CHAPTER 2

Key issues

2.1 The Bill purports to protect the rights of traditional owners of native title land to own, use, develop and control that land if it is within an area declared as a wild river area under Part 1 of Division 2 of the *Wild Rivers Act 2005* (Qld) (Queensland Act).

2.2 During the course of the inquiry, the committee received considerable information regarding the Queensland Act and wild river declarations made pursuant to that Act. The committee notes the breadth and divergence of these viewpoints which, in a broad sense, can be classified as either those who support the Queensland Act and oppose the Bill, or those who support the Bill and oppose the Queensland Act.

2.3 However, the terms of reference for the inquiry are the provisions of the Bill, rather than the Queensland Act and the ten wild river declarations made by the Queensland Government as at the date of writing.[1] For that reason, this report will focus primarily on matters directly relevant to the Bill, with reference to extraneous issues only as is considered necessary to provide context or background.

2.4 The focal issues which the report will examine are:

- the *Native Title Act 1993* (Cth) (the NT Act);
- the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP);
- the consultation process;
- drafting issues – clauses 5 and 7 of the Bill; and
- economic opportunities in wild river areas.

Matters directly relevant to the Bill

2.5 A central provision of the Bill is clause 5, which states:

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1 The first six wild river declarations were the Fraser, Gregory, Hinchinbrook, Morning Inlet, Settlement and Staaten Wild River Declarations (28 February 2007); the next three wild river declarations were the Archer, Stewart and Lockhart Wild River Declarations (3 April 2009); and the most recent wild river declaration was the Wenlock Wild River Declaration (4 June 2010). The Queensland Government has announced plans to propose a further 11 wild river declarations by mid-2011: see the Hon. Stephen Robertson MP, Minister for Natural Resources, Mines and Energy, 'More wild rivers protection planned in 2009-10', Media Release, 16 June 2009.

> The development or use of native title land in a wild river area cannot be regulated under the relevant Queensland legislation unless the Aboriginal traditional owners of the land agree.

2.6 Many Indigenous representative bodies and individuals strongly supported this proposed provision.[2] It was the subject of considerable comment in submissions and evidence, both in terms of existing native title rights under the NT Act and the principle of 'free, prior and informed consent' as embodied in Article 19 of the UN DRIP.

Native Title Act 1993 (Cth)

2.7 At present, Division 3 of Part 2 of the NT Act establishes a procedural framework within which acts that would affect native title ('future acts') may be undertaken subject to the consideration of native title rights and interests as a pre-requisite to the validity of the future act (the 'future acts regime').

2.8 Submitters and witnesses were divided as to whether the Queensland Act, or an activity or use covered by it, is a future act within the meaning of the NT Act.[3] Mr Greg McIntyre SC, for example, argued that the making of a wild river declaration is a future act since the declaration:

> …operates as an acquisition of the native title right to decide how the land can be used, which was not achieved voluntarily, and so is a compulsory acquisition. A compulsory acquisition of a native title right is valid if done in accordance with the 'right to negotiate' under the [NT Act]…[4]

2.9 In Mr McIntyre's view, as the procedures set out in Subdivision P of the NT Act were not adopted by the Queensland Government, the Archer, Stewart and Lockhart Wild River Declarations (the 2009 Declarations) are invalid under both the NT Act and section 109 of the Constitution (Inconsistency of laws),[5] which states:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

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2 For example, Lockhart River Aboriginal Shire Council, *Submission 6*, p. 2; Ms Phyllis Yunkaporta, *Submission 9*, p. 2; Mr Harold Lucwick, *Submission 24*, p. 1; and Australians for Native Title and Reconciliation, *Submission 31*, p. 4.

3 For example, Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, pp 12-13; Mr Anthony Esposito, The Wilderness Society, *Committee Hansard*, Cairns, 13 April 2010, p. 28; and Mr Terry Piper, Balkanu Cape York Development Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 49. Also see Carpentaria Land Council Aboriginal Corporation, *Submission 27*, p. 7 which questioned whether the Bill intends to bring the Queensland Act within the ambit of the future acts regime.

4 *Submission 8*, p. 3. Also see *Western Australia v Ward* [2002] HCA 28 at 219; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Commonwealth v Tasmania* (1983) 158 CLR 1; and *Wurridjal v The Commonwealth* [2009] HCA 2.

5 *Submission 8*, p. 4.

2.10 Constitutional inconsistency was a topic addressed in only one other submission. Rather than examining the Queensland Act's inconsistency with the NT Act, the Gilbert & Tobin Centre of Public Law submitted that the Queensland Act, would be inconsistent with the Bill (if enacted) and therefore liable to be 'overruled' to the extent of the inconsistency:

> If the Bill is enacted, it would be inconsistent with the [Queensland Act]. The High Court held in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 that s 109 will be engaged where one law claims to confer a right or entitlement that another law attempts to eradicate or diminish. The [Queensland Act] diminishes the decision-making power of Aboriginal native title holders over their land as would be conferred by the Bill. Enacting the [Bill] would render the [Queensland Act] inoperative to the extent of the inconsistency.[6]

2.11 Other submitters agreed with Mr McIntyre that the Queensland Act affects native title rights and must therefore fall within the ambit of the future acts regime.[7] In this context, the committee notes the relevance of section 44 of the Queensland Act.

2.12 Subsections 44(1)-(2) of the Queensland Act provide:

> **44 Relationship with other Acts**
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> (1) Other than as mentioned in sections 42 and 43, the prohibition and regulation in a wild river area of carrying out activities and taking natural resources are dealt with in the Acts that prohibit or regulate the activities or taking.
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> (2) However, a wild rivers declaration or a wild rivers code, in applying for the purposes of any of those Acts, can not have the direct or indirect effect under the other Act of limiting a person's right to the exercise or enjoyment of native title…[8]

2.13 The Cape York Land Council (CYLC) submitted that the 'shield' of subsection 44(2) does not apply because native title is significantly affected by the operation of the Queensland Act rather than the 'direct or indirect effect under [another] Act'.[9]

2.14 The Cape York Institute (CYI) similarly rejected that the Queensland Act does not affect native title. It attributed its interpretation of subsection 44(2) to the

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6 *Submission 1*, p. 3.

7 For example, Lockhart River Aboriginal Shire Council, *Submission 6*, p. 2; Cape York Institute, *Submission 7*, p. 5; Kokoberrin Tribal Aboriginal Corporation, *Submission 15*, p. 2; and Cape York Land Council, *Submission 25*, p. 6. However, for a different view see Chuulangun Aboriginal Corporation, *Submission 10*, p. 1.

8 Note also that section 42 of the Queensland Act deals with the effect of classification on particular development applications, and section 43 deals with the effect of a declaration on particular development applications.

9 *Submission 25*, p. 6. Also see Mr Greg McIntyre SC, *Submission 8*, p. 4.

view that 'native title is restricted [under the Queensland Act] to so-called 'traditional' activities, confined to hunting and gathering'.[10]

2.15 In contrast, the Queensland Government did not consider that the Queensland Act, or an activity or use covered by it, is a future act within the meaning of the NT Act. In particular:

> …the operation of the Native Title Act is a very complex piece of legislation. It is the state government's view that the passage of the Wild Rivers Act in 2005 was not a future act for the purposes of the Commonwealth Native Title Act; that is, the passage of that legislation did not suppress or extinguish native title.[11]
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> …
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> In making sure that is the case there is section 44 of the [Queensland Act] that explicitly confirms that it cannot.[12]

United Nations Declaration on the Rights of Indigenous Peoples

2.16 In relation to clause 5 of the Bill, another issue of concern to some submitters and witnesses was the internationally recognised principle of 'free, prior and informed consent'.

2.17 Article 19 of the UN DRIP, to which Australia is a recent signatory (3 April 2009), provides:

> States shall consult and cooperate 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.[13]

2.18 The committee heard a number of views regarding the Queensland Government's compliance with Article 19 in its declaration of certain wild river areas. Most submissions and evidence explicitly, or implicitly, questioned such compliance

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10 *Submission 7*, p. 5. Professor Jon Altman also noted that 'under all forms of land rights, native title and complementary resource laws, Indigenous groups are guaranteed 'customary' non-market use rights, but not commercial market (and tradable) rights': see *Submission 14*, p. 2. Also see Ms Katherine Jones, Attorney-General's Department, *Committee Hansard*, Canberra, 30 March 2010, pp 8-9; and Mr Greg McIntyre SC, *Committee Hansard*, Canberra, 30 March 2010, p. 11 for further discussion of the legal meaning of 'native title rights'.

11 Mr Andrew Luttrell, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 35.

12 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 36.

13 United Nations, Declaration on the Rights of Indigenous Peoples (adopted by General Assembly Resolution 61/295 on 13 September 2007), Article 19. Also see Article 32(1): 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.

on the bases of consultation processes employed to date and also a perceived lack of good faith on the part of the Queensland Government.[14]

2.19 Mr Greg McIntyre SC told the committee that the Queensland Act arguably breaches Article 19 due to the nature of the consultation process undertaken in the Cape York Peninsula:

> Certainly the government has the right to enact legislation of this kind, but before it does that I suppose the only argument would be that where there are existing native title rights of an absolute kind then, if it is going to behave in a way which does not arbitrarily deprive people of property, it needs in accordance with, for example, the Universal Declaration of Human Rights to preserve that right, and it ought to give notice, engage in a proper process of consultation and arguably pay compensation for loss.[15]

2.20 This argument presupposes that 'existing native title rights are of an absolute kind'.[16] However, a representative from the Attorney-General's Department and Mr McIntyre both noted that, broadly speaking, native title currently reflects traditional practices, laws and customs of Indigenous claimants.[17]

2.21 Most importantly, two witnesses also highlighted that Article 19 of the UN DRIP has not been incorporated into domestic law,[18] meaning that federal, state and local governments are not bound to implement the principle of 'free, prior and informed consent'. The committee notes that, at present, only the *Aboriginal Land Rights (Northern Territory) Act 1976* framework contains explicit 'free, prior and informed consent' provisions.

The consultation process

2.22 Several submitters focussed on the related principle of consultation which, in their view, has been inadequate under the wild river regulatory scheme. The concerns ranged from a lack of 'proper' consultation, including failure to engage with traditional owners (either individually or through representative organisations), the brevity of the consultation process, the timeliness of consultations, and a perceived lack of serious

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14 For example, Cape York Institute, *Submission 7*, p. 6; Mr Greg McIntyre SC, *Committee Hansard*, Canberra, 30 March 2010, p. 13; and Mr Peter Kyle, *Committee Hansard*, Cairns, 13 April 2010, p. 84.

15 *Committee Hansard*, Canberra, 30 March 2010, p. 13.

16 Mr Greg McIntyre SC, *Committee Hansard*, Canberra, 30 March 2010, p. 13.

17 Ms Katherine Jones, Attorney-General's Department, *Committee Hansard*, Canberra, 30 March 2010, p. 8; and Mr Greg McIntyre SC, *Committee Hansard*, Canberra, 30 March 2010, pp 13-14 where Mr McIntyre notes debate regarding the inclusion of commercial rights.

18 Ms Katherine Jones, Attorney-General's Department, *Committee Hansard*, Canberra, 30 March 2010, p. 7; and Professor George Williams, *Committee Hansard*, Canberra, 30 March 2010, p. 18.

consideration of issues presented by traditional owners to government officials during the consultation process.[19]

2.23 For example, the Lockhart River Aboriginal Shire Council stated that, '[a]s far as we are concerned, there was no credible consultation on [the Queensland Act], nor did the Traditional Owners agree to the proposal'.[20] In a similar vein, the Kulla Land Trust submitted that the 2009 Declarations were made without its input or consent: '[w]e did not agree to it, we raised issues and we were largely ignored'.[21]

2.24 However, other stakeholders told the committee that they had been adequately consulted. Mr Murrandoo Yanner from the Carpentaria Land Council Aboriginal Corporation (CLCAC), for example, told the committee:

> I believe we were consulted appropriately. The Queensland government came out at first and did not consult with us. They went around to the councils. We had a big row with them and they came back and consulted intensely and properly across the region with the native titleholders.[22]

2.25 The Chuulangun Aboriginal Corporation commented on its early involvement with the wild rivers initiative and its consequent ability to positively impact on the terms of the Wenlock Basin Wild River Declaration, which affected its region:

> Chuulangun Aboriginal Corporation has been involved with the Wild Rivers initiative since 2006 and was instrumental in developing the Indigenous guide to Wild Rivers. From 2007-10 we have secured funding under the Wild Rivers initiative for funding to employ three full-time rangers as well as some capital and operating costs for the Chuulangun Ranger program. Funding from the Wild Rangers program has assisted in the establishment of the Chuulangun Ranger Office as well as access to a ranger vehicle to help facilitate activities for the protection of the Wenlock and Pascoe Basins.[23]

2.26 In this context, a representative from Cape York Sustainable Futures noted that:

> ...the consultation process has been targeted at certain people, knowing the outcomes…We have found that people who are against wild rivers and who

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19 For example, Ms Phyllis Yunkaporta, *Submission 9*, p. 2; Northern Peninsula Area Traditional Owners, *Submission 13*, p. 1; Kokoberrin Tribal Aboriginal Corporation, *Submission 15*, p. 2; Balkanu Cape York Development Corporation, *Submission 19*, p. 2; Girringun Aboriginal Corporation, *Submission 26*, p. 2; Carpentaria Land Council Aboriginal Corporation, *Submission 27*, pp 1-4; Ms Ann Creek, *Submission 33*, p. 1; Mr Joseph Elu, Cape York Sustainable Futures, *Committee Hansard*, Cairns, 13 April 2010, p. 70; and Cape York Sustainable Futures, additional information, received 13 April 2010, p. 1.

20 *Submission 6*, p. 2.

21 *Submission 11*, p. 2 and Attachment A, p. 1.

22 *Committee Hansard*, Cairns, 13 April 2010, p. 57.

23 *Submission 10*, p. 5.

> argue against wild rivers are not consulted—or they are not consulted a second time, if there is a second round of consultation.[24]

2.27 The committee heard that the Queensland Government consultation processes have improved over time.[25] Mr Murrandoo Yanner from the CLCAC told the committee:

> …I believe [consultations] may have occurred differently in the cape, and I support the right of Cape York people, or Aboriginal people anywhere, to be consulted properly. All I can speak for is my area [in the lower gulf region]. The Queensland government started off wrong but then they corrected it and they should be applauded for that.[26]

2.28 Mr Anthony Esposito from the Wilderness Society also commended the Queensland Government for ultimately recognising problems with its consultation processes:

> [The Queensland Government] took some time to get up to speed in terms of dealing with the issues of consultation. I think they could have been far more extensive at the early stages…There is further room without doubt for consultation to be improved on a whole range of issues. I think the state government to its credit has at least understood that and started resourcing that, getting officers out to the regions, effectively trying to provide baseline information for communities to use.[27]

2.29 At the Cairns public hearing, an officer of the Department of Environment and Resource Management elaborated on the 'engagement' process undertaken by the Queensland Government pursuant to the Queensland Act. In particular, the officer acknowledged the challenge of finding an effective and culturally appropriate way of engaging with Indigenous stakeholders in an area like Cape York Peninsula, or in other areas that have a significant Indigenous population. The officer confirmed the Queensland Government's intention to continue to improve its consultation processes:

> There has been a commitment from the government over a number of years to try to improve the way in which we [engage stakeholders]…[W]e do see that there is opportunity to continue to improve the way we engage with Indigenous stakeholders around wild river declarations, if not least to make sure that there is a clear understanding of the potential impact of wild river declarations and what they do continue to provide for, in terms of economic aspirations of Indigenous stakeholders, but also to make sure that there can

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24 Mr Joseph Elu, Cape York Sustainable Futures, *Committee Hansard*, Cairns, 13 April 2010, p. 74.

25 For example, Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, p. 12; Mr Anthony Esposito, The Wilderness Society, *Committee Hansard*, Cairns, 13 April 2010, p. 28; and Mr Murrandoo Yanner, Carpentaria Land Council Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 57.

26 *Committee Hansard*, Cairns, 13 April 2010, p. 57.

27 *Committee Hansard*, Cairns, 13 April 2010, p. 28.

> be informed feedback in relation to the features of the wild river declaration.[28]

2.30 In response to questions on notice from the committee, the Queensland Government subsequently provided a detailed analysis of the consultation process relating to the 2009 Declarations. A key mechanism used was the engagement of Balkanu Cape York Development Corporation (Balkanu) to facilitate the organisation of over 100 meetings with Indigenous stakeholders in Cape York Peninsula.[29]

Drafting issues – clauses 5 and 7 of the Bill

2.31 The committee notes that consultation is an important feature of Division 1 of Part 2 of the Queensland Act. Based on evidence received throughout the inquiry, it is clearly a crucial issue for the traditional owners who would potentially be affected by the operation of the Bill. Accordingly, clause 5 of the Bill – which provides for the consent of Aboriginal traditional owners to the making of a wild river declaration – is particularly relevant this context.

2.32 Submitters and witnesses generally supported the stated intention of this provision but also identified certain terminological problems with its drafting. Of particular concern was the vague requirement for agreement from traditional owners. The term 'agreement' attracted substantial comment,[30] as did use of the term 'traditional owners' (not defined in either the Bill or the NT Act).

2.33 For example, the Chuulangun Aboriginal Corporation advised that a wild river area might have a number of traditional owner groups and tribes, each with different perspectives and aspirations for land management and development of their homelands:

> The risk of this is that effectively Traditional Owners upstream might be able to allow a large scale development regardless of the management, perspectives and decisions of Traditional Owners or other land managers downstream. It is not right that one group of Traditional Owners should have the right to veto protection of rivers.[31]

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28 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, pp 33-34.

29 *Submission 35*, pp 5-6 and Attachment A.

30 For example, Queensland Government, *Submission 35*, p. 4; Mr Greg McIntyre SC, *Committee Hansard*, Canberra, 30 March 2010, p. 11; Professor George Williams, *Committee Hansard*, Canberra, 30 March 2010, p. 17; Mr Noel Pearson, Cape York Institute, *Committee Hansard*, Canberra, 30 March 2010, p. 20; and Mr Anthony Esposito, The Wilderness Society, *Committee Hansard*, Cairns, 13 April 2010, p. 28.

31 *Submission 10*, p. 7. For similar arguments, see Mr Simon Kennedy, *Submission 21*, p. 1; The Wilderness Society, *Submission 29*, p. 14; Professor George Williams, *Committee Hansard*, Canberra, 30 March 2010, p. 17; and Mr Donald De Busch, Nyacha Kumopinta Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 3.

2.34 The Nyacha Kumopinta Aboriginal Corporation emphasised the importance of obtaining consent from the right traditional owners:

> In order to get consent there needs to be a consensus from the right traditional owners that speak for their Homelands. This is the only way to follow our traditional lore.[32]

2.35 Adopting a slightly different approach, the Wilderness Society questioned 'the means by which 'the agreement of Aboriginal traditional owners' is to be gained or refused'.[33] Its focus was on clause 7 of the Bill, which provides that the Governor-General may make regulations, including for: seeking the agreement of Aboriginal traditional owners under the Bill; negotiating terms of such agreement; and giving and evidencing the agreement.

2.36 The Wilderness Society noted that clause 7 contains too little detail to provide any real guidance as to the meaning of 'agreement' of traditional owners:

> The complex issues of traditional ownership and Indigenous decision-making and representation, alongside the principles of river ecology that underpin the Wild Rivers environmental regulations, remain almost entirely unaddressed [by the Bill].[34]

2.37 Australians for Native Title and Reconciliation concurred, stating that, in the absence of any draft regulations, it is impossible to tell whether the consultation processes proposed by the Bill would be any better than those currently in place:

> If the Bill were to become law, in the absence of such Regulations, it is difficult to know how it might operate in practice.[35]

Economic opportunities in wild river areas

2.38 Subclause 4(3) of the Bill is stated to protect the rights of traditional owners of native title land within wild river areas to own, use, develop and control that land.

2.39 Use and development of native title land within a wild river area captured the attention of many submitters and witnesses who consider that the Queensland Act has adversely affected economic opportunities in Cape York Peninsula. Those submitters and witnesses argued that the Bill will restore those economic opportunities for traditional owners in that area.[36]

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32 *Submission 20*, p. 3. For similar arguments, see Mr David Claudie, Chuulangun Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 7.

33 *Submission 29*, p. 11.

34 *Submission 29*, p. 11.

35 *Submission 31*, p. 4.

36 For example, Advance Cairns, *Submission 3*, p. 1; Cummings Economics, *Submission 5*, p. 2; and Cape York Institute, *Submission 7*, p. 7.

2.40 Professor Jon Altman took a broad policy view and advocated the granting of commercial rights to develop land to traditional owners in the region:

> Without resource rights Aboriginal goals to either integrate into the market or to earmark resources for local and regional beneficial uses are limited… To create commercial opportunity in remote locationally disadvantaged regions like Cape York will require the allocation of any existing commercial advantage possible to Aboriginal land owners in the region, as well as the provision of the maximum leverage in negotiations that can be provided either by the allocation of 'special law' resource rights or free, prior, informed consent rights.[37]

2.41 Similarly, the Wilderness Society recognised the merit in enabling land development by Indigenous peoples as a pathway out of welfare and disadvantage. However, it submitted that there is a far more complicated and often contradictory set of issues than are presently being considered in the context of the Bill:

> The logic of the Bill suggests that social justice concerns in relation to remote area Indigenous people can be addressed by simply removing environmental regulations, and that development by Indigenous people should be an unfettered right because of social disadvantage, but that the environment will be somehow protected none-the-less.[38]

2.42 The majority of submitters and witnesses did not engage in a policy-oriented debate. For these organisations and individuals, the real issue is how a wild river declaration affects the day-to-day economic aspirations of traditional owners in an affected area. In addition to limited investment opportunities,[39] the committee heard that the designation of management areas – particularly high preservation areas – stymies the use and development of land within a wild river area.

High preservation areas

2.43 As indicated in Chapter 1, wild river areas are subject to a number of statutory controls, which regulate and/or prohibit certain activities within management areas. High preservation areas are the most protected, and some submitters and witnesses

37 *Submission 14*, pp 4-5. Professor Altman's preference was for amendment of the *Native Title Act 1993* to confer full resource rights where there have been native title determinations: see p. 5. Also see Professor George Williams, *Committee Hansard*, Canberra, 30 March 2010, p. 16 for similar views on the limited breadth of the Bill.

38 *Submission 29*, p. 13.

39 Mr Joseph Elu, Cape York Sustainable Futures, *Committee Hansard*, Cairns, 13 April 2010, p. 69.

argued that the designation of such areas in particular is not always reasonable or practical.[40]

2.44 In describing the overall effect of a wild river declaration on development in a wild river area, the Cape York Land Council submitted:

> It all depends on whether it is allocated to high preservation areas or preservation areas in the declaration…[I]t is fair to say that development opportunities are substantially constrained given the constraints that automatically apply with a wild river declaration, particularly around vegetation clearing and affecting in-stream and near-stream water lease.[41]

2.45 Balkanu concurred with this assessment:

> Over the past twelve months. Balkanu Cape York Development Corporation has sought legal advice from a number of sources in relation to various activities within High Preservation Areas. It has become clear that due to the relationship between the Wild Rivers Act and Vegetation Management Act, activities such as the construction of tourist cabins and construction of indigenous housing and campground facilities within a High Preservation Area would either be prohibited or highly problematic.[42]

2.46 Some submitters especially noted that the wild rivers regulatory regime limits only certain forms of development in high preservation areas. By way of example, the Chuulangun Aboriginal Corporation submitted:

> In regard to the Wenlock Basin the 1km protection zone around the river is a sound approach to river protection, particularly given the location of many waterholes within this zone, and the tight association of groundwater/surface water interactions in this area. In reality, only high impact developments are affected in this area, including strip mining, intensive agriculture (eg. feedlotting), and building dams. Homelands development and building infrastructure need only meet simple criteria to happen in this area and existing developments are not affected.[43]

2.47 Mr Donald de Busch from the Nyacha Kumopinta Aboriginal Corporation informed the committee that the Bill will not impact on its development plans:

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40 For example, P&e Law, *Submission 4*, pp 1-2; Cape York Land Council, *Submission 25*, pp 2-3; Mr Noel Pearson, Cape York Institute, *Committee Hansard*, Canberra, 30 March 2010, p. 23; Dr Paul Messenger, Cape Alumina Limited, *Committee Hansard*, Cairns, 13 April 2010, p. 63; and Cape York Sustainable Futures, additional information, received 13 April 2010, p. 1.

41 Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, p. 17.

42 *Submission 18*, pp 21-22.

43 *Submission 10*, p. 7. Also see Dr Geoff Mosley, *Submission 2*, p. 2; and Mr Glenn Walker, The Wilderness Society, *Committee Hansard*, Cairns, 13 April 2010, p. 27 who presented similar views in this regard.

> We have aspirations to have sustainable ecotourism ventures, and we do not feel at all that would be stopped by the legislation one bit.[44]

2.48 At the public hearing in Cairns, the Carpentaria Land Council Aboriginal Corporation described in detail the beneficial wild river ranger program instituted under the Gregory, Morning Inlet, Settlement and Staaten Wild River Declarations. Mr Murrandoo Yanner indicated that more wild river declarations would be welcome in their region:

> We are wild about wild rivers, in a good way. We love it. If we had our way the whole of the lower gulf would be covered in wild river declarations.[45]

2.49 Although the number of rangers employed under the wild river ranger program might be limited, Mr Yanner put in perspective the impact that this initiative has had on the local Indigenous population:

> [The Queensland Government] should be commended for the first time ever in agreeing to fund regional bodies or local Aboriginal groups in a ranger program directly. All other ranger programs in Australia are usually done from the Commonwealth government, so that has been something different by the Queensland government. There is a promise, I believe, of up to 100 throughout the gulf and cape, and we certainly want a lot more down in the lower gulf because the guys we do have are doing great work and the more we get the more great work we will do. These are real jobs, too. They are on three-year contracts; they are on a bloody good salary.[46]

2.50 Mr Greg McIntyre SC agreed that the Queensland Act does not prevent all developments but raised the issue of 'red tape' in the development application process:

> It is sometimes said in the press that that is the effect of it. It is not as far-ranging as that and it does allow various forms of agricultural and other development, but particularly in the high protection areas it restricts it to some extent…my concern is that it adds another quite substantial layer of intricate regulation…[47]

2.51 Mr David Yarrow from the CYLC developed this theme, telling the committee that in practical terms the wild rivers legislation impedes development due to its regulatory complexity:

> If there were some legal or administrative measures that would actually make environmentally compatible, commercially viable opportunities for

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44 *Committee Hansard*, Cairns, 13 April 2010, p. 7. Also see Mr David Claudie, Chuulangun Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 9; and Mr Murrandoo Yanner, Carpentaria Land Council Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, pp 56-57 for similar views.

45 *Committee Hansard*, Cairns, 13 April 2010, p. 53.

46 *Committee Hansard*, Cairns, 13 April 2010, p. 58.

47 *Committee Hansard*, Canberra, 30 March 2010, p. 13. Also see Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, p. 13 for a similar viewpoint.

> business communities more accessible compared to the degree of regulatory burden that would be great.[48]

2.52 In its submission, the Queensland Government informed the committee that development can and does occur in wild river areas:

> Since the first wild river declarations were approved under the [Queensland Act], there have been approximately 173 development applications made (this includes applications for environmental authorities, riverine protection permits, vegetation clearing and mining tenements). Of those which have been finalised, there have been no refusals.
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> …
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> Many new developments can and do proceed in wild river areas. Some of the developments which are able to proceed include offstream dams, native vegetation clearing, road development and maintenance, access to quarry material, essential services such as water and sewerage treatment, grazing and farming, tourism operations, development of outstation and homesteads, and yes, even mining activities.[49]

2.53 At the Cairns hearing, a representative from the Queensland Department of Environment and Resource Management submitted that the wild rivers regulatory scheme does not create any additional regulatory burden, or red tape for landowners:

> …the wild rivers regime…provides an overarching framework which calls up other pieces of legislation, so the approval is still provided under that legislation. Someone submitting a development approval would do so to the local government, most usually as the assessment manager, and the assessment manager would need to have regard to the wild rivers code. If there was an issue of a commercial fishery or a charter fishing operation then that decision would be made to issue a permit under the Fisheries Act by the chief executive, but the chief executive would have regard to the wild rivers code…[T]here is not so much a burden on applicants and participants in that process, in terms of bogging down of red tape, it is that the assessment process managed by assessment managers has regard to the natural values of these unique systems.[50]

2.54 The representative from the Queensland Department of Environment and Resource Management also noted that, where an activity is banned in a high preservation area, there is scope – via a property development plan – for an assessment manager to:

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48 *Committee Hansard*, Cairns, 13 April 2010, p. 13. This suggestion was supported in other evidence: see, for example, Dr Timothy Seelig, The Wilderness Society, *Committee Hansard*, Cairns, 13 April 2010, p. 29.

49 *Submission 35*, p. 2.

50 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 34.

> …consider the development plan, the specific circumstances of that project and for there to be amendment provided for in terms of the wild river declaration. There is an explicit process to have a case-by-case approach.[51]

2.55 In its submission, the Chuulangun Aboriginal Corporation presented an analogous view:

> …tourism ventures are enhanced by wild river protection, not hindered, and the approval process is made through the normal local Government development process. No actual examples of an Indigenous development that will be hindered by [a] declaration have been named.[52]

Status of development applications

2.56 The issue of how many development applications have been received, approved and rejected under the Queensland Act to date was also canvassed in submissions and evidence.

2.57 The Queensland Government advised that 'there are no examples known of an application being refused under the provisions of the [Queensland Act] in a wild river area'. Information provided to the committee shows that 113 of the 173 applications received to date have been approved, with decisions pending for 45 applications. Only two of these 45 applications do not relate to mining tenements or mining activities. Fifteen applications (also related to mining activities) are no longer current.[53]

2.58 The Queensland Government also noted that high preservation areas cover 16% of the Archer wild river area, 19.1% of the Lockhart wild river area, and 17.2% of the Stewart wild river area.[54] This means that the majority of land within these areas is predominantly classified as a preservation area, within which a wide range of economic opportunities is possible, including:

- continuation of existing developments;
- grazing;
- recreational fishing;
- boating or refuelling;
- traditional cultural activities;
- native title;
- land management such as clearing weeds;

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51 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 34.

52 *Submission 10*, p. 7. Also see Mr Donald De Busch, Nyacha Kumopinta Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 8 who agreed with this view.

53 Additional information, received 13 April 2010, p. 1.

54 *Submission 35*, p. 6.

- traditional burning;
- taking water for stock or domestic needs; and
- improving pasture (unless using risk species).[55]

2.59 There was some contention as to whether the Queensland Government's figures accurately portray the impact of the Queensland Act on Indigenous traditional owners and their development aspirations. The CYLC submitted, for example:

> Many proposed activities on country subject to the declarations will require Traditional Owners to engage in resource intensive assessments of development proposals, including gaining legal and scientific advice. Given the practical realities of many Indigenous peoples' lives in Cape York, such requirements will smother proposals from Traditional Owners before they even get to the Government for consideration. They are regulatory brick walls rather than 'restrictions'.[56]

2.60 At the Cairns public hearing, several Indigenous representative organisations advised that they were not aware of any applications that had been refused under the Queensland Act.[57] According to some witnesses, however, any emphasis on approval or otherwise of development applications to date is misguided, with opposition to the wild rivers regulatory regime being an issue of long-term native title rights. As Mr Noel Pearson from the CYI told the committee in Canberra:

> It is not a question for 2009. It is a question of whether my son can make an application in 20 years time. It is a question of whether my grandchildren can make an application in 30 years time. My entire advocacy in relation to this question has been to preserve opportunity. We do not have a pocketful of applications that we are desperately trying to get approval for. What we are saying is that we need to preserve opportunities for future generations to use their land.[58]

2.61 However, Queensland Government representatives maintained that the greatest deterrent to development over the past year has been the uncertainty created by various misinformation campaigns:

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55 See Managing New Development summaries for the Archer, Lockhart and Stewart Basin Wild River Declarations provided by the Queensland Department of Environment and Resource Management: http://www.derm.qld.gov.au/wildrivers/archer.html; http://www.derm.qld.gov.au/wildrivers/lockhart.html; http://www.derm.qld.gov.au/wildrivers/stewart.html#managing_new_development (accessed 9 June 2010).

56 *Submission 25*, p. 6.

57 For example, Mr John Andy, Girringun Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 7; Mr David Claudie, Chuulangun Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 6; Mr Donald De Busch, Nyacha Kumopinta Aboriginal Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 7; and Mr Murrandoo Yanner, Carpentaria Land Council, *Committee Hansard*, Cairns, 13 April 2010, pp 56-57.

58 *Committee Hansard*, Canberra, 30 March 2010, p. 22.

> …concerted misinformation…has promoted the view that wild rivers declarations stop all development. This is what has created the most uncertainty for Indigenous economic development on the cape. The truth is that the development can occur under that framework and that development is occurring in wild river areas.[59]

2.62 The confusion led the committee to query the process by which a traditional land owner would make a development application in Cape York Peninsula. The response from Balkanu was enlightening: it highlighted a clear conflict of interest in Balkanu's role of assisting Indigenous land owners to economically develop their land while at the same time strongly advocating the abolition of the wild rivers regulatory scheme established under the Queensland Act:

> Senator McLUCAS—…We have an assertion from different sides in this argument that various economic uses will or will not be allowed under the Queensland legislation. We have a very limited way to test those assertions and I suppose as the Indigenous economic development organisation I am wondering what your role is in terms of assisting Indigenous people to be able to make applications through their local government authority by and large. What role do you have?
>
> …
>
> If an Aboriginal person from Cape York in one of the wild rivers regions who is a traditional owner wanted to undertake a tourism venture, would they come to Balkanu?
>
> Mr Piper—They would come to Balkanu and we would try to assist them them.[60]

2.63 The representatives from Balkanu continued to explain that one of the forms of assistance that Balkanu would provide to a traditional owner would be advice concerning a proposed application. Members of the committee then drew attention to the differing interpretations of the Queensland Act and the impact of classification of a management area as a high preservation area or a preservation area:

> Senator McLUCAS—This is the point…How do we, as a committee, have any ability to make a judgement about [the Queensland Government and your] two sets of assertions? It is almost impossible unless we have a test.
>
> Mr Piper—I think you can have a hypothetical proposal and get your own advice.
>
> Senator McLUCAS—Would Balkanu, as the Indigenous economic development organisation for Cape York Peninsula, be part of that? The point I am making is that you are running a campaign against a piece of legislation. It is your right to do that and I support your right to do that. I might not agree with you, but I would support your right. Yet you are also

59 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 32.

60 *Committee Hansard*, Cairns, 13 April 2010, p. 51.

> the organisation to whom an Indigenous person would come to actually achieve an economic outcome. There is a problem.[61]

Alleged breach of process

2.64 During the course of the inquiry, the committee received evidence alleging a breach of process by the Queensland Government in the making of the 2009 Declarations.

2.65 Division 1 of Part 2 of the Queensland Act sets out the process which the minister (currently the Minister for Natural Resources, Mines and Energy) must follow in making a wild river declaration. The statutory requirements include:

- the publication of a notice of intention to declare a wild river area;
- the preparation of a proposal for the wild river area and publication of a notice about the proposal;
- a description of matters which the minister must consider in preparing a wild river declaration;
- the making of a decision whether to declare a wild river area; and
- approval by the Governor in Council of a wild river declaration.[62]

2.66 In particular:

- section 13 of the Queensland Act states:

> **13 Matters Minister must consider**
>
> (1) In preparing a wild river declaration, the matters the Minister must consider include-
>
> (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.
>
> …
>
> (3) Subsection (1) does not limit the matters the Minister may consider.

- subsection 15(1) of the Queensland Act states:

> **15 Deciding whether to make declaration**
>
> (1) After considering the matters mentioned in section 13 and any other matters the Minister considers appropriate, the Minister may-
>
> (a) declare the area to be a wild river area; or
>
> (b) decide not to proceed with declaration of the wild river area

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61 *Committee Hansard*, Cairns, 13 April 2010, p. 52.

62 Sections 8, 11, 13 and 15-16 of the *Wild Rivers Act 2005* (Qld).

…

- subsections 16(1)-(2) of the Queensland Act state:

16 Approval of wild river declaration

(1) The Governor in Council may, by gazette notice, approve the declaration of a wild river area.

(2) The declaration has effect when-

(a) the declaration is approved by the Governor in Council; and

(b) the approval is notified in the gazette.

…

2.67 Some submitters and witnesses raised the possibility that the statutory process (particularly sections 13 and 15 of the Queensland Act) was not properly followed by the Queensland Government.[63]

2.68 By way of background, the Queensland state election was held on 21 March 2009, with the current minister, the Hon. Stephen Robertson MP sworn in on 26 March 2009. On 2 April 2009, the Governor in Council approved the 2009 Declarations, and this approval was gazetted on 3 April 2009.

2.69 According to some submitters and witnesses, there are two contentious dates within this timeline: 30 March 2009, when the declarations were purportedly forwarded to the Governor in Council for approval; and 1 April 2009, when Minister Robertson decided to make the 2009 Declarations.

2.70 The CYI argued that the minister who complies with section 13 of the Queensland Act must be the same minister who performs the function under section 15 of the Queensland Act. CYI asserted that this did not occur because the process commenced under the previous minister, the Hon. Craig Wallace MP, and concluded with Minister Robertson:

> …the Archer, Lockhart and Stewart declarations were already proceeding to the Governor in Council on 30 March 2009, two days before they were supposedly declared by Minister Robertson on 1 April 2009…[64]

2.71 Balkanu supported this argument and especially queried whether Minister Robertson had in fact made the 2009 Declarations and on what date:

> Contrary to established practice, the Wild River Declarations gazetted on 3 April do not include a date on which the declarations were made, nor identify the Minister who made the declarations. Balkanu Cape York Development Corporation and Indigenous leadership have written to the

63 For example, Cape York Institute, *Submission 7*; Balkanu Cape York Development Corporation, *Submission 18*; Professor Suri Ratnapala, *Submission 22*; and Cape York Land Council, *Submission 25*.

64 *Submission 7*, p. 2.

> Minister, the Premier and the Governor seeking to clarify which Minister made the Wild River declarations, the date that the declarations were made, and a copy of the instrument signed by the Minister by which the declarations were made.[65]

2.72 Balkanu advised that information it obtained under a Freedom of Information request does not evidence the existence of any document by which Minister Robertson made the 2009 Declarations, leading Balkanu to conclude 'that such an instrument does not exist'.[66]

2.73 In response to these concerns, the Queensland Government denied that there had been any breach of process. At the Cairns public hearing, a representative stated that 'the full statutory process…was absolutely followed'.[67] In an answer to a question on notice, the Queensland Government elaborated:

> The previous Minister responsible for the Wild Rivers Act, the Honourable Craig Wallace MP, commenced this process when he published Notices of Intent to declare the three basins as wild river areas on 23 July 2008. It is not an uncommon occurrence for more than one Minister to be involved in a statutory process which takes a considerable amount of time, given governments and Ministers will change from time to time.
>
> All relevant material was provided to the Honourable Craig Wallace MP on 18 February 2009. These materials were again submitted to [the] Honourable Stephen Robertson MP on being sworn into office.
>
> …
>
> [T]he Minister began actively considering these matters and was briefed by departmental officers…
>
> On 1 April 2009, the Minister signed the final decision to seek approval by Governor in Council to declare the Archer, Stewart and Lockhart Basins as wild river areas…This decision was made pursuant to section 15 of the [Queensland Act].[68]

2.74 A copy of the Ministerial Briefing Note bearing Minister Robertson's approval (on 1 April 2009) was included in the Queensland Government's submission. A copy of the Gazettal Notice was also included in further information provided to the committee.[69]

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65 *Submission 18*, p. 18. Also see Balkanu Cape York Development Corporation, answer to question on notice, received 28 April 2010.

66 *Submission 18*, p. 19.

67 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 37.

68 *Submission 35*, p. 14. Also see Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 40.

69 Queensland Government, *Submission 35*, Attachment E; and Queensland Government, answer to questions on notice, received 6 May 2010, p. 4.

Constitutionality of the Bill

2.75 Subclause 4(1) of the Bill states that it relies on the Commonwealth's legislative powers under paragraph 51(xxvi) of the Constitution, which provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (xxvi) the people of any race for whom it is deemed necessary to make special laws.[70]

2.76 The committee received only two submissions which examined the Bill's source of legislative authority. In particular, the Gilbert & Tobin Centre of Public Law stated that the Bill meets the constitutional criteria to be a valid enactment under section 51(xxvi) of the Constitution.[71] If enacted, as noted in paragraph 2.10 above, the Bill might be inconsistent with the Queensland Act and inoperative to the extent of that inconsistency in accordance with section 109 of the Constitution.

2.77 The Carpentaria Land Council Aboriginal Corporation suggested, however, that the Bill might be trying to overreach its constitutional authority as the definition of 'native title land' in clause 5 of the Bill is ambiguous, making it difficult to precisely determine 'the intent of the Bill and, in particular, its effect on the operation of the *Native Title Act*'.[72]

Committee view

2.78 Throughout the inquiry, the committee received a vast amount of evidence regarding the passage of the Queensland Act and the processes by which wild river declarations have been, or are to be, made. Most of this evidence concerned the Cape York Peninsula and the Archer, Stewart and Lockhart Basin Wild River Declarations. The committee notes, however, that the Queensland Act, and the regulatory scheme which it establishes, applies throughout the state of Queensland and, as a result, impacts upon many Indigenous and non-Indigenous peoples.

2.79 There were several points of view put to the committee across a range of different issues in this inquiry. The committee acknowledges these divergent views and the fervour with which submitters and witnesses advocated their respective positions. Clearly, the wild rivers initiative deeply touches the hearts and minds of the people who are most likely to be affected by the wild rivers regulatory scheme, as well as those people who passionately support the environmental objectives of the scheme.

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70 Section 51(xxvi) of the Constitution.

71 *Submission 1*, p. 3. For a similar, but slightly equivocal, view, see the Carpentaria Land Council Aboriginal Corporation, *Submission 27*, p. 7.

72 *Submission 27*, p. 7.

2.80 The committee is not able to make any conclusive assessments regarding certain viewpoints since the weight of evidence does not support any one view over another. In the circumstances, it would be inappropriate for the committee to make any determinations on those viewpoints.

2.81 In particular, the committee considers that the alleged breach of process by the Queensland Government in the making of the Archer, Stewart and Lockhart Basins Wild River Declarations is not an appropriate matter for examination and determination by the committee. Not only is the alleged breach of process beyond the scope of the inquiry, it is properly a matter for the Queensland Parliament and the courts, not the Federal Parliament. However, the committee notes that the Queensland Government has provided documentation and explanation which would appear to support its contention that there was no breach of process in the making of those declarations. Apart from this observation, the committee makes no further comment on the matter except to note that, prior to the tabling of this report, the Cape York Land Council instituted proceedings in the High Court of Australia challenging the validity of the 2009 Declarations made under the Queensland Act.

2.82 Native title is a highly complex and evolving area of law, and the committee is not well placed, on the basis of the evidence put before it during the inquiry, to conclusively determine whether a wild river declaration is a 'future act' within the meaning of the NT Act. In turn, the committee cannot form a view in relation to whether the Queensland Act is inconsistent with the Bill for the purposes of section 109 of the Constitution. The issue appears to turn on whether the declaration is an acquisition of native title rights; however, the current definition of native title rights, and the existence of subsection 44(2) of the Queensland Act and its apparent preservation of native title rights in wild river areas, suggest that native title rights are not compulsorily acquired by the making of a wild river declaration.

2.83 In relation to Article 19 of the UN DRIP, the committee notes only that the principle of 'free, prior and informed consent' is not binding in Australian law, nor have the federal, state and territory governments overwhelming embraced the principle. Criticisms of the Queensland Act based on this international principle of law are therefore not well founded.

2.84 In contrast, the principle of consultation commonly features in the development and implementation of legislation, and is evidenced in this instance by the Queensland Act. The committee commends the Queensland Government for acknowledging the need for, and implementing, a statutory consultation process in the wild rivers regulatory scheme. However, the committee expresses concern as to how the consultation process is being conducted, with many affected stakeholders voicing a myriad of concerns in relation to certain aspects of that process. Other stakeholders felt that the consultation process had been conducted effectively. The committee welcomes attempts to improve the consultation process, where necessary, and urges the Queensland Government to continue making headway in this regard even where numerous or divergent views complicate the process and the making (or not) of a wild river declaration.

2.85 The committee notes that the use and development of native title land within a wild river area is regulated by the Queensland Act and that areas designated as high preservation areas contain more stringent controls than preservation areas. In some cases, these controls prohibit certain types of activity and the taking of natural resources. However, the committee acknowledges evidence from Indigenous organisations that activities which are taking place – such as the wild river ranger programs – provide job opportunities and are positive outcomes under the wild rivers regulatory scheme.

2.86 While there might be a need for further information and assistance with development applications, the committee is not persuaded that the Queensland Act substantially interferes with the current or future development aspirations of Indigenous or other landowners in wild river areas. Even if it did, the committee does not consider that the Bill provides the comprehensive and considered solution needed to economically and socially empower Indigenous communities in wild river areas. Accordingly, the committee is of the view that the Bill should not be passed by the Senate.

Recommendation 1

2.87 The committee recommends that the Senate should not pass the Bill.

Senator Trish Crossin

Chair