DISSENTING REPORT BY COALITION SENATORS

1.1 The Queensland Government's wild rivers initiative and its legislative framework has undoubtedly created widespread and passionate debate. It was apparent early in the inquiry that the committee could not avoid this debate: to examine the Bill also requires examination of the state legislation and its effect on traditional owners of native title land in wild river areas.

1.2 The topics canvassed in this dissenting report are:

- a breach of statutory processes by the Queensland Government in 2009;
- the scope of wild river declarations;
- economic opportunities in wild river areas;
- consultation processes employed by the Queensland Government;
- the *Native Title Act (1993)*(the NT Act); and
- constitutionality of the Bill.

A breach of statutory processes by the Queensland Government in 2009

1.3 Division 1 of Part 2 of the Queensland Act sets out the process which the Minister for Natural Resources, Mines and Energy (Minister) must follow in making a wild river declaration. The most pertinent of the legislative provisions are subsections 13(1) and 13(3), subsection 15(1) and subsections 16(1)-(2) of the Queensland Act.

1.4 Some submitters and witnesses raised concerns that the statutory processes (particularly under sections 13 and 15 of the Queensland Act) were not properly followed by the Minister in the making of the 2009 Declarations.[1]

1.5 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.

1.6 Cape York Institute (CYI) submitted that the Minister who performs the function under section 15 of the Queensland Act must be the same person who has complied with section 13 of the Queensland Act. CYI argued that this did not occur

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1 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*.

with the process that took place under Minister Craig Wallace and 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…[2]

1.7 Coalition senators conclude therefore that, as at 30 March 2009, Minister Robertson had not considered the matters as required under section 13 of the Queensland Act with the view that he would be the minister required to make the wild river declarations under section 15 of the Queensland Act. It is likely that this consideration did not occur until Minister Robertson was provided with a ministerial briefing note (CTS 02637/09) on 1 April 2010 – by which time it was too late to give meaningful consideration to the matters raised because the declaration documents would have already been finalised for approval by the Governor-in-Council.

1.8 Information provided to the committee also shows that, in a departmental email dated 30 March 2009 (4.59pm):

> [I]t appears the previous Minister did not sign CTS 0118/09, to approve the declaration proceeding to GIC. If this is the case, I propose that I will renew this CTS for the Minister's information and approval.[3]

1.9 The Queensland Department of Environment and Resource Management (Department) attempted to explain the timing of this email as an 'administrative' process and in its evidence sought to clarify as follows:

> [Minister Wallace] was beginning the process. The new minister took over. He had all the material in front of him. What I was asking there was whether a decision had been made prior to the election and, if not, then the new minister is making the decision and therefore that had to be finalised. The decision was being made. All I was asking for was the administrative process to get the sign-off on that decision.[4]

1.10 However, another departmental email dated 30 March 2009 (4.57pm) reads:

> Also, [a departmental officer] has asked that I make sure the Minister's office has been made aware of the fact that they are proceeding to GIC.[5]

1.11 Coalition senators interpret these emails and the evidence to the committee as evidencing that, late on 30 March 2009, two days before the minister supposedly

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2 *Submission 7*, p. 2.

3 Balkanu Cape York Development Corporation, additional information, received 13 April 2010, p. 6; and Senator the Hon. Ron Boswell, information tabled at Cairns public hearing, 13 April 2010.

4 Mr Scott Buchanan, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, pp 39-40.

5 Balkanu Cape York Development Corporation, additional information, received 13 April 2010, p. 7.

made the 2009 Declarations, Minister Robertson was not aware that he would be required to make a decision on the declarations of the Archer, Lockhart and Wild Rivers.

1.12 Balkanu Cape York Development Corporation (Balkanu) highlighted another irregularity:

> 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 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.[6]

1.13 Balkanu submitted that information obtained by it under a Freedom of Information request did not evidence the existence of any document by which Minister Robertson made the 2009 Declarations. This led Balkanu to conclude 'that such an instrument does not exist'.[7]

1.14 Following the Cairns public hearing, the Queensland Government made a submission to the committee. The submission included a copy of a Ministerial Briefing Note bearing Minister Robertson's approval (on 1 April 2009) and purported to attach a copy of the gazettal notice. However, the copy of the gazettal notice was not actually provided until the committee made a further specific request.[8]

1.15 The Ministerial Briefing Note recommended that the minister:

- approve the declarations of the Archer, Stewart and Lockhart basins as wild river areas and the progression of documents to the Governor-in-Council for final approval and gazettal; and
- note the submissions and results of consultation on the three declaration proposals for the mentioned basin areas.[9]

1.16 Coalition senators requested a copy of the instrument that must have flowed from the Ministerial Briefing Note, and in response to this question on notice, the Department advised:

> The reference in the Attachment E briefing note is to highlight for the Minister that changes from the declaration proposal were made as a result

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6 *Submission 18*, p. 18.

7 *Submission 18*, p. 19. Also see Balkanu Cape York Development Corporation, answer to question on notice, received 28 April 2010.

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

9 Queensland Government, *Submission 35*, Attachment E, p.1.

> of the consultation process, but this was subject to his decision to approve the changes. 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.[10]

1.17 It appears to Coalition senators that the minister is relying on the Ministerial Briefing Note as the instrument; however, the final declarations were not attached as required under the Queensland Act, highlighting another inconsistency and raising further questions regarding the making of the 2009 Declarations.

1.18 Consistent with the departmental email referred to above (at paragraph 1.8), and the Ministerial Briefing Note itself, a representative of Balkanu told the committee:

> …Minister Wallace did not sign that briefing note, so we know that Minister Wallace may not have considered the results of public consultation or the submissions himself. We also know from [the departmental] email and we know from the FOI material that that briefing was made up of 341 pages, so it was quite an extensive briefing.[11]

1.19 This evidence reiterates the concern that more than one Minister was involved in the statutory process of making the 2009 Declarations, as well as raising the question of how well Minister Robertson could have complied with the statutory requirement to consider the results of community consultation on the declaration proposal (pursuant to section 13 of the Queensland Act).

1.20 The Department rejected the notion of any impropriety in Minister Wallace commencing the statutory declaration process in July 2008 and Minister Robertson completing the process in April 2009. In response to the latter Minister's involvement and his statutory compliance, an officer of the Department gave evidence that:

> …the minister had the full briefing information before him. It had clearly been the subject of extensive work, so the material was in a final form ready for the minister's consideration after taking up his position, and during that period of time the minister went through all of the appropriate material and satisfied himself against those sections of the legislation before making his recommendation to Governor in Council and it was gazetted.
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> …
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> Minister Robertson obviously served in the cabinet that had considered the wild river declaration proposals. He was very much familiar with the wild rivers legislative framework and indeed the original proposals for those declarations, given he was the minister responsible at various times in an earlier role. He was not, as you would say, a newcomer to that ministry.[12]

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10 Queensland Government, answer to questions on notice, received 6 May 2010, p. 1.

11 Mr Terry Piper, Balkanu Cape York Development Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 45.

12 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 40.

1.21 While noting the Queensland Government's reasons for holding the view that there was no breach of process in the making of the 2009 Declarations,[13] Coalition senators remain sceptical as to the ability of Minister Robertson to have properly read, digested and acted on extensive briefing material in what appears to be three days only.

1.22 In addition, Coalition senators are disappointed with the late receipt of a submission from the Queensland Government (21 April 2010). This submission was lodged with the secretariat after both the Canberra and Cairns public hearings, giving the committee little opportunity to question the Queensland Government on the veracity of its contents. Coalition senators are disappointed with, and frustrated by, the Queensland Government's actions in this regard and interpret those actions as a blatant attempt to frustrate the Senate's committee process.

Developments subsequent to the Cairns public hearing

1.23 On or about 8 June 2010, the Cape York Land Council (CYLC), on behalf of certain traditional land owners in Cape York Peninsula, launched a challenge to the validity of the 2009 Declarations in the High Court of Australia. Five grounds for the suit were publicly reported, including:

> …[that] the minister did not properly make the declarations and there was a failure of procedure. Further, even if the declarations were properly made, they are invalid because they overreach the minister's powers.[14]

1.24 The respondents in the proceedings, the State of Queensland and the Minister for Natural Resources have two weeks to formally respond to the writs (whether by way of appearance or other). In the meantime, the minister has been reported as defending the Queensland Act on the ground that subsection 44(2) of the Queensland Act explicitly preserves native title rights.[15]

1.25 Coalition senators note that the action encompasses more than one legal cause of action, which the minister's response, perhaps understandably, does not address. Coalition senators note that the matter is now before the courts and await the outcome with interest.

The scope of wild river declarations

1.26 Coalition senators acknowledge that wild river declarations made pursuant to Division 1 of Part 2 of the Queensland Act affect the economic aspirations of traditional landowners of native title in wild river areas. This issue is explored below.

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

14 The Australian Financial Review, *Writs flow in battle over Cape York wild rivers*, 9 June 2010.

15 For example, Australian Broadcasting Corporation (ABC) News, *Wild rivers legal stoush looms*, 9 June 2010; and Northern Miner, *Wild Rivers impact claim ignores facts*, 11 June 2010;

1.27 In answers to a question on notice, Balkanu referred to the Queensland Government's 2004 pre-election policy as focussing on 'major development activities such as excessive water extraction, building of dams and in-stream mining'.[16] It argued, however, that contrary to the 2004 Policy:

> The Wild Rivers Queensland Act and Wild River declarations have gone well beyond the intention of the election commitment to prohibit and over regulate a wide range of lower level activities such as aquaculture, small scale commercial horticulture and small scale ecotourism ventures and indigenous housing.[17]

1.28 Balkanu described a further effect of the change in state government policy on the traditional land owners of the Cape York Peninsula region:

> The [Queensland] Government and the Wilderness Society have in recent times claimed that the 2004 Election commitment was for the declaration of thirteen river 'basins' on Cape York rather than the thirteen 'rivers' identified in the election policy.
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> …
>
> The declarations of the Stewart, Archer and Lockhart Basins in April 2009 involved the declaration of thirteen separate wild rivers rather than three.
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> …
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> If the Queensland Government proceeds with its intentions, the change from thirteen rivers to thirteen basins will result in the declaration of 80% of Cape York as [a] 'preservation area' under the Wild Rivers Act.[18]

1.29 Coalition senators note information received during the inquiry regarding the high preservation/preservation areas created by the 2009 Declarations. These include 'preservation area' classification for 84% of the Archer wild river area, 80.9% of the Lockhart wild river area, and 82.8% of the Stewart wild river area. The Department also advised that the balance of the wild river areas comprises 'high preservation areas'.[19]

1.30 While these percentages could be unique to the Archer, Lockhart and Stewart wild river areas, there is no actual evidence to suggest that this is the case: it could equally represent what is occurring in other wild river areas.

1.31 Coalition senators acknowledge the stated purpose of the Queensland Act to 'preserve the natural values of rivers that have all, or almost all, of their natural values

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16 Answer to questions on notice, received 16 April 2010, pp 3-6.

17 *Submission 18*, p. 7.

18 *Submission 18*, p. 7. Also see Balkanu Cape York Development Corporation, answer to questions on notice, received 16 April 2010, pp 3-6.

19 *Submission 35*, p. 6.

intact',[20] and that balancing this environmental interest and that of landowners is an inherently difficult process. From submissions and evidence received throughout the inquiry, it is clear that the appropriate balance has not been struck with the wild rivers regulatory scheme.

Economic opportunities in wild river areas

1.32 Subclause 4(3) of the Bill, which goes to the heart of the proposed legislation, states:

> …
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> In particular, it is the intention of the Parliament that [the Bill] protect the rights of traditional owners of native title land within wild river areas to own, use, develop and control that land.

1.33 In his second reading speech, Senator the Hon. Nigel Scullion emphasised the importance of this provision, telling Parliament that recognising property rights is the key to creating and promoting Indigenous economic activity in Cape York Peninsula:

> Land is one of the greatest assets that Cape York and indeed many Indigenous people have yet they are unable to use this asset as the basis of economic opportunity for themselves and for future generations. Aboriginal and Torres Strait Islander people have had their legal rights as our first Australians recognised through a long process that has delivered land rights and Native title rights. I am a firm believer that the recognition of rights over land ownership should be the start of Indigenous involvement in land and sea based economic activity.[21]

1.34 Use and development of native title land within a wild river area was a hot topic of the inquiry. The committee received a vast amount of evidence arguing that the Queensland Act adversely affects economic opportunities in Cape York Peninsula.[22]

1.35 The Anglican Church (Brisbane Diocese), for example, submitted:

> The Wild Rivers legislation negatively impacts the well-being of the indigenous population within [the Cape York Peninsula] area as it reduces the ability of Cape York indigenous communities to engage with the real economy.[23]

1.36 CYI quoted the conclusions of a detailed economic analysis conducted by ACIL Tasman in 2009 and also noted:

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20 Subsection 3(1) of the *Wild Rivers Queensland Act 2005* (Qld).

21 *Senate Hansard*, 23 February 2010, p. 883.

22 For example, Advance Cairns, *Submission 3*, p. 1; and Cummings Economics, *Submission 5*, p. 2.

23 *Submission 37*, Wild Rivers Policy – Likely impact on Indigenous Well-Being, p. iii.

> The impact on the Cape York Reform Agenda…is significant…Our reform agenda which focuses on rebuilding individual responsibility, reciprocity and incentives, is designed to break widespread passive welfare dependence and build economic independence. To this end, the Commonwealth governments allocated $48 million over four years with a complementary commitment from the Queensland Government, aimed at creating opportunities through small business opportunities, education and job creation.
>
> Yet the highly restrictive nature of the Wild Rivers Act, which imposes layers of red tape on communities and individuals seeking to self-start small-scale enterprises, mocks that progress and significant investment. They hurtle our reform initiatives backwards.
>
> The most perverse effect of Queensland's Wild Rivers scheme is that it will make smaller scale environmentally sustainable developments more difficult, whilst at the same time not prevent large-scale industrial developments, such as mining.[24]

1.37 Coalition senators note that, at times, the discussion pitted two main viewpoints against each another: environmental protection and management against Indigenous property development rights, welfare reform and social equity issues. However, Coalition senators consider that the two viewpoints are not disparate and are accommodated by the Bill.

Attracting investment

1.38 The way in which management areas are classified within a wild river area affects the development of that area, particularly in high preservation areas. The committee received important evidence of limited investment opportunities in Cape York Peninsula, which witnesses at the Cairns public hearing indicated is further complicated by the wild rivers regulatory scheme.

1.39 One representative from Cape York Sustainable Futures told the committee:

> [The Queensland Act] is an impediment to the flow of capital into these communities; that is a major problem we find. The only capital we seem to attract is government capital. Indigenous communities and other members of ours come up with either 70 per cent or 60 per cent before going to the banks.
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> …
>
> [P]roperties on the cape have not appreciated because of other legislation, and this wild rivers legislation is now another layer. I am referring to the perception of banks and financial institutions. If I were to go to a bank down here and say, 'I'm from Bamaga' -or Seisia- 'and I want to build a motel at the airport there,' firstly, there is [Deed of Grant in Trust]; secondly, there is native title involvement; thirdly, there is vegetation that

24 *Submission 7*, p. 8.

> has to be cleared; and, fourthly, it is going to be under the catchment of the Jacky Jacky River, which is going to be declared wild rivers, which is another layer. But those first three layers will probably knock me out.[25]

1.40 A traditional landowner, Mr Peter Kyle, similarly described the difficulty he would face if he were to apply for a loan from a private financial institution:

> How many people can obtain funding from the bank when their land is tied up? Our land is tied up. Do you know how long my family and I have lived down on Silver Plains Homestead for? Five years. And do you know how? My pension and their little bit of [Commonwealth Development Employment Projects] money. If I were to go to the bank and ask for a loan, the first thing they would ask me is, 'What sort of collateral have you got behind you there to support this?'[26]

1.41 In addition, Coalition senators note that the making of a wild river declaration can forestall third party investment in a wild river area. Witnesses attested to such situations at the Cairns public hearing.[27] More recently, the point has been demonstrated with the making of the Wenlock Basin Wild River Declaration on 4 June 2010.

1.42 Five days after the making of that declaration, Cape Alumina Limited announced that it had placed its $1.2 billion Pisolite Hills bauxite mine and port project in west Cape York Peninsula under review.[28] A day later, Matilda Zircon announced that it was relinquishing its exploration tenements and applications in the Cape York Peninsula.[29]

1.43 Coalition senators observe that the Queensland Government has had ample opportunity to avail itself of evidence similar to that received by the committee throughout the inquiry. Further, a decision regarding the making of the Wenlock Basin Wild River Declaration has been delayed from the end of March.[30] In the circumstances, it is difficult to conceive the rationale for both the declaration and its

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25 Mr Joseph Elu, Cape York Sustainable Futures, *Committee Hansard*, Cairns, 13 April 2010, p. 69 and p. 73. Also see Cape York Sustainable Futures, answer to questions on notice, received 30 April 2010.

26 *Committee Hansard*, Cairns, 13 April 2010, p. 85.

27 For example, Dr Paul Messenger, Cape Alumina Limited, *Committee Hearing*, Cairns, 13 April 2010, p. 61; and Mr Rodney Accoom, Lockhart River Aboriginal Shire Council, *Committee Hansard*, Cairns, 13 April 2010, pp 90-95.

28 For example, see Australian, *Mining jobs lost to wild rivers*, 5 June 2010; Australian Associated Press Financial News Wire, *Miner backs High Court Action*, 9 June 2010; and Dow Jones International News, *Cape Alumina Backs Court Case Against Queensland Wild Rivers Law*, 9 June 2010.

29 For example, see Australian Associated Press Financial News Wire, *Matilda to halt Cape York exploration*, 10 June 2010; and the Australian, *Miner quits over Wild Rivers law*, 11 June 2010.

30 The Australian, *Bend ahead in Wild Rivers rules*, 15 January 2010, p. 5.

timing: in the opinion of Coalition senators, the timing was highly questionable, demonstrative of poor judgement and evidences an extreme lack of foresight.

1.44 Coalition senators acknowledge evidence that the difficulty of attracting investment in the Cape York Peninsula inhibits or prevents economic development and employment opportunities in the region. The need for such development and opportunities in remote Indigenous communities is well known and will not be further explored in this dissenting report.[31]

Development applications lodged to date

1.45 The ability to use and develop native title land within a wild river area very much depends on its classification under a wild river declaration and the proposed activity or taking of natural resources on that land.

1.46 In general, submissions and evidence accepted that the regulatory scheme creates prohibitions and constraints, with particular concerns focussed on certain activities in high preservation areas (such as ecotourism, housing and campground facilities).[32]

1.47 Balkanu, for example, highlighted the adverse impact on Indigenous community vegetable gardens for people with residences included within the High Preservation Area either side of a declared wild river:

> [A] community vegetable garden within a High Preservation Area is only permissible if it does not involve clearing of vegetation. It is difficult to imagine circumstances on Cape York where a community vegetable garden could be established without some clearing of vegetation.
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> High Preservation Areas have in almost all declaration been declared to the maximum of 1km either side of a declared wild river and its major tributaries – with no scientific justification. The best soils for community gardens are within this area.[33]

1.48 Coalition senators express concern with this intrusion into native title land owners' ability to use their land in whatsoever manner they see fit and in respect of community vegetable gardens, particularly in circumstances where the proposed use is intended to improve physical and social well-being.

1.49 The Queensland Government submitted that, as at April 2010, approximately 173 development applications have been made which are affected by the Queensland

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31 See, for example, Advance Cairns, *Submission 3*, p. 1; and Cape Alumina Limited, *Submission 30*, p. 2.

32 For example, see Balkanu Cape York Development Corporation, *Submission 18*, pp 21-22; and Lama Lama Land Trust, *Submission 23*, Attachment A, p. 3. Also see Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, pp 12 and 17.

33 Answer to questions on notice, received 18 June 2010, p. 1.

Act, including 'applications for environmental authorities, riverine protection permits, vegetation clearing and mining tenements'.[34] The Queensland Government further advised that no finalised application has been refused.[35]

1.50 However, Coalition senators observe that, on the whole, these 173 development applications do not appear to be the types of applications which native title landowners in wild river areas wish to lodge for development and use purposes.

1.51 The Queensland Government also submitted:

> Some of the developments which are able to proceed include off-stream 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.[36]

1.52 According to evidence from a departmental officer at the Cairns hearing, commercial or business opportunities, such as a tourist lodge, are infrastructure for which a development application would need to be lodged via the normal channels, that is, the local government authority.[37]

1.53 At the Cairns public hearing, the committee heard that ventures which would have benefited Indigenous communities, and which were supported by those communities, have failed to eventuate, or might fail to eventuate, due to the wild rivers regulatory scheme.[38] However, Coalition senators note that this is not the same issue as why traditional owners of native title land in wild river areas do not appear to be lodging developing applications for that land.

Regulatory complexity

1.54 According to Indigenous submitters and witnesses, the reason for the lack of development in wild river areas relates not just to the uncertainty surrounding the wild river regulatory scheme,[39] but also to the complexity of the development application process.

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34 Queensland Government, *Submission 35*, p. 2. Also see Queensland Government, additional information, received 13 April 2010, p. 2.

35 Queensland Government, *Submission 35*, p. 2. Also see Queensland Government, additional information, received 13 April 2010, p. 2.

36 *Submission 35*, p. 2.

37 Mr John Bradley, Queensland Government, *Committee Hansard*, Cairns, 13 April 2010, p. 33.

38 Mr Rodney Accoom, Lockhart River Aboriginal Shire Council, *Committee Hansard*, Cairns, 13 April 2010, p. 90; and Dr Paul Messenger, Cape Alumina Limited, *Committee Hansard*, Cairns, 13 April 2010, p. 61.

39 For example, Mr Noel Pearson, Cape York Institute, *Committee Hansard*, Canberra, 30 March 2010, p. 22.

1.55 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.[40]

1.56 At the public hearing in Cairns, Mr David Yarrow from the CYLC also suggested:

> If there were some legal or administrative measures that would actually make environmentally compatible, commercially viable opportunities for business communities more accessible compared to the degree of regulatory burden that would be great.[41]

1.57 Similarly, Mr Murrandoo Yanner of the Carpentaria Land Council Aboriginal Corporation told the committee:

> …if Indigenous people want to start up a little business within the wild river area, unless you can afford a lawyer and a few different things, it could be quite complex and scary to some people. Our simple solution to that is that the government should provide funding and resources to any traditional owner or owner groups who, with the support of their community, want to propose a sustainable development on the wild river area and need help to make a proper application and get through the necessary red tape.[42]

1.58 Coalition senators consider that evidence of high levels of uncertainty and complexity clearly shows that Indigenous native title land owners in wild river areas have not been provided with the knowledge and resources they need to navigate and work within the wild rivers regulatory scheme.

1.59 In addition, Coalition senators note that the issue of use and development of wild rivers area land is not a short-term matter which can be viewed solely in terms of empirical data. As Mr Noel Pearson from the Cape York Institute noted:

> 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

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40 *Submission 25*, p. 6.

41 Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, p. 13.

42 *Committee Hansard*, Cairns, 13 April 2010, p. 58. Also see Mr Greg McIntyre SC, *Committee Hansard*, Canberra, 30 March 2010, p. 13; and Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, p. 13 for similar arguments.

> are saying is that we need to preserve opportunities for future generations to use their land.[43]

Consultation processes employed by the Queensland Government

1.60 Coalition senators note that the Queensland Act sets out a mandatory consultation process under subsections 11(2) and 11(3). These subsections provide:

> (2) The declaration proposal notice must state-
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> (a) the proposed wild river area to which the declaration proposal notice relates; and
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> (b) where copies of the declaration proposal are available for inspection and purchase; and
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> (c) that written submissions may be made by any entity about the declaration proposal; and
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> (d) the day by which submissions must be made, and the person to whom, and the place where, the submissions must be made.
>
> (3) The day stated under subsection (2)(d) must not be earlier than 20 business days after the day the declaration notice is published.

1.61 Balkanu provided a useful explanation of why this statutory consultation process disadvantages traditional owners of native title land:

> For traditional owners to have their views properly considered by the Minister, they have two paths. They must raise their issues in meetings presented by state government officers and have faith that these issues will be communicated accurately back to the Minister, or alternatively provide submissions on the declaration proposals. State government officers present set information but do not enter into discussions with traditional owners to seek to identify their particular issues and concerns.
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> Submissions on the other hand are required to be in writing to be considered 'properly made'. The written submissions must state the grounds, facts and circumstances relied upon. For many indigenous people literacy is an issue, English is a second language and they rarely have access to the materials required to assess, write and submit their views in relation to wild rivers.
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> …
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> To effectively provide submissions there is considerable time and support required, particularly where there are a large number of dispersed people. Although the Cape York Land Council and Balkanu were able to provide support to many traditional owners in preparing submissions on the Archer, Lockhart and Stewart River Basin proposals, the tragedy was that these submissions were largely ignored by the Minister. It is noted that [for] the

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

> most part government denied the traditional owners of the Wenlock River the ability to obtain support to prepare submissions.[44]

1.62 Coalition senators note that state government funding enabled Balkanu to facilitate the 2009 Declarations consultation process[45] and, as a result, over 100 meetings were held with stakeholders in the Cape York Peninsula region.[46] Coalition senators commend this approach but note that it was not universally adopted by the Queensland Government and there is contention as to the quality of the consultation. This was not only in relation to incorporation of feedback from native title landowners but the lack of ongoing or meaningful consultations.

1.63 Most notably, the documentation obtained by Balkanu under its Freedom of Information request (referred to in paragraph 1.13 above) reveals that, in a draft consultation report, the Queensland Government considered informing the minister:

> The government has undertaken extensive consultation with affected Indigenous communities on Cape York Peninsula and is confident that it has addressed any concerns the Indigenous communities may have had. It was noted from the consultation that there is significant support for the intent of the Wild Rivers program amongst Indigenous communities on Cape York Peninsula.[47]

1.64 An editorial comment from departmental officers challenged this viewpoint, casting doubts on the credibility of the consultation process:

> Ross and I strongly disagree with this paragraph. It is open to interpretation whether we did consult widely and extensively. What is consultation to one may not be consultation to another. I am not confident we have addressed concerns as we wouldn't be going back to Balkanu with the D[irector]G[eneral] if this were the case. There was not significant support for wild rivers. It was a mixed viewpoint. Significant in differences.[48]

1.65 The committee heard that some traditional owners of native title land were not aware of the extent of wild river declarations which directly affected them until after the making of those declarations. For example, Ms Phyllis Yunkaporta, a traditional owner of the Apalach Clan Group living in Aurukun submitted:

> I am extremely concerned that large areas of land south of the Archer River were declared as High Preservation Area without prior notification to the [Aurukun Shire] Council and traditional owners and without affording the

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44 *Submission 18*, pp 13-14.

45 Mr Gerhardt Pearson, Balkanu Cape York Development Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 43.

46 Queensland Government, *Submission 35*, Attachment 1, pp 1-8.

47 Balkanu Cape York Development Corporation, additional information, received 13 April 2010, p. 24.

48 Balkanu Cape York Development Corporation, additional information, received 13 April 2010, p. 24.

> [Aurukun Shire] Council and traditional owners due process to make submissions about the proposal.[49]

1.66 The Kokoberrin Tribal Aboriginal Corporation indicated that it was consulted on behalf of the Kokoberrin of the Inkerman Station (Pinnarinch) area but this consultation occurred only in the early stages of the making of the Staaten Wild River Declaration:

> In December 2005, a notice of intent to declare the Staaten Wild River Area was published in newspapers. The notice also advertised the availability of the Staaten Wild River Declaration Proposal for public comment and formal submissions. The submission period closed on 24 April 2004.
>
> Throughout 2006, Government undertook negotiations with some stakeholders, but not traditional owners of the Staaten River, to resolve issues about the Act and the proposed declarations…
>
> [We] believe the Wild Rivers is a legislative injustice which has serious implications for the Commonwealth's welfare reform agenda, and its relationship with all indigenous Australians. It was imposed after only token consultations – and without negotiations with indigenous people…[50]

1.67 Notably, a representative from Cape York Sustainable Futures gave evidence 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 argue against wild rivers are not consulted—or they are not consulted a second time, if there is a second round of consultation.[51]

1.68 Coalition senators find such a practice reprehensible and consider that the traditional owners of native title land in wild river areas are entitled to good faith and respect in all their dealings with the Queensland Government.

United Nations Declaration on the Rights of Indigenous People

1.69 As noted by Australians for Native Title and Reconciliation (Qld), consultation does not equate to consent:

> The process of consultation is fundamentally different from the princip[le] of consent and one does not automatically lead to the other. Nor is consultation a mandate for final decision making, nor a replacement for free, prior and informed consent.[52]

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49 *Submission 9*, p. 2. Also see Balkanu Cape York Development Corporation, *Submission 18* pp 17-18; and Aurukun Shire Council, *Submission 36*, p. 2.

50 Kokoberrin Tribal Aboriginal Corporation, *Submission 15*, p. 2 and p. 4.

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

52 *Submission 31*, p. 2.

1.70 Coalition senators agree with this statement which is supported by clause 5 of the Bill and Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP).

1.71 Article 32 of the UN DRIP, which is also relevant to the inquiry, provides:

> 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.[53]

1.72 Some submitters and witnesses questioned the Queensland Government's compliance with Articles 19 and 32 of the UN DRIP.[54]

1.73 Mr Greg McIntyre SC, for example, told the committee that the Queensland Act arguably breaches Article 19 due to 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.[55]

1.74 In relation to the 2009 Declarations, the Cape York Institute submitted:

> The Wild River laws contravene both of these articles. Free, prior and informed consent was not obtained from indigenous Cape York communities before the imposition of the three Declarations of the Lockhart, Stewart and Archer Basins in April 2009.
>
> There is in Australian law a well established mechanism for governments and other parties to obtain the free, prior and informed consent of indigenous peoples in relation to matters affecting their lands – and that is Indigenous Land Use Agreements (ILUAs) under the Native Title Act.
>
> The Queensland Government should have negotiated and settled ILUAs with native titleholders as part of the process of putting in place environmental protection provisions for rivers.[56]

1.75 Coalition senators note that Articles 19 and 32 of the UN DRIP are not incorporated into domestic law and the principle of 'free, prior and informed consent'

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53 United Nations, Declaration on the Rights of Indigenous Peoples (adopted by General Assembly Resolution 61/295 on 13 September 2007), Article 32.

54 For example, Aurukun Shire Council, *Submission 36*, p. 2; and Anglican Church (Brisbane Diocese), *Submission 37*, p. 2.

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

56 *Submission 7*, p. 6.

is therefore not one which Australian governments must take into account. Coalition senators also note that the NT Act does not explicitly incorporate such a principle. However, 'free, prior and informed consent' is a fundamental human rights principle for Indigenous peoples.

Native Title Act 1993 (Cth)

1.76 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').

1.77 Some submitters and witnesses argued that the Queensland Act, or an activity or use covered by it, is a 'future act' within the meaning of the NT Act.[57]

1.78 Evidence presented to the committee argued that the future act regime set out in the NT Act is triggered by the making of a wild river declaration. Mr McIntyre SC, for example, submitted that a wild river 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]…[58]

1.79 Mr Yarrow from the CYLC more broadly expressed the view that the wild rivers legislation:

> …is a future act and it does affect native title…[S]ection 44(2) of the [Queensland Act] is not adequate to protect native title.[59]

1.80 These arguments conclude that, as the procedures set out in Division 3 of Part 2 of the NT Act were not implemented by the Queensland Government (especially ILUAs under Subdivision D and the right to negotiate under Subdivision P), the 2009 Declarations (and possibly others) made pursuant to the Queensland Act are invalid under both the NT Act and section 109 of the Constitution.

1.81 As indicated above, subsection 44(2) of the Queensland Act is also considered relevant in this regard. Subsection 44(2) provides that, under the 'other Acts' involved in the regulatory scheme, a wild river declaration cannot directly or indirectly limit a person's right to the exercise or enjoyment of native title.

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57 For example, Mr David Yarrow, Cape York Land Council, *Committee Hansard*, Cairns, 13 April 2010, pp 12-13; and Mr Terry Piper, Balkanu Cape York Development Corporation, *Committee Hansard*, Cairns, 13 April 2010, p. 49.

58 *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.

59 *Committee Hansard*, Cairns, 13 April 2010, p. 12.

1.82 The 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 itself, as opposed to any other piece of legislation.[60]

1.83 The CYI similarly rejected that the Queensland Act does not affect native title. In essence, it argued that native title is not 'restricted to so-called 'traditional' activities, confined to hunting and gathering',[61] and the economic empowerment of Indigenous peoples depends upon a broader interpretation and approach to native title:

> The exercise of traditional rights and traditional activities is important but that will never lift our people out of poverty and misery. We have to be able to undertake land use that generates economic return for the people who live there. We are not going to be serious about closing the gap as to Indigenous disadvantage if we have this view that all that Aboriginal people should be happy with and all that they should be entitled to is to stand on one leg in the sunset picking berries.[62]

1.84 Coalition senators note the Queensland Government's submission that under section 44 of the Queensland Act, 'a wild river declaration does not and cannot affect the exercise or enjoyment of existing native title rights and interests and therefore is not a future act.'[63] However, on the evidence before them, Coalition senators do not agree.

1.85 While the prevailing definition of 'native title rights' (traditional activities) appears to be consistent with the wild rivers regulatory regime, it is arguable that this definition is too restrictive. If one adopts the view that native title is a right to exclusive possession, a wild river declaration must necessarily deprive traditional owners of native title land and their ability to control, use and develop that land.

Constitutionality of the Bill

1.86 Coalition senators note submissions and evidence which contended that the Bill meets constitutional criteria so as to be a valid enactment under section 51(xxvi) (the 'races power') of the Constitution.

1.87 In particular, the Gilbert & Tobin Centre of Public Law examined the validity of the Bill under section 51(xxvi) by analysing each criterion of the races power: 'the

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60 *Submission 25*, p. 6. Also see Mr Greg McIntyre SC, *Submission 8*, p. 4 for a similar viewpoint.

61 *Submission* 7, p. 5. In a similar vein, Professor Jon Altman 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.

62 Mr Noel Pearson, Cape York Institute, *Committee Hansard*, Canberra, 30 March 2010, p. 23.

63 *Submission 35*, p. 3.

people of any race'; 'deemed necessary'; and 'special laws'.[64] At the Canberra public hearing, Professor George Williams, a constitutional law expert presented his view:

> …this bill would be constitutionally valid. I do believe it would be supported by the race power in the Constitution. It has been carefully drafted to pick that up and is dealing specifically with the rights of Aboriginal people in a way that I think would attract validity under that power.[65]

1.88 The Gilbert & Tobin Centre of Public Law also noted:

> 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 [of the Constitution] 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.[66]

Coalition senators dissenting view

1.89 In view of the information received throughout the inquiry, Coalition senators strongly support the Bill and its aim of protecting the rights of traditional owners of native title land within wild river areas to own, use, develop and control that land with a view to economic and social advancement.

1.90 Two years ago, Prime Minister the Hon. Kevin Rudd in his Apology to Australia's Indigenous Peoples stated:

> For [Australians], symbolism is important but, unless the great symbolism of reconciliation is accompanied by an even greater substance, it is little more than a clanging gong. It is not sentiment that makes history; it is our actions that make history.[67]

1.91 Unfortunately, the Rudd Labor Government has not backed this rhetoric with action, and the Prime Minister's promise has not been honoured. Events such as the passage of the 2009 Declarations also work directly against the Apology and any commitment to Closing the Gap. As noted by the Leader of the Opposition, the Hon. Tony Abbott MP:

> [O]n the same day that the Rudd government subscribed to the International Declaration on the Rights of Indigenous Peoples, the Bligh government in Queensland applied the wild rivers legislation to the significant rivers of

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64 *Submission 1*, p. 3.

65 *Committee Hansard*, Canberra, 30 March 2010, p. 16.

66 *Submission 1*, p. 3.

67 The Prime Minister the Hon. Kevin Rudd MP, *House Hansard*, 13 February 2008, p. 171.

> Cape York—effectively blocking Aboriginal people from developing their land in the catchments of the Archer, Stewart and Lockhart rivers in Cape York.[68]

1.92 In his second reading speech, Senator Scullion identified the purpose of the Bill as an attempt to rectify this injustice and thereby provide some substance to the Queensland Government's Indigenous policy:

> This bill, the Wild Rivers (Environmental Management) Bill 2010, will restore the economic potential of the Cape York land covered by the Queensland wild rivers legislation to Cape York Aboriginal people. By exercising the powers under section 51(xxvi) of the Constitution, this parliament has the ability to make laws for the people of any race. We as a parliament should support this bill and pass laws to ensure that the Indigenous people of Cape York are given back their birthright in respect of their land.[69]

1.93 Coalition senators also note inconsistencies with the Australian Government's Closing the Gap policy and the promotion of Indigenous economic and social advancement. Economic development is the key to progress for Indigenous peoples, yet the Queensland Act curtails the development of native title land in wild river areas (particularly the Cape York Peninsula region) through overregulation and the imposition of additional red tape. This appears to be highly relevant to valuable native title land holdings classified as High Preservation Areas within a wild river area.

1.94 Coalition senators also note inconsistencies between the Queensland Act and federal legislation (*Native Title Act 1993*). In spite of Queensland Government assertions that the Queensland Act, and the declarations made thereunder, are not future acts within the ambit of the future acts regime, Coalition senators consider that it is possible for there to be a full or partial abrogation of native title rights by the making of a wild river declaration.

1.95 From evidence received throughout the inquiry, Coalition senators consider that, in addition to the contradictory federal-state legislation and policy rationale, the 2009 Declarations are flawed by numerous inconsistencies and breaches in the making of those declarations by the Queensland Government. Coalition senators note legal action recently initiated in the High Court of Australia regarding the legality of the 2009 Declarations. This action further demonstrates community concern with the operation of the current regime.

1.96 It is additionally noted that each wild river declaration covers a substantially greater area than was initially envisaged under the wild rivers regulatory scheme prior to the 2004 state election. The new focus on basins rather than rivers demonstrates bad faith on the part of the Queensland Government. This focus continues to be replicated

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68 The Leader of the Opposition the Hon. Tony Abbott MP, *House Hansard*, 8 February 2010, p. 715.

69 Senator the Hon. Nigel Scullion, *Senate Hansard*, 23 February 2010, p. 883.

in the consultation processes employed to date, processes which, on the evidence (including evidence provided by the relevant department) are selective, non-responsive and sporadic.

1.97 All of these considerations lead Coalition senators to conclude that application of the Queensland Act is severely restricting the capacity of Indigenous communities in wild rivers areas to use, develop and control their land. In particular, wild rivers declarations made under the Queensland Act are restricting economic and employment opportunities for Cape York communities. The Bill will ensure that Indigenous communities are properly consulted and given opportunity to achieve consensus among themselves and to make an informed decision before consenting to the making of any wild river declaration effecting their land. This will increase opportunities for Indigenous communities to engage with the real economy and work towards economic independence, thus addressing related social issues such as welfare dependence and unemployment, consistent with the objective of Closing the Gap and giving substance to the Apology to Australia's Indigenous Peoples. Accordingly, Coalition senators strongly endorse the Bill and commend it to the Senate.

Recommendation 1

1.98 Coalition senators recommend that the Senate pass the Bill.

Senator Guy Barnett **Senator Stephen Parry**

Deputy Chair

Senator the Hon. Ron Boswell **Senator the Hon. Bill Heffernan**

Senator the Hon. Ian Macdonald **Senator the Hon. Nigel Scullion**

Senator Russell Trood