The Senate

Legal and Constitutional Affairs Legislation Committee

Wild Rivers (Environmental Management) Bill 2010 [No.2]

June 2010

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Suite S1. 61	Telephone:	(02) 6277 3560
Parliament House	Fax:	(02) 6277 5794
CANBERRA ACT 2600	Email:	legcon.sen@aph.gov.au

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Recommendation 1

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

CHAPTER 1

Introduction and overview

Background

1.1 On 25 February 2010, the Senate referred the Wild Rivers (Environmental Management) Bill 2010 [No. 2] (Bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 9 May 2010.[1] On 5 May 2010, the committee tabled an interim report in which it indicated that it required additional time to consider the evidence presented during the course of the inquiry and would present its final report by 30 June 2010. On 16 June 2010, the committee agreed to present the final report on 22 June 2010.

1.2 The Bill was introduced in the Senate as a private senator's bill on 23 February 2010 by Senator the Hon. Nigel Scullion and is identical to a bill introduced in the House of Representatives by the Hon. Tony Abbott MP on 8 February 2010. There was no Explanatory Memorandum for either bill.

1.3 According to Senator Scullion's second reading speech, the Bill will enable 'the Indigenous people of Cape York to use or develop their land as any other land holder may'[2] and is a response to the Wild Rivers initiative implemented by the Queensland Government in the *Wild Rivers Act 2005* (Qld) (the Queensland Act).

Wild Rivers Act 2005 (Qld)

1.4 In October 2005, the Queensland Parliament passed the Queensland Act with the purpose of 'preserv[ing] the natural values of rivers that have all, or almost all, of their natural values intact'.[3] The Queensland Act aims to accomplish this goal by establishing a protective legislative framework, an integral part of which is the declaration of wild river areas under Division 1 of Part 2.

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1 Journals of the Senate, No. 112-25 February 2010, p. 3229.

2 Senator the Hon. Nigel Scullion, *Senate Hansard*, 23 February 2010, p. 56.

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

1.5 Once declared, a wild river area is subject to a number of statutory controls[4] which outline the requirements for approval of a proposed activity or taking of a natural resource in a particular management area, if permitted. A wild river area includes, or may include, the following management areas:

- high preservation areas – areas within and up to 1km each side of the wild river, its major tributaries and special features (such as floodplain wetlands);
- preservation areas – the wild river areas outside high preservation areas;
- floodplain management areas – floodplain areas with a strong hydrologic connection to river systems (may overlap with a high preservation and/or preservation area); and
- subartesian management areas – aquifer areas with a strong hydrologic connection to river systems (may overlap with a high preservation and/or preservation area).[5]

1.6 The management areas particularly discussed throughout the inquiry were the high preservation areas and preservation areas.

1.7 In relation to high preservation areas:

> [N]ew high impact activities cannot occur in [such areas], [but] other development activities can continue in the H[igh]P[reservation]A[rea] providing they do not impact on the natural values of the wild rivers.
>
> High impact activities which are effectively prohibited in the HPA include:
>
> in-stream dams and weirs;
>
> intensive animal husbandry (e.g. feedlots, emu farms);
>
> aquaculture (e.g. hatcheries, grow out ponds);
>
> environmentally relevant activities (except some that are essential for urban areas);
>
> surface mining (except for limited hand sampling in stream and low-impact exploration off-stream); and
>
> intensive agriculture.[6]

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4 These statutory controls include the Wild Rivers Code 2007 (Qld), the *Coastal Protection and Management Act 1995* (Qld), *the Environmental Protection Act 1994* (Qld), the *Forestry Act 1959* (Qld), the *Fossicking Act 1994* (Qld), the *Sustainable Planning Act 2009* (Qld), the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld), the *Mineral Resources Act 1989* (Qld), the *Nature Conservation Act 1992* (Qld), the *State Development and Public Works Organisation Act 1971* (Qld), the *Transport Infrastructure Act 1994* (Qld), the *Vegetation Management Act 1999* (Qld) and the *Water Act 2000* (Qld).

5 Subsection 3(2) and section 41 of the *Wild Rivers Act 2005* (Qld). The Queensland Act also identifies two additional management areas: designated urban areas; and nominated waterways, secondary tributaries or streams in preservation areas that have been designated for wild river purposes.

1.8 In relation to preservation areas:

> Subject to normal approval processes, development activities may continue to operate, start up, or expand in this area. The P[reservation]A[rea] makes up around 80 per cent of a declared wild river basin.[7]

1.9 The Queensland Department of Infrastructure and Planning has prepared a detailed table summarising typical wild river requirements in high preservation and preservation areas.[8]

Key provisions of the Bill

1.10 The Bill contains four substantive provisions:

- proposed section 4, which states:
  - the Commonwealth relies on its legislative powers under section 51(xxvi) of the Constitution, and any other express or implied legislative Commonwealth power capable of supporting the enactment of the Bill;
  - it is the Parliament's intention that the Bill be a special measure for the advancement and protection of Australia's Indigenous people; and
  - it is the Parliament's intention 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;
- proposed section 5, which provides that the development or use of native title land in a wild river area cannot be regulated under the Queensland Act unless the Aboriginal traditional owners of the land agree;
- proposed section 6, which provides that a wild river declaration made before the commencement of the Bill will be valid until a fresh declaration is made with the agreement of the Aboriginal traditional owners of the land or six months elapse from the commencement of the Bill, whichever is the first; and
- proposed section 7, which grants the Governor-General a discretionary power to make regulations for the purposes of the Bill, including:

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6 Queensland Department of Environment and Resource Management, *Frequently asked questions – wild rivers*, pp 5-6: see http://www.derm.qld.gov.au/wildrivers/pdf/wild_rivers_web_faqs.pdf (accessed 15 June 2010).

7 Queensland Department of Environment and Resource Management, *Frequently asked questions – wild rivers*, p. 6: see http://www.derm.qld.gov.au/wildrivers/pdf/wild_rivers_web_faqs.pdf (accessed 15 June 2010).

8 Queensland Department of Infrastructure and Planning, *Guide to using the IDAS development application forms: Guide 27 – Development in a wild river area*, Version 1.3 (February 2009), Table 1: see http://www.dip.qld.gov.au/resources/idas-guide-27.pdf (accessed 15 June 2010).

- for seeking the agreement of Aboriginal traditional owners under the Bill;
- for negotiating the terms of the agreement; and
- for giving and evidencing the agreement.

Conduct of the inquiry

1.11 The committee advertised the inquiry in *The Australian* newspaper on 10 March 2010 and 24 March 2010. Details of the inquiry, the Bill and the second reading speech were placed on the committee's website. In the absence of an Explanatory Memorandum, there was little additional material available to explain the purpose of the Bill or its key provisions. The consideration of bills by committees (and by the Parliament as a whole) is assisted if they are accompanied by an explanation of the intent and operation of the proposed provisions. In this instance, no such explanation accompanied the bill which was neither helpful nor usual practice.

1.12 The committee contacted 34 organisations and individuals, inviting submissions by 31 March 2010. The committee provided over one month for the lodgement of submissions and, where specifically requested, granted formal extensions to both Indigenous and non-Indigenous individuals and organisations. The committee encouraged and continued to accept submissions and supplementary submissions up to the date of tabling this report.

1.13 A total of 38 submissions were received by the committee and these are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public. The committee held public hearings in Canberra on 30 March 2010 and in Cairns on 13 April 2010. A list of witnesses who appeared at the hearings are at Appendix 2, and copies of the *Hansard* transcript are available through the internet at http://www.aph.gov.au/hansard.

1.14 The committee has taken into consideration all organisations and individuals with an interest in the subject matter relating to this inquiry. In particular, the committee endorsed a program for the public hearings that reflected a range of views and opinions about the proposed legislation. The committee believes that it is important to emphasise that the selection of witnesses for the public hearings was to ensure that evidence was collected that both supported and disagreed with the legislation.

1.15 To accommodate a range of individuals and organisations, including Indigenous and non-Indigenous stakeholders, the committee heard from additional witnesses not originally listed on the public hearing programs and extended the Cairns public hearing well beyond its scheduled time for completion. All of these different viewpoints have been taken into consideration in formulating this report.

1.16 The committee refutes in absolute terms the assertions made in certain media articles published during the course of the inquiry that the public hearing programs were unbalanced and that certain organisations were provided 'favourable' treatment.

Acknowledgement

1.17 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Scope of the report

1.18 Chapter 2 discusses the key issues raised in submissions and evidence.

Note on references

1.19 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*: page numbers may vary between the proof and the official *Hansard* transcript.

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**
>
> (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.
>
> (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]
>
> …
>
> 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.
>
> …
>
> 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

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.
>
> …
>
> 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.
>
> …
>
> The declarations of the Stewart, Archer and Lockhart Basins in April 2009 involved the declaration of thirteen separate wild rivers rather than three.
>
> …
>
> 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:

> …
>
> 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.
>
> …
>
> [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.
>
> 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-
>
> (a) the proposed wild river area to which the declaration proposal notice relates; and
>
> (b) where copies of the declaration proposal are available for inspection and purchase; and
>
> (c) that written submissions may be made by any entity about the declaration proposal; and
>
> (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.
>
> 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.
>
> …
>
> 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

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

1.1 Whilst this inquiry understandably received a wide range of views about the pros and cons of Queensland's Wild Rivers Act, the committee has been tasked by the Senate to inquire into the Wild Rivers (Environmental Management) Bill 2010 [No. 2] (Bill) introduced into the Senate by Senator Scullion. Given the diverse and sometimes contradictory information provided to the committee about various aspects of the Queensland Wild Rivers Act, a far more comprehensive inquiry would be required before the Australian Greens Senators would be in a position to reach definitive conclusions about the operation, administration and application of Queensland's laws in this area.

1.2 The committee's report (paras 2.31 – 2.37) identifies some of the drafting problems with the Bill. Unless these were to be remedied, there is no guarantee that the Bill would operate in a way which is consistent with what those who support the legislation are indicating it would do.

1.3 Given that the Bill deals with native title land and purports to address the rights of native title holders, the Greens believe it would be more appropriate to address these issues via amendments to the *Native Title Act 1993*. This would be far more likely to produce an outcome consistent with what those who support Senator Scullion's legislation say they are hoping to see, namely the requirement to obtain the agreement of Aboriginal people before a Wild Rivers Declaration which applies to their land can be made.

1.4 The committee heard conflicting evidence as to whether the Queensland Wild Rivers Act contravenes the federal Native Title Act. Given the differing legal opinions provided to the inquiry, the Greens do not believe the committee is in a position to express a definitive view on this matter. In any case, given the recent announcement by the Cape York Land Council that they have initiated legal proceedings in the High Court on this matter, it appears the court process will provide an answer to this question.

1.5 Senator Scullion's Bill is silent on the processes which could, or should, be used in obtaining the agreement of what the legislation refers to as 'the traditional owners of native title land'. A number of witnesses to the inquiry noted there is an existing process under the Native Title Act for negotiating and reaching agreements known as Indigenous Land Use Agreements (ILUAs). Given this is an existing and already defined process, the Greens believe it makes sense to have this reflected in any legislative changes which seek to require the consent or agreement of Aboriginal people in regards to Wild Rivers Declarations.

1.6 This reinforces the Greens view that it makes more sense from both a policy and a legislative perspective for the issues raised in the Senator Scullion's legislation to be dealt with through amendments to *Native Title Act 1993* which already contains clearly defined processes, rather than through a new stand alone piece of law which contains no mention of what processes would be required in obtaining and defining agreement.

1.7 The desirability for this is reinforced by the Greens view that any change to the native title rights of Aboriginal and Torres Strait Islander peoples should apply nationally, rather than only in one part of one state, and even then only in regard to the operation of a single piece of Queensland legislation. As Professor George Williams told the committee:

> [I]t is generally preferable to pass a law that deals with these issues across the country rather than focus on a particular area…That is because it can set up two classes of rights for Aboriginal people in one area and not others. My own view is that if there are important rights involved…then they ought to be protected Australia-wide.[1]

1.8 In his submission to this inquiry, Professor Jon Altman stated:

> [I]n terms of Indigenous policy, the proposals in the Wild Rivers Bill are important and should be strongly supported. However, unless such provisions are extended Australia-wide this change will constitute Cape York bioregion-specific legal exceptionalism. This is hardly appropriate given that the Closing the Gap framework applies nation wide.[2]

1.9 Some may find it surprising that the Liberal Party, which sought to significantly reduce the rights of Aboriginal and Torres Strait Islander people under the Native Title Act, is now putting forward legislation which seeks to expand the rights of native title holders. However, the Greens welcome the Liberal Party's commitment to increasing the rights of native title holders as Senator Scullion's legislation (and the identical legislation introduced by the Hon. Tony Abbott in the House of Representatives) seeks to do.

1.10 The Greens support amending the Native Title Act so that it reflects the increased rights of native title holders that the Liberal Party is proposing. Those increased rights should be available to all native title holders across the country and in all circumstances, rather than only on Cape York and only in regard to one particular Queensland law.

1.11 As the committee's report notes, many submissions and witnesses to this inquiry also raised the United Nations Declaration on the Rights of Indigenous Peoples and in particular, the principle of 'free, prior and informed consent' which is detailed in Article 19 of that Declaration. The committee is of course correct to note

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1 *Committee Hansard*, 30 March 2010, p. 16.

2 *Submission 14*, p. 4.

that the Declaration and the consent principle contained within it is not binding in Australian law. However, the Greens believe we as a nation should not indicate we support international declarations unless we are prepared to make a good faith effort to implement them in our legislation and administrative practices.

1.12 Whilst the inquiry heard differing views about the adequacy of the consultation processes followed by the Queensland Government under its Wild Rivers law, and also about the adequacy or otherwise of the consultation processes followed by the Liberal Party in putting together the Bill which is the subject of this inquiry, the submission from Australians for Native Title and Reconciliation (Qld) makes the point that:

> …the Process of Consultation is fundamentally different from the Principle 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.[3]

1.13 Professor Altman's submission to the Committee notes:

> In Australia, free prior informed consent provisions only exist under the Aboriginal Land Rights (Northern Territory) Act framework, and even here there are national interest override provisions although these have not been invoked in the 33 years since this law was passed. In other jurisdictions (except Western Australia) under State land rights laws there are other specific forms of consultation and negotiation possible.[4]

1.14 The Native Title Act framework does not provide native title groups free prior informed consent rights. Instead, under the future acts regime only a right to negotiate at best (with a window of opportunity restricted to six months) and a mere right of consultation, at worst are provided.

1.15 Quite clearly, our Native Title Act is not yet consistent with the important principle of consent contained with the UN Declaration. As the Declaration was only recently adopted internationally, and only supported at federal government level in Australia even more recently, it is not surprising that we have yet to fully adapt our laws and procedures to ensure they reflect the content of the Declaration. However, this inquiry and the issues raised by it have provided a reminder that it is time for Australia, and in particular the federal Parliament, to start working on this task.

1.16 The Greens have consistently supported the UN Declaration on the Rights of Indigenous Peoples and also supported the current Australian government's decision to sign the Declaration. Although the Liberal Party opposed the Declaration when in government, and continuing public statements would suggest their official policy is to continue to oppose it, the Greens none-the-less welcome the support which Liberal

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3 *Submission 31*, p. 2.

4 *Submission 14*, p. 4.

Party Senators have expressed throughout this inquiry for the principle of free, prior and informed consent as contained in the Declaration.

Recommendation 1

1.17 Given the flaws contained in Senator Scullion's Bill, the Senate should not pass the Bill, but should instead amend the *Native Title Act 1993* to ensure the stated intent of Senator Scullion's Bill (requiring agreement from native title holders to government legislation or determinations which affect their lands) is properly defined and equally available to all Aboriginal and Torres Strait Islander people across Australia.

Recommendation 2

1.18 That the Senate resolve to initiate a process aimed at ensuring the content of the UN Declaration of the Rights of Indigenous Peoples is reflected in government laws, processes and practices, with priority given to examining how the principle of free, prior and informed consent can be consistently and effectively applied.

Senator Scott Ludlam

Australian Greens

Senator Rachel Siewert

Australian Greens

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Gilbert + Tobin Centre of Public Law
2	Dr Geoff Mosley
	Attachment 1
	Attachment 2
	Attachment 3
	Supplementary Submission
3	Advance Cairns
4	P&e Law
	Attachment 1
5	Cummings Economics
6	Lockhart River Aboriginal Shire Council
7	Cape York Institute
8	Mr Greg McIntyre QC
9	Ms Phyllis Yunkaporta
10	Chuulangun Aboriginal Corporation
11	Australian Conservation Foundation
12	Kulla Land Trust
	Supplementary Submission
13	Northern Peninsula Area Traditional Owners
14	Professor Jon Altman
15	Kokoberrin Tribal Aboriginal Corporation

16	Property Rights Australia
17	Mr Stephen Brech
	Attachment 1
18	Balkanu Cape York Development Corporation
19	Cape York Sustainable Futures
20	Nyacha Kumopinta Aboriginal Corporation
21	Mr Simon Kennedy
22	Professor Suri Ratnapala
23	Lama Lama Land Trust
24	Mr Harold Ludwick
25	Cape York Land Council
26	Girringun Aboriginal Corporation
27	Carpentaria Land Council Aboriginal Corporation
28	Ms Melissa Sinclair
29	The Wilderness Society (Qld)
30	Cape Alumina Limited
	Attachment 1
	Attachment 2
31	ANTaR Qld
32	Ms Tracey Ludwick
33	Ann Creek
34	Queensland Aquaculture Industries Federation (QAIF)
35	Queensland Government
	Attachment 1
36	Aurukun Shire Council

37 Anglican Church, Diocese of Brisbane

Attachment 1

38 Confidential

TABLED DOCUMENTS

Documents tabled at public hearing by Queensland Department of Environment and Resource Management in Cairns on Tuesday, 13 April 2010

Documents tabled at public hearing by Balkanu Cape York Development Corporation in Cairns on Tuesday, 13 April 2010

Documents tabled at public hearing by Carpentaria Land Council Aboriginal Corporation in Cairns on Tuesday, 13 April 2010

Documents tabled at public hearing by Cape York Sustainable Futures in Cairns on Tuesday, 13 April 2010

Documents tabled at public hearing by Senator Boswell in Cairns on Tuesday, 13 April 2010

Documents tabled at public hearing by Umpila Traditional Owner Mr Peter Kyle in Cairns on Tuesday, 13 April 2010

Document tabled by the Cape York Land Council in Cairns on Tuesday, 13 April 2010

ADDITIONAL INFORMATION RECEIVED

Answers to Questions on Notice provided by the Attorney-General's Department on 13 April 2010

Answers to Questions on Notice provided by Balkanu Cape York Development Corporation on 16 April 2010 and 28 April 2010

Answers to Questions on Notice provided by the Chuulangun Aboriginal Corporation on 22 April 2010

Answers to Questions on Notice provided by Cape Alumina on 23 April 2010

Answer to Question on Notice provided by The Wilderness Society QLD on 27 April 2010

Answers to Questions on Notice provided by Carpentaria Land Council Aboriginal Corporation on 28 April 2010

Answers to Questions on Notice provided by Cape York Sustainable Futures on 30 April 2010

Answers to Questions on Notice provided by the Queensland Government on 30th April 2010 and 6 May 2010

Answers to Questions on Notice provided by Balkanu Cape York Development Corporation on 18 June 2010

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 30 March 2010

HARVEY, Ms Tamsyn, Assistant Secretary, Native Title Unit, Attorney-Generals Department

JONES, Ms Katherine, First Asssistant Secretary, Social Inclusion Division, Attorney-Generals Department

McINTYRE SC, Mr Greg, Private capacity

PEARSON, Mr Noel, Director, Cape York Institute

PIPER, Mr Terry, Adviser, Cape York Institute

WILLIAMS, Professor George, Private capacity

Cairns, 13 April 2010

ACCOOM, Mr Rodney, Mayor, Lockhart River Aboriginal Shire Council

AHMAT, Mr Richie, Chairman, Cape York Land Council

ANDY, Mr John, Chairman, Girringun Aboriginal Corporation

BRADLEY, Mr John, Chief Executive Officer, Department of Environment and Resource Management, Queensland

BUCHANAN, Mr Scott, Project Director (Wild Rivers), Department of Environment and Resource Management, Queensland

BUTLER, Mrs Patricia, Chief Executive Officer, Cape York Sustainable Futures

CLAUDIE, Mr David, Chief Executive Officer and Chairman, Chuulangun Aboriginal Corporation

DE BUSCH, Mr Donald, Chairman, Nyacha Kumopinta Aboriginal Corporation

ELU, Mr Joseph, Secretary, Cape York Sustainable Futures

ESPOSITO, Mr Anthony, National Manager, Indigenous Conservation Program, The Wilderness Society (QLD)

HOGNO, Mr Mark, Ranger Coordinator, Carpentaria Land Council

KYLE, Mr Peter, Umpila Traditional Owner and Member, Umpila, Nesbit, Rocky, Massey, Chester Rivers Advisory Committee

LUTRELL, Mr Andrew, Director, Policy Indigenous Services, Department of Environment and Resource Management, Queensland

MESSENGER, Dr Paul, Managing Director, Cape Alumina Limited

MOSLEY, Dr Geoff, Private capacity

PEARSON, Mr Gerhardt, Chief Executive Officer, Balkanu Cape York Development Corporation

PIPER, Mr Terry, Chief Operating Officer, Balkanu Cape York Development Corporation

SEELIG, Dr Timothy, Queensland Campaign Manager, The Wilderness Society (QLD)

TAYLOR, Mr Terence, Wild Rivers Head Ranger, Carpentaria Land Council Aboriginal Corporation

WALKER, Mr Glenn, Wild Rivers Campaigner, The Wilderness Society (QLD)

WOOSUP, Mr Larry, Traditional Owner and key spokesperson, Ankamuthi

YANNER, Mr Murrandoo, Spokesman, Carpentaria Land Council, and Traditional Owner

YARROW, Mr David, Barrister, Victorian Bar, Counsel to Cape York Land Council

YUNKAPORTA, Ms Phyllis, Director, Ngan Aak Kunch Aboriginal Corporation