsula, and
- the Australian Conservation Foundation (ACF) and The Wilderness Society (TWS), representing environmental interests in land use on Cape York Peninsula.

1. The CU, ACF and TWS acknowledge and affirm that the Aboriginal people, represented by the CYLC, and the Peninsula Regional Council of ATSIC, are the original inhabitants of Cape York Peninsula who are entitled by their traditional law to their traditional customs and culture, including access to areas of traditional significance.
2. The Aboriginal people of Cape York Peninsula, the ACF and TWS acknowledge and affirm that pastoralists of Cape York Peninsula (including non CU members) are significant landholders who have existing legal right and concerns related to their industry and lifestyle.
3. The parties acknowledge that there exist on Cape York Peninsula areas of significant conservation and heritage value encompassing environmental, historical and cultural features, the protection of which is the responsibility of State and Federal Governments in conjunction with the parties.
4. The parties maintain their respective positions on the East Coast Wilderness Zone but shall encourage negotiations between pastoralists in the Zone and the State Government on its creation. If the negotiations prove unsuccessful, the parties undertake to meet again to discuss the matter.
5. All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interest in the area.
6. Subject to clause 5, all parties are committed to the development of a sustainable cattle industry on Cape York Peninsula.
7. The parties are committed to jointly approach the State Government to secure upgraded lease tenure for pastoral properties and restructure lease boundaries under the existing provision of the Queensland Land Act. As a necessary prerequisite for this process, a property consistent with clause 5, in consultation with existing landholders. The parties agree to encourage

leaseholders to make necessary applications to the State Government for these purposes.

8. The CU and CYLC agree to make joint approaches to secure investment for development of the cattle industry through the Indigenous Land Corporation, The Rural Adjustment Scheme, and other sources.
9. The Aboriginal people agree to exercise any native title rights in a way that will not interfere with the rights of pastoralists.
10. Pastoralists agree to continuing rights of access for traditional owners to pastoral properties for traditional purposes. These rights are:
    - right to hunt, fish and camp;
    - access to sites of significance;
    - access for ceremonies under traditional law;
    - protection and conservation of cultural heritage.
11. These rights shall be attached to the lease title and shall be consistent with a detailed code of conduct to be developed between pastoralists and traditional owners. The code of conduct shall ensure leaseholders are protected from public liability claims arising from the exercise of access rights.
12. The code of conduct for access shall be a minimum to apply to the region, but there shall also be provision for additional features to be negotiated between traditional owners and individual landholders.
13. The parties agree that areas of high conservation and cultural value shall be identified by a regional assessment process according to objective national and international criteria. There shall be an independent review acceptable to all parties in the case of dispute as to whether the values are consistent with the criteria. Where such areas are identified, the landholder shall enter into appropriate agreements to protect the area under State or Commonwealth provision which may include World Heritage listing. As part of such agreements, funds shall be provided for management of the area, monitoring of agreements and equitable economic and social adjustment.
14. There shall be no compulsory acquisition of private leasehold or freehold land, without prior negotiation with the landowner, and unless all reasonable avenues of negotiation, including the agreements detailed in clause are exhausted.
15. The purchase of land for the protection and management of cultural and environmental values shall only take place as land becomes available commercially.
16. The parties support the establishment of a fund for the purpose of purchasing land with identified high environmental and cultural values by the Commonwealth Government. The fund also shall contain funds for effective management of land purchased by the fund.

17. Land purchased through the fund shall be assessed for World Heritage values.
18. The management regime to apply to land purchased through the fund shall be negotiated between the Commonwealth and State Governments and traditional owners and shall be based on culturally and ecologically sustainable use of the land's resources to achieve Aboriginal economic viability. Negotiations will involve relevant community organisations and traditional owners on a sub-regional basis, and particularly in the following sub-regions:
    - Kowanyama
    - Pormpuraaw
    - Aurukun
    - Napranum
    - Old Mapoon
    - Northern Peninsula
    - Lockhart River
    - Coen
    - Laura
    - Cooktown
    - Hope Vale
    - Wujal Wujal
19. The nomination for World Heritage listing on any land on Cape York Peninsula shall proceed only where there is a management arrangement which is negotiated with all landholders who may be affected directly by such listing.
20. The parties shall approach the Commonwealth and the State to become parties to this agreement process.
21. The parties are committed to pursuing agreements with the mining and tourism industries and with other industries with interests in Cape York Peninsula.

(Cape York Heads of Agreement, 1996)

An Economic Unravelling of the Precautionary Principle: The Queensland Wild Rivers Act 2005

STEPHEN ILES AND GARY JOHNS[1]

Abstract

The paper assesses the application of the precautionary principle in the Queensland Wild Rivers Act 2005. It finds that the Act is more restrictive than the ecologically sustainable development principles as conceived, and deployed, by the Queensland Government elsewhere. At the same time the Act is injurious to property rights, unnecessarily restricts future development options, and does not allow for assessments of non-environmental values or the cost of options forgone. As a result the Act has severe consequences for the Cape York economy and increases the risk of perverse consequences for the environment.

Background

Cape York Peninsula contains the largest areas of natural environment in eastern Australia within a land space slightly larger than Victoria. Unlike Victoria, which accommodates five million people at a high average standard of living, Cape York houses just 13 000 people, the vast majority of whom live on welfare. Indigenous people make up more than 50 per cent of the population and own and/or control more than six million hectares, representing 45 per cent of Cape York's 13.7 million hectares. [2] There is a major Welfare Reform program taking place on Cape York, designed to break widespread passive-welfare dependence and boost individual economic independence. In support of this major reform,

1 Stephen Iles, Cape York Institute; Gary Johns, Australian Catholic University, Gary.Johns@acu.edu.au. The original work for the paper was undertaken when both authors were consultants with ACIL Tasman Pty Ltd. The client was Balkanu Cape York Development Corporation. The authors would like to thank the two anonymous referees and the Editor for their comments.

2 Balkanu Cape York Development Corporation (unpublished correspondence).

the Queensland and Australian governments have contributed $100 million over four years. Nevertheless, the inhabitants are generally poorly equipped to face the serious environmental and economic threats to Cape York's biodiversity posed by invasive cane toads, wild pigs and other feral animals and grasses which impose great cost on Cape York.

An early attempt to satisfy the competing interests on Cape York had various interest groups sign the Cape York Heads of Agreement. The Cape York Land Council, The Wilderness Society, the Australian Conservation Foundation, the Cattlemen's Union and (some years later) the Queensland Government agreed:

> All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interest in the area. (Cape York Heads of Agreement 1996)

In 2005, the Heads of Agreement strategy was superseded, however, by the introduction of the Wild Rivers Act, legislation proposed by conservation groups in return for political support to the Queensland Government. More than a third of the total Cape York Indigenous estate is now designated for conservation purposes, mostly as national parks and nature refuges. [3] The strategy behind the Wild Rivers Act appears to assume that the future of Cape York will be based on limited types of tourism and government transfers (environmental welfare), [4]and that future residents will be unable to manage and develop land both to create wealth and preserve or indeed enhance the environment of Cape York. The Act has proved politically contentious and in 2010 the Federal Opposition vowed to introduce a Bill to the Commonwealth Parliament with the aim of overriding the Queensland legislation.

The precautionary principle

The Queensland Government seeks to protect the environment from future actions adverse to the environment. In doing so, it has drawn on the concept of Ecologically Sustainable Development (ESD) (Brundtland 1987), the widely accepted approach to jointly managing in the interests of the environment and development so as to protect the enjoyment of future generations in the environment. In order to achieve the desired balance of interests invoked by ESD, however, it is essential to apply some rule to manage the risk to the

3 Ibid.

4 A trial of 20 Wild River Rangers is under way across the Gulf and the Cape, with a total commitment of 100 rangers to eventually cover the entire Gulf and Cape declared Wild Rivers (Queensland Government 2009d).

environment that development may bring. The widely applied rule is that of the precautionary approach or precautionary principle. The Queensland Government has applied this principle in its Wild Rivers Act.

At its simplest, the precautionary principle advises that a proponent should proceed with caution before undertaking an action where there is risk of possible harmful outcomes. Following Cussens (2009) and Soule (2000), it is clear that the apparently simple principle is not so simple after all. The principle, although widely invoked, does not necessarily assist in managing risk. For example, a widely accepted definition of the principle is known as the Wingspread Statement:

> When an activity raises threats of harm to the environment or human health, precautionary measures should be taken, even if some cause-and-effect relationships are not fully established. (quoted in Cussens 2009: 67)

The difficulty with the statement is that there is no definition of three crucial elements: threat of harm, uncertainty about risks and causal relationships, and the level of precaution in response to the threat. Cussens suggests that if threat of harm is taken to mean the actual risk of an activity, then the principle says too little; it is reduced to a cliché that tells us, 'when there is evidence of hazard, it is prudent to take care'. If, on the other hand, 'threat of harm' means the public perception of hazard, then the precautionary principle says too much; it can be invoked to slow or stop innovative, and possibly very beneficial, products or procedures, on the basis of lack of evidence (Cussens 2009: 67). To illustrate the bias of the principle, Cussens (2009: 69) formulates an alternative proposition: 'When a lack of activity raises a threat of harm to wealth creation, precautionary measures should be taken, even if some cause-and-effect relationships are not fully established.'

As Cussens argues, the statement has all the flaws of the Wingspread definition, but is nevertheless its 'logical equivalent'. Both are precautionary principles; where Wingspread has human and environmental health as its fundamental value, Cussens' version has wealth creation. Cussens' purpose is to illustrate that both versions are too vague to be practically applicable and that the usual version of the precautionary principle is value laden in what might be called a 'green' direction: 'A principle that is presented by its proponents in the guise of a value neutral guide to policy-making in the face of uncertainty is nothing of the kind.' (Cussens 2009: 69).

ESD and the application of the precautionary principle in Australia

Perhaps reflecting the insight that the precautionary principle is value laden, one of the premier international environmental organisations, the International Union for the Conservation of Nature (IUCN), recently published guidelines (IUCN 2007: 6) for applying the precautionary principle to biodiversity conservation and natural-resource management. Crucially, the guidelines suggest that the principle be integrated with other relevant principles and rights. The IUCN cautions that other principles and rights, including intergenerational and intragenerational equity, the right to development, the right to a healthy environment, and human rights to food, water, health and shelter must be borne in mind when applying the precautionary principle:

> In some circumstances these other rights may strengthen the case for precautionary action. In other circumstances, the Precautionary Principle may need to be weighed against these other rights and principles, taking into due account the critical nature of the Principle. (IUCN 2007: 6) [5]

It is the contention of the paper that risk and uncertainty can never be avoided for either protection or development choices. For example, given the difficult circumstances of Aboriginal people in the Cape, Aboriginal development and unemployment are both uncertain under the protection and development options. There may be, for example, some irreversible effects of development opportunities lost forever under a stringent application of the precautionary principle. The ESD invoked by the IUCN and the Australian intergovernmental agreement seeks among other things, for example, to balance the needs of Aboriginal people and their desire to attain the living standards of other Australians and the needs of the environment. The difficulty is that the principle does not of itself provide a solution as to how these are to be achieved. The suspicion with Wild Rivers is that the principle is invoked in such a way as to allow the environment to trump the interests of Aboriginal economic aspirations. Rather than resort to such a crude use of the principle, it is possible to use management tools such as cost-benefit analysis to better understand, manage

5 Similarly, the national strategy for ecologically sustainable development adopted by the Council of Australian Governments in 1992 (Intergovernmental Agreement on the Environment) was careful to balance various principles and rights including, for example:

- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
- to provide for equity within and between generations
- to protect biological diversity and maintain essential ecological processes and life-support systems. (Ecologically Sustainable Development Steering Committee 1992)

and allocate risk and uncertainty. For example, the precautionary approach may encourage research that seeks to build knowledge and remove uncertainty, or apply sensitivity analysis that examines a range of possible outcomes and their response to changes in key variables. Most important, precaution used flexibly may accommodate the advance of knowledge and regulatory processes that require extensive testing to demonstrate reliability of outcome as well as prohibition of potentially damaging activity.

There is no single approach to the application of the principle in Australia. Indeed, Weirer and Loke (2007) count no fewer than 120 pieces of legislation and hundreds of 'non-binding policies' that invoke precaution in Australia, most of which reference the Intergovernmental Agreement on the Environment. The key question is to understand which version of the principle — between flexible and heavily restrictive — has been applied in Cape York under the Wild Rivers Act.

Various attempts have been made to formally classify the Australian approaches. The typology initially developed by Cooney (2004) and subsequently modified by Weirer and Loke (2007) is a good example.

Broad categories are as follows:

- Flexible applications seek to resolve uncertainty and not use uncertainty as a reason to avoid taking action. Cost-effectiveness may be a criterion for determining whether action should be taken.
- Moderately prescriptive responses narrow the field of reference for decision-makers. Cost-benefit analysis and magnitude of impact are less influential.
- Heavily restrictive interpretations discard considerations of cost-benefit. An absolute threshold is frequently established to trigger action, regardless of scale or impact.

Within the broad categories, variants of the precautionary approach (Weirer and Loke 2007), differ over whether:

- a threshold for action is frequently established (often 'serious' or 'irreversible')
- associated costs and benefits are assessed
- action is required by decision-makers
- the burden of proof is reversed onto proponents to demonstrate that harm will not arise.

Assignment of costs

The five tests summarised in Table 5.1 form the basis of the assessment framework to be applied to the Wild Rivers Act and have been formulated in conjunction with the three broad categories specified above.

Threshold tests

A trigger for invoking the principle can often be identified. Flexible applications often require an acknowledgement that consequences be sufficiently severe and have a degree of likelihood of occurrence. By contrast, heavily restrictive versions have no such requirement. The 'serious or irreversible' terminology is adopted in the Intergovernmental Agreement on the Environment and accordingly is categorised as flexible.

Cost-benefit analysis

Cost-benefit analysis is a second test to determine the strength and intensity of precaution in policy, regulation and legislation. The IUCN guidelines, the Intergovernmental Agreement on the Environment as well as the Cape York Heads of Agreement acknowledge the equal importance of conservation, intergenerational equity and economic and social development. An absence of cost-benefit analysis implies a preference for one of the latter three elements.

Irrespective of costs and benefits, an acceptance or assertion that an area has high preservation values can as a separate exercise lead to a search for the most cost-effective way of achieving those values. The IUCN guidelines and the Intergovernmental Agreement specifically cite the requirement for cost-effective responses.

Burden of proof

Reversal of the traditional burden of proof in relation to potential harm or damage in light of uncertain facts is a readily observed element of restrictive interpretations of precaution. Specifically, heavily restrictive versions require proponents to demonstrate that their proposed actions are entirely free from harm or damage. In contrast, flexible interpretations may not assign a burden of proof but, rather, simply remove uncertainty as a means of forestalling action to prevent harm.

Neither the Guidelines nor the Agreement reverses the burden of proof, requiring developers to demonstrate freedom from harm. The Agreement does, however, call for 'fundamental consideration' of 'biological diversity and ecological integrity'.

Costs

Consideration of cost is a contested area. Weirer and Loke (2007) discuss the assignment of liability in the event of damage. Heavily restrictive interpretations clearly assign liability to development proponents, while flexible applications may not directly. The Agreement applies the 'polluter pays' principle and calls for developers to bear costs of 'containment, avoidance or abatement'. This paper more critically assesses the broader consequence of costs.

The specific incidence of cost is important. Some communities have greater capacity to bear costs. This fact explains differentiated expectations in climate-change debates. First-world nations, such as Australia and the United States are reasonably expected to incur greater costs now while rapidly industrialising nations, such as India and China, have lower expectations placed on them. Developing nations like Bangladesh have even lower capacities again. The Guidelines identify this aspect when it states the qualification, 'according to their capabilities'.

Attendant to discussion of current costs is consideration of intergenerational cost burdens. Precaution seeks to reduce the costs of damage and harm borne by future generations arising from the present consumption of resources. Flexible versions of precaution that acknowledge the requirement for a balanced treatment of competing aims, such as conservation and development, are keenly aware of intergenerational cost burdens arising from actions that limit either. Also, if sound, ecologically sustainable development is stopped for minor environmental reasons, or for environmental effects that can be mitigated, future generations suffer a loss of potential income (part of which could have been used for environmental protection).

Table 1: The Comparison of Precautionary Principle applications of Weirer and Loke

	Flexible	Moderately-prescriptive	Heavily restrictive
Is there a threshold of threat for triggering application of the Principle? (a)	Yes For example, 'significant', 'irreversible', 'serious' harm	Sometimes	No
Is an assessment of the costs and benefits of alternative actions required?	Usually Cost-effectiveness may be applied	Not usually Cost-effectiveness may be applied	No Cost-effectiveness may be applied
Is precautionary action required?	No	Yes Either required or 'justified'	Yes
Is the burden of proof assigned? (b)	No Depends on other regulations	No Depends on other regulations	Yes Developer/producer bears the burden of proof
Is liability for harm assigned? (c)	No	No	Usually Developer/producer bears liability

(a) Failure to satisfy the threshold test prevents the Principle being invoked but does not preclude precautionary action.

(b) The standard of proof is crucial in determining the practical effects of assigning liability.

(c) Liability is the legal obligation to provide compensation for damage resulting from an action for which the liable party is held responsible.

Source: (Weirer and Loke 2007: 7)

Costs also arise from distorted priorities. Heavily restrictive applications risk ignoring real and present dangers by placing too great an emphasis on distant and potential risks. Disproportionate responses that fail to deal with known and real risks now may impose significant costs on society.

Perverse consequences may also impose costs. Such consequences arise from heavily restrictive interpretations of precaution that mandate action, regardless of cost, in the event that the preventative or remedial actions taken are ineffective. Application of safety margins and improved information through research, evident in flexible approaches, may be more effective and minimise costs of action.

Well-established Australian expressions of the precautionary principle explicitly seek to balance consideration of economic and environmental consequences of decision-making. Specific acknowledgement is made of the fact that economic development pays for conservation. Section 3.3 of the Agreement states that:

> The parties consider that strong, growing and diversified economies (committed to the principles of ecologically sustainable development) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner. (Australian Government 1992)

Applying the framework to the Wild Rivers Act

Initially, six Wild River Basins were declared in Queensland, with most situated in the Gulf of Carpentaria. Subsequently, four additional Wild River Basins — Archer, Stewart, Lockhart, and Wenlock (Queensland Government 2009a, b, c, 2010) — have been declared in Cape York. A further eight Cape York river systems are scheduled to be declared.

Wild Rivers Act is precautionary

The Wild Rivers Act is clearly precautionary. Section three invokes precaution as a primary concept within the Act itself: '…having a *precautionary approach* to minimise adverse effects on known natural values and reduce the possibility of adversely affecting poorly understood ecological functions. (s3, 3, (b)) (emphasis added)

Additionally, precaution is raised in the Stewart River Consultation Report in response to questions from the public about the High Preservation Areas being declared to the maximum possible extent:

> The department, in reviewing the proposed high preservation areas has considered the state of the natural values of the proposed wild rivers and adopted a *precautionary approach* in determining the width of the high preservation areas. (Queensland Government 2009d) (emphasis added)

Disassociation from ESD

The Wild Rivers Act specifically disassociates itself from ESD with the Explanatory Notes to the Act stating:

> The Acts that regulate these resources and activities generally do not set development limits at the catchment scale. Those Acts that do set limits, generally do so under the principles of ecological sustainable development (ESD), which permits a loss in natural values to achieve economic and social benefits. *The level of preservation sought for wild*

> *rivers, which have all or almost all of their natural values intact, is higher than for ESD* but below that generally provided in a national park. (Wild Rivers Bill 2005: Explanatory Notes) (emphasis added)

The Notes go on to establish the absolute importance of preservation:

> Hence it is necessary to clearly specify limits on resource allocations and activities *for the purpose of preserving the natural values of wild river systems*. (Wild Rivers Bill 2005: Explanatory Notes) (emphasis added)

The term 'preserve' has a different meaning to the term 'conserve'. Preservation does not permit any changes, while conservation allows the ongoing management and does contemplate change. This effectively unbundles the three equally important core principles of the National Strategy for Ecologically Sustainable Development of economic development, intergenerational equity and biological diversity. This is in violation of the Queensland Government's COAG commitments. The Act is precautionary in its approach and it specifically disassociates itself from the well-founded principles of ESD in a number of ways.

Low threshold test

The Explanatory Notes recognise that pressure to develop Cape York is 'limited' and 'little' development has historically taken place:

> the level of future development is not expected to be high. Wild rivers tend to be in regions of the State where little development has occurred and *generally have limited development pressure*. (Wild Rivers Bill 2005: Explanatory Notes) (emphasis added)

This establishes a very low threshold for action. Not only are there few expected threats of damage, but that these threats are currently being constrained by existing legislation and regulation.

Precludes cost benefit analysis

The Explanatory Notes to the Act explicitly preclude consideration of cost-benefit analysis by stating:

> While wild rivers may contain or support other values, such as economic, social, scientific, educational and Indigenous, the *Bill is intended to preserve the natural values* listed above. (Wild Rivers Bill 2005: Explanatory Notes) (emphasis added)

Here, the Act establishes the primacy of preservation, rendering the other values secondary and outside the scope of the legislation. In expanding on the

purpose of the Act, the Explanatory Notes introduce the concept of 'necessary development' without defining it. In the absence of cost-benefit analysis, necessary development is clearly understood on purely conservation grounds:

> The aim of the Bill is to ensure that a declared wild river's environment is maintained in its largely natural state, and impacts from *necessary development* minimised. (Wild Rivers Bill 2005: Explanatory Notes) (emphasis added)

Like any policy, the Wild Rivers Act imposes, either implicitly or explicitly, costs and benefits (Rolfe 1995). There has been no assessment of these to check that adverse costs are not too high. The justification of the Wild Rivers Act would normally involve an assumption that the benefits of conservation outweigh the costs. No assessment of the costs and benefits of individual declarations has been undertaken to identify whether it is worthwhile for a river to be declared. This underscores the earlier observation that the Act unbundles the ESD package of equally important core objectives detailed in the National Strategy and the Cape York Heads of Agreement. The Wild Rivers Act removes any consideration of elements outside natural preservation, including cost-benefit analysis. It is heavily restrictive legislation.

Reverses burden of proof

A burden of proof, to be carried by the applicant, is clearly established by the Act at two stages.

- At the property development plan stage
- At the ministerial decision-making stage.

The Wild Rivers Code is very explicit in its application of precaution:

> When determining whether an application meets the required outcome, the assessment manager must take a precautionary approach that is, not use the lack of full scientific certainty as a reason for not imposing requirements or conditions to minimise potential adverse effects on the natural values. *The onus lies with the applicant to demonstrate that a proposed development or activity meets the required outcomes of the code.* (Queensland Government 2007) (emphasis added)

Is highly restrictive

A proponent of a prohibited development in a Highly Protected Area (HPA) can seek to have the prohibited development assessed by lodging a Property

Development Plan. Approval of the Plan does not result in approval to proceed. Rather, the approved Plan forms the basis for a change to the Wild River Declaration.

Consideration of a property development plan under the Wild Rivers Code is, therefore, clearly forbidden. Further, a proposal under a Plan must be assessed with reference to:

> the nature and extent of any other thing proposed to be done in addition to the activities, or the taking, that would result in a *beneficial impact on the natural values* of the relevant wild river (s31D, 1, (j)) (emphasis added)

Not only must the proponent demonstrate that *no harm* will arise from the proposed development, the proponent must demonstrate a *beneficial impact* on conservation values! This narrowly defined beneficial environmental impact is well outside the scope of ESD. Well-defined and accepted Australian interpretations of ESD place no requirement of proof on proponents. The Act is clearly highly restrictive, a finding reinforced with reference to Ministerial decision-making. Any proposed amendment is also subject to the consideration of public submissions and, ultimately, ministerial decision. Once a property development plan is considered by the relevant minister, the minister is required to ensure that the proposed amendment: 'will not have an overall adverse *impact on the natural values* of the wild river. (s31E(b)) (emphasis added)

And that further: 'the *environmental benefits* of the plan justify the approval of the plan. (s31E(c)) (emphasis added)

The proposed amendment must demonstrate that the property development plan has positive environmental benefits and not simply an absence of harm.

The process for ministerial decision is lengthy and expensive. For example, a proposed plan has to be submitted with a fee and assessed by an independent panel of scientists expert in hydrology, geomorphology, water quality, riparian function and wildlife movement. If the minister approves the plan, with or without conditions, the minister can then seek to amend the declaration through the current formal process, including public consultation and submission. Based on submissions, the minister will then make a decision whether to amend the declaration. If the declaration is amended the landholder will then have to submit applications for each development and go through the normal assessment process under the Integrated Planning Act or other relevant act. This means that the developments will have to meet the wild rivers requirements. Also, to prevent the landholder later choosing to capitalise on the amended declaration and applying to do something else all developments on the property for the

next 10 years have to be in accordance with the plan (*Weekly Hansard* 2007). With respect to decision-making, the Wild Rivers Act is a highly restrictive interpretation of the precautionary approach.

Is costly

The Act's heavily prescriptive approach precludes assignment of direct costs arising from damage to developers – the 'polluter pays' concept. Liability is irrelevant, as many developments in HPA zones are simply prohibited. Allowable developments in HPA and Protected Area (PA) zones are assigned liability for damage under existing legislation (for example, the Environmental Protection Act (1994)). A broader range of cost considerations must also be taken into account when testing the severity of precaution in the Act (Cooney 2004).

Wild Rivers specifically excludes consideration of costs beyond a narrow interest in loss of natural preservation values. While the Act specifically acknowledges the presence of other competing interests, it clearly disregards them. In doing so, costs associated with lost economic development opportunities and social exclusion are precluded from consideration in the operation of the Act. Decisions are made purely on the basis of environmental benefit. This places significant potential opportunity costs on society.

Neglects intergenerational equity

In as much as Wild Rivers implicitly acknowledges intergenerational equity by seeking to preserve amenity for future generations, it achieves this only in part. While it seeks to conserve Cape York's river catchments for future generations, it ignores the economic and social well-being of these same future generations. Heavily restrictive conservation policy that is disassociated from ESD eliminates current development opportunities and also eliminates all future opportunities. ESD gives full voice to future generations by limiting current and future development that does not maximise welfare. The singular focus on future enjoyment of the environment, at the expense of future economic and social welfare, makes the Act heavily restrictive.

Treats landowners inconsistently under the Act

A further matter, not readily fitting within the Weirer and Loke framework but worthy of consideration nevertheless, is that the Act treats the current and future options of landowners inconsistently. For example, the Act purports to make provision for current and future mining, fishing and grazing. In the Second Reading Speech to parliament on 24 May 2005 the minister gave clear

guidance that the Act provided 'enhanced opportunities' for grazing and fishing. Speaking to subsequent amendments to the Act during the Second Reading on 31 October 2006, the minister permitted minerals exploration and below-ground mining.

What the Act does is prohibit and regulate a wide range of lower-level activities such as tourism and market gardens, for example. The Act seems disproportionate in its response to the actual threats posed to Cape York as opposed to distant and uncertain threats. This necessarily imposes costs. The established Australian legislative and regulatory practice of ESD specifically seeks to minimise costs by allowing wide consideration of costs and benefits attributable to conservation, development and intergenerational equity and selecting options that maximise total benefits, net of costs.

Section 17 of the Act specifically recognises and protects property owners who have elected to develop their land already: 'This clause preserves existing rights of entities to carry out activities and take natural resources.' (Wild Rivers Bill 2005: Explanatory Notes)

Activity that was being carried out prior to declaration and activity that was authorised prior to any declaration under the Act is allowed to continue despite the subsequent operation of the Act. The Queensland Government denies claims that any rights are injured (Queensland Government 2009d) but, compensation issues aside, the very recognition of pre-existing rights implies that future rights may be degraded. This point is underscored by the fact that Property Development Plans across a range of activities in HPAs will not be accepted and are deemed to be improperly made.

Applying the options framework to these circumstances suggests that options already exercised are recognised and protected but future options as yet unexercised are not recognised and not protected.

The rights to future options are injured

In the instance of significant injury to property owners' range of future options, governments frequently compulsorily acquire the property. The Australian Government is constitutionally compelled to compensate property owners 'on just terms' when compulsorily acquiring property. While State governments are not compelled to apply just-terms compensation, they frequently do so (Nicholls 2008).

> When future options are only modestly injured, compensation is a cost effective alternative to compulsory acquisition. This recognises that future options are potentially impaired in the instance of government decision making. (Ibid)

The Wild Rivers Act offers neither compensation nor compulsory acquisition, an aspect of the legislation that the Scrutiny of Legislation Committee commented on as follows:

> It appears to the committee that the only circumstance in which existing rights might potentially be adversely affected by a wild river declaration would be if a declaration affected freehold land. In such cases the general common law right of landowners of freehold land to use that land (subject to not causing 'nuisances' to adjoining landowners) in whatever manner they see fit would probably be inhibited. (Scrutiny of Legislation Committee 2005)

The Act employs a device under the Integrated Planning Act that mandates that certain development applications cannot be considered by the department or the minister.

Injury to the rights of property owners is particularly relevant under Wild Rivers. Declaration of Wild Rivers and the high-preservation zone is made regardless of the property type. Future options available to affected owners are potentially severely curtailed, yet the State makes no offer of restitution for these lost options. This is particularly significant as options are being restricted while tenure resolution is under way through State Land Dealings.

Property owners are potentially faced with injurious impacts to their possible future options. The minister underscored this point in the Act's initial Second Reading speech stating: 'Very few activities will be permitted in the waterway itself or in the 'high preservation' area, including a buffer up to one kilometre wide on each side of the river.' (*Weekly Hansard* 2005)

The Act 'does not limit the matters the Minister may consider' (Wild Rivers Act 2005). It does, however, direct the minister to consider:

- the results of community consultation on the declaration proposal
- all properly made submissions about the declaration proposal
- any water-resource plan or resource-operations plan that applies to all or part of the proposed wild river area.

The Wild Rivers Act fails to recognise that Property owners have 'standing' and are not simply unrelated third parties to the legislation and its direct impacts. Third-party voices are given equal treatment and the Act has no basis

to establish or differentiate the voices. In a best-practice guide published by the World Conservation Union, Cooney (2004) observes that issues of inappropriate incidence of cost burden are 'intimately tied to the question of who is involved and represented in the decision-making process'. Simply appearing as one of many individuals and organisations that participated in a consultation forum does not equate to involvement and representation in decision-making. Cooney then cautions against abuse of the precautionary principle that renders it merely as a 'rhetorical tool of convenience'.

Conclusion

Many of the arguments made by the Queensland Government for the preservation of Cape York could apply to any river in Queensland. A key reason for the focus on Cape York is that the costs of preservation are seen to be low. If this were not so, the legislation would apply everywhere in Queensland. The real problem with the Act is that some general assessment of costs and benefits is being used to select the rivers for declaration, but this is not explicit, and there is no use of costs and benefits to temper the application of the policy on a case-by-case basis. The Wild Rivers Act applies a highly restrictive interpretation of the precautionary principle that unnecessarily limits property owners' future options. Future ESD options on Cape York are currently subject to significant and excessive restrictions. These include:

- legislation such as the Vegetation Management Act 1999
- the current nature of land tenure which is not conducive to the economic use of land.

There is an ever-expanding set of possible future limitations to ESD options in Cape York. The Wild Rivers Act sets a dangerous precedent by radically departing from the well-established and widely understood Australian commitment to the principles of ESD and their equally important foundational concepts. Other possible future limitations to ESD options include:

- World Heritage listing (currently proposed by the State and Commonwealth Governments)
- Australian Heritage listing (proposed by Humane Society International)
- Climate change.

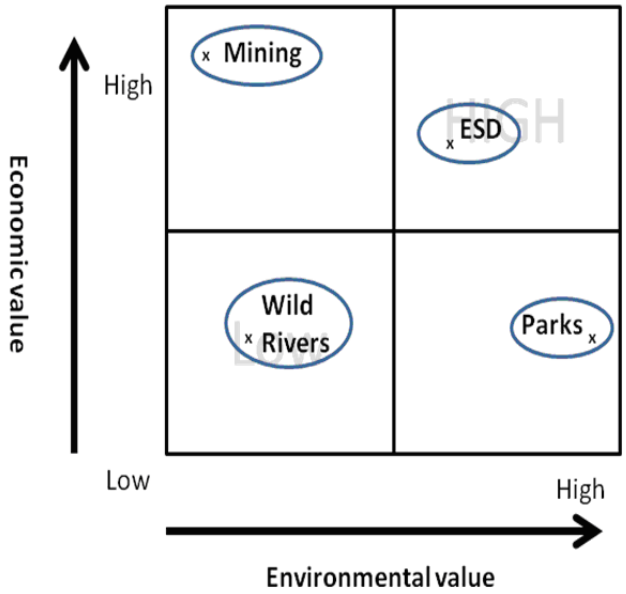
ESD actively seeks to maximise the range of potential future options available to land owners. It explicitly maximises both economic and environmental options. looks at Wild Rivers and ESD in relation to the maximisation of environmental and economic value. The upper-right quadrant defines high economic value

and high environmental value. The lower-left quadrant identifies low economic and low environmental value. High economic and low environmental value is described by the upper-left quadrant, while low economic and high environmental value is defined in the lower-right corner.

National Parks maximise environmental options but explicitly limit economic options. The Act maximises neither. From an options perspective, National Parks may restrict future potential land-use options to a similar extent as mining. Mining has some irreversible destructive impacts on the environment. National Parks and the conceptual extension of natural-value preservation on private land through Wild Rivers are in practice irreversible. Some governments are now reliant on green electoral preferences. Ascent to power would be blocked to political parties advocating the abolition of a National Park. The onerous legislative process specified in the Act for Wild River Declaration amendments is also likely to ensure practical irreversibility.

The Wild Rivers Act is too narrowly focused. It assumes that the only potential risks are environmental. Welfare Reform has demonstrated the risks associated with a lack of development and social engagement. These risks have also been shown to be intergenerational.

Figure 1: Ecologically sustainable development assessment of Wild Rivers



Note: ESD = Ecologically sustainable development; Parks = National Parks

Source: Authors.

References

Arrow, K. and Fisher, A. 1974, 'Environmental Preservation, Uncertainty, and Irreversibility', *Quarterly Journal of Economics* 88(2): 312–19.

Australian Government 1992, *Intergovernmental Agreement on the Environment*, Department of the Environment, Water, Heritage and the Arts: http://www.environment.gov.au/esd/national/igae/index.html

Brundtland, G. H. 1987, *Our Common Future*, World Commission on Environment and Development.

Cape York Heads of Agreement 1996, The Wilderness Society: http://www.wilderness.org.au/articles/agreement/?searchterm= cape york heads of agreement

Cape York Institute 2009, *The economic potential of emerging markets for carbon and biodiversity for Cape York Indigenous people*, Cairns: Cape York Institute for Policy and Leadership.

Cooney, R. 2004, 'The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners', Gland, Switzerland and Cambridge, UK: IUCN.

Cussen, K. 2009, 'Handle with Care: Assessing the Risks of the Precautionary Principle', *Australasian Journal of Environmental Management* 16(2): 66–9.

Ecologically Sustainable Development Steering Committee 1992, *National Strategy for Ecologically Sustainable Development*, Department of the Environment, Water, Heritage and the Arts: http://www.environment.gov.au/esd/national/nsesd/strategy/index.html

Farrow, S. 2004, 'Using Risk Assessment, Benefit-Cost Analysis, and Real Options to Implement a Precautionary Principle', *Risk Analysis* 24(3): 727–35.

Gollier, C. and Treich, N. 2003, 'Decision-Making Under Scientific Uncertainty: The Economics of the Precautionary Principle', *The Journal of Risk and Uncertainty* 27(1): 77–103.

International Union for the Conservation of Nature 2007,'Guidelines For Applying The Precautionary Principle To Biodiversity Conservation And Natural Resource Management', 67th meeting of the IUCN Council 14–16 May 2007.

Nicholls, D. 2008, *Compensation for Injurious Affection Caused by Planning Instruments — Is it Withering on the Vine?* Brisbane: Hopgood Ganim Lawyers.

Queensland Government 2009a, *Archer Basin Wild River Declaration*, Brisbane: Department of Environment and Resource Management.

Queensland Government 2009b, *Lockhart Basin Wild River Declaration*, Brisbane: Department of Environment and Resource Management.

Queensland Government 2009c, *Stewart Basin Wild River Declaration*, Brisbane: Department of Environment and Resource Management.

Queensland Government 2009d, *Stewart Basin Wild River Declaration Consultation Report*, Brisbane: Department of Environment and Resource Management.

Queensland Government 2010, *Wenlock Basin Wild River Declaration*, Brisbane: Department of Natural Resources and Water.

Queensland Government 2007, *Wild Rivers Code*, Brisbane: Department of Natural Resources and Water.

Rodrigues-Neto, J. A. 2008, 'Climate Change Policy: A Theorist's Plea to Take Heed of Game Theory and Ambiguity Aversion', *Agenda* 15(2): 85–90.

Rolfe, J. 1995, 'Ulysses Revisited: A Closer look at the Safe minimum Standard Rule', *Australian Journal of Agricultural Economics* 39(1): 55–70.

Scrutiny of Legislation Committee 2005, *Alert Digest* (7 June) Brisbane: Queensland Parliament.

Soule, E. 2000, 'Assessing the Precautionary Principle', *Public Affairs Quarterly* 14(4): 309–28.

United Nations Conference on Environment and Development 1992, *Rio Declaration on Environment and Development*, UN Documents: Gathering a Body of Global Agreements: http://www.un-documents.net/rio-dec.htm

Weekly Hansard 2005, May 24 Queensland Parliament: http://www.parliament.qld.gov.au/hansard/

Weekly Hansard 2006, October 31 Queensland Parliament: http://www.parliament.qld.gov.au/hansard/

Weekly Hansard 2007, February 22 Queensland Parliament: http://www.parliament.qld.gov.au/hansard/

Weirer, A. and Loke, P. 2007, 'Precaution and the Precautionary Principle', Productivity Commission Staff Working Paper.

Wild Rivers Act 2005.

Wild Rivers Bill 2005: Explanatory Notes.

Wild Rivers Regulation 2007.

Land Use & Conservation Management in Cape York

Proposed Solution and Implementation Plan

April 2010





Roadmap to comprehensive regional conservation agreements and World Heritage listing on Cape York

The exceptional environmental and cultural values of Cape York Peninsula requires a land management solution which is unique to the region. Traditional owners, as the primary land holders of the region, must be proponents of conservation regimes. It is therefore imperative to:

- **Replace the current Wild Rivers declarations on Cape York with the consent provided by the Cape York Land Council's Alternative Procedures ILUA as detailed below**
- **Impose a moratorium on additional Wild Rivers declarations**

Within three months, Cape York Land Council will enter into an Alternative Procedures ILUA under the Native Title Act authorising the Queensland Government to take necessary measures to ensure that the following river protection measures apply to all rivers intended to be covered by the Wild Rivers scheme in the Cape:

- **No in-stream mining**
- **No damming of major waterways**

General development proposals can continue under current legislation

This moratorium will enable the establishment of a comprehensive land management regime and ensure that Traditional Owners are proponents of the conservation solution for Cape York.

Cape York traditional owners as proponents of a comprehensive conservation agenda – three year plan

Step 1: Commonwealth and Queensland Governments will enter into an Alternative Procedures ILUA with the Cape York Land Council and Balkanu which

a) Gives effect to the replacement of existing Wild Rivers Declarations with consent for river protection measures applicable to all intended rivers and places a moratorium on any further Wild River Declarations; and

b) Sets out a process agreement for planning and negotiation leading to a comprehensive regional agreement on land use and indigenous development

Step 2: Parties agree to appoint a high profile facilitator to liaise between the parties in relation to the planning process

Step 3: Commonwealth and Queensland Governments to provide necessary funding support for:

a) Cape York Land Council and Balkanu to facilitate a series of regional and sub-regional forums involving traditional owners over 24 months, aimed at translating the Cape York Heads of Agreement into a binding detailed Cape York Regional Agreement

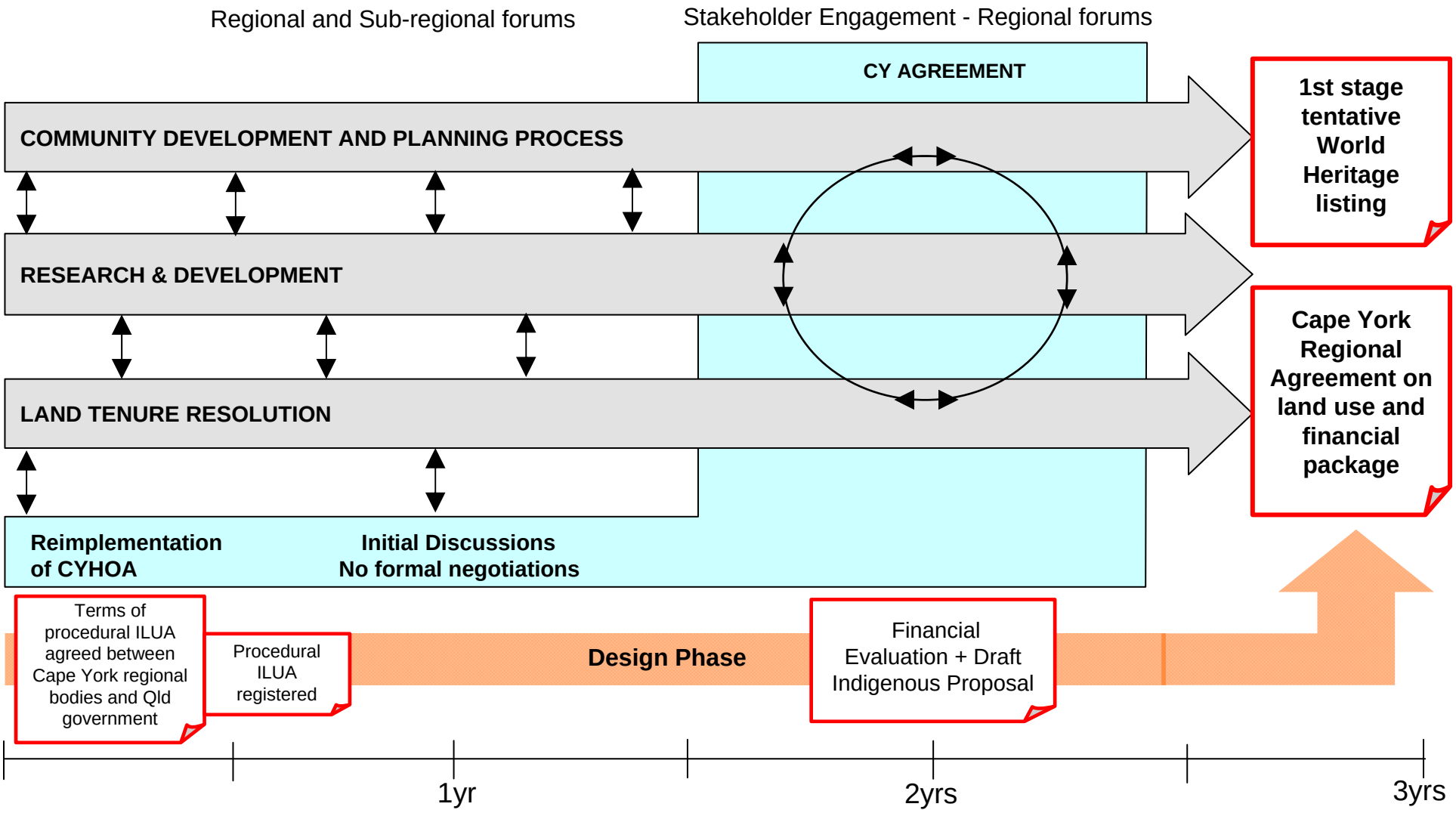
b) Cape York regional organisations to undertake various research and development streams (including legal, policy and governance, economic, cultural, and environmental) and land tenure resolution processes that feed into the planning process

Step 4: The outcome of the planning process after 24 months will be a draft indigenous proposal that will form the basis of a planning and negotiation process with other stakeholders and governments aimed at producing a detailed Cape York Regional Agreement

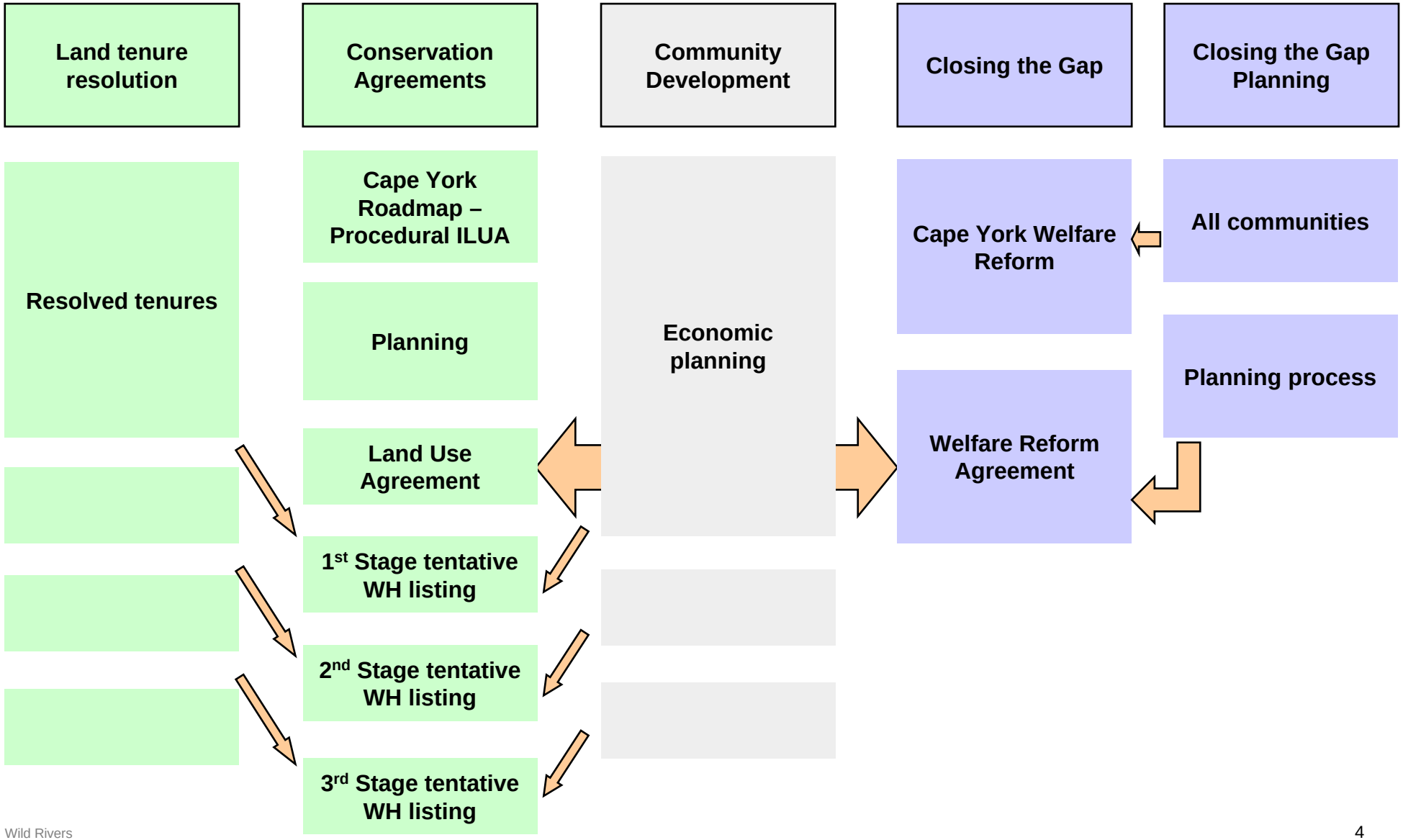
Step 5: Final agreement within 12 months including agreement on a first stage World Heritage listing

***Additional funding is required from government to undertake this work**

Holistic approach towards a Cape York Regional Agreement



Comprehensive Cape York Regional Agreement Plan



Timeline for Cape York Regional Agreement