30 March 2010

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA
ACT 2600

Dear Secretary

Inquiry into the Wild Rivers (Environmental Management) Bill 2010 [No 2]

Thank you for the opportunity to make a submission to the Committee's inquiry into the Wild Rivers (Environmental Management) Bill [No 2]. I make this submission in my own capacity and am solely responsible for its contents.

The *Wild Rivers Act 2005 (Qld)* is unique in Australia in its tenure-blind approach that provides for it to be applied upon areas that are not public land, reserves or within national parks. According to a Queensland Parliamentary Research Brief 'wild' river protection in other jurisdictions occur primarily in conservation reserves, national parks or upon public land. In Tasmania protection occurs primarily (96%) in reserve systems, in New South Wales protection is provided for only in national parks whilst in Victoria protection has provisions that apply only to public land. (Queensland Parliamentary Library, 2005: 33-35)

Due to the unique application of a preservation policy upon large areas of native title and Aboriginal freehold land in Cape York, I chose to conduct research into Indigenous sentiment towards the policy to meet academic requirements for a Master of Environmental Management. From December 2008 and December 2009, I volunteered with the Give Us A Go campaign as a participatory action researcher. During this time, I visited many Aboriginal communities in Cape York to discuss their understanding of and sentiment towards Wild Rivers and on a couple of occasions I was able to observe representatives of the Department of Natural Resources and Water conduct individual consultations with traditional owners.

My research conclusions have led me to make this submission to the Inquiry.

1. **This Bill enhances native titleholders land rights by enabling them to negotiate agreement regarding the declaration of native title areas as 'Wild River' areas as set out in s5 "Agreement of Traditional Owners required"**

During my research I observed not an insignificant degree of opposition from traditional owners towards the WRA related to the imposition of preservation areas and prohibition of certain activities within high

preservation areas upon Indigenous land without a requirement of agreement with traditional owners. For this reason, this submission supports the proposed Bill and its intent in s5 of "Agreement of Traditional Owners required".

2. **This Bill supports the right of Indigenous people to determine and develop priorities for the development and use of their lands by providing in s7 for the prescription of procedures that seek agreement, negotiate terms of the agreement and for giving and evidencing the agreement**

Such an approach appears in line with Article 10 of the Convention on Biological Diversity and Articles 19 and 32 of the United Nations Declaration on the Rights of Indigenous People.

Article 10 of the CBD states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.

Article 19 of the UN Declaration on the Rights of Indigenous peoples states:

> 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.

And Article 32 states:

> Indigenous people have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

My research concluded that indigenous sentiment towards *Wild Rivers Act 2005 (Qld)* did express a requirement for better consultative procedures, including cross-cultural procedures and that provided for traditional owners to provide prior informed consent.

Consultation on Legislative Measures

Discourse analysis of debate regarding the WRA highlights that the Queensland government did not seek wide consultation with Cape York traditional owners in the development of the legislation in 2005. Kathy McLeish's interview with Minister Robertson on Australian Broadcasting Corporation's Stateline program, 17 June 2005, highlights that Minister Robertson considered it appropriate to consult with traditional owners only after the Wild Rivers legislative framework had been determined, furthermore Minister Robertson clearly noted that regardless of

consultation, the principles of the Wild Rivers Bill were "set in stone… it's a mandate". Likewise 2007 consultations on the WRA did not seek wide traditional owner participation, the outcome of which was a raft of amendments that sought to accommodate pastoral and mining interests.

Consultation on Declarations

The discourse analysis regarding the Wild Rivers Declarations consultation processes that suggesting wide and deep consultation (ABC, AM 6 April 2009; The Australian, 8 April 2009) with Indigenous traditional owners appeared incongruous with my research results for a variety of reasons.

Prior to the Wild River Declarations in Cape York, I briefly visited Coen, Lockhart River and Aurukun and the few conversations I had with traditional owners suggested they were either confused or unhappy with idea of Wild Rivers or had not heard of Wild Rivers. During this time I was able to observe a few Department of Natural Resources and Water consultations with individual traditional owners. I had serious concerns regarding the consultation processes and noted that the consultation;

- refused to address the management, policies or strategies that would be enacted in Wild River areas if the declaration was made
- informed traditional owners that the most important thing they needed to know is that they can still go hunting, fishing and camping on the river and did not consider their rights as Aboriginal freehold land owners
- informed traditional owners at the end of the consultation that they are invited to provide submissions, but should they not provide submissions, the notes from the 1 hour consultation will be provided to the Minister in order for their comments to be considered. The process however did not inform or request permission from the traditional owner prior to the consultation occurring that their comments were being noted and did not seek the informed consent of the traditional owner that the contents of the Departmental notes were a correct representation of the traditional owners sentiments towards the Wild Rivers Declaration
- construed that people were spreading lies about the Wild Rivers legislation without being specific as to the content of those lies
- conveyed to traditional owners that they are allowed to use the land "for their own purposes" but did not clearly outline what those purposes may be or articulate the procedural barriers they may face
- conveyed to traditional owners that they can still build in the high preservation areas but did not outline the processes Wild River regulations would require from traditional owners in order for development approvals
- presented 'Wild Rivers' as going to protect the rivers from exploitation by non-traditional owners who want large scale agriculture and mining but did not highlight the procedural barriers or restrictions on small scale agriculture

- articulated that the Wild Rivers regime will stop "new" mining and other exploitative activities but did not highlight that the Minister has the right to exempt certain mining activities if its in the states interest
- presents Wild Rivers as the only approach that has the potential to protect Cape York rivers from damage

My concern at the DNRW processes of consultation conducted with traditional owners regarding Wild River Declarations has led me to support the Bill that will allow the Governor-General to prescribe more appropriate procedures for consultation with traditional owners to ensure that their agreement, should it be obtained, is done so in a manner that reflects the evolving international principle of free and prior informed consent as set out in s19 of the UN Declaration on the Rights of Indigenous Peoples.

Other concerns regarding principles of ecologically sustainable development

Australian principles of ecologically sustainable development (ESD) are outlined in the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC) s3A as decision-making that integrates economic, environmental, social and equitable considerations. The EPBC presents the principle of ESD as the precautionary principle, inter-generational equity and conservation of biological diversity and ecological integrity.

Failing to require integrated environmental decision-making

Numerous conversations with various traditional owners highlighted to me that traditional owners were not against river protection, rather their concerns regarded a blanket approach to environmental management that failed to provide for integrated decision-making by traditional owners.

The *Wild Rivers Act 2005 (Qld)* fails to require integrated environmental decision making through its intent to s5(1) to "preserve the natural values of rivers that have all, or almost all, of their natural values intact" and specifically prohibits certain activities in high preservation areas despite the *Integrated Planning Act 1997 (Qld)* (repealed in June 2009 and replaced with the *Sustainable Planning Act 2009 (Qld)*).

Misinterpretation of the precautionary principle

Furthermore I have a personal concern that the Wild Rivers Act 2005 (Qld) misinterprets the precautionary principle.

The precautionary principle is defined in the Convention of Biological Diversity 1992, Principle 15,

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of

> scientific certainty shall not be used a reason for postponing cost-effective measures to prevent environmental degradation. (CBD, 1992)

The focus of the principle is to anticipate and avoid harm when there is a threat of serious or irreversible damage, rather than to prescribe what type of measures should be taken to protect the environment. The *Wild Rivers Act 2005 (Qld)* s5(3)(b) "having a precautionary approach to minimise adverse effects on known natural values and reduce the possibility of adversely affecting poorly understood ecological functions" has reinterpreted the principle by using it to prescribe what measures are to be taken, such as prohibition and particular regulation, and in so doing attributes the level protection to the precautionary approach, when such a decision is eminently a political decision rather than a principled decision.

Furthermore, international commentary regarding this principle highlights that it is particularly relevant to the management of risk and therefore requires scientific evaluation of the risks associated with activities and that measures based on the precautionary principle should be *inter alia non discriminatory* in their application. However, the *Wild Rivers Act 2005 (Qld)* on the one hand requires no evidence of risk to prohibit certain activities in high preservation areas such as aquaculture and agriculture regardless of any environmental impact assessment proponents may choose to conduct (as such is deliberately blind to both scale and practice of potential activities). On the other hand, it provides exemptions for mining activities in high preservation nominated waterways to be exempted for various reasons including an environmental impact statement showing natural values will be preserved or the state considers the project of state significance or the value of the natural resource is sufficient to warrant a lease in the waterway (Wild Rivers Declaration 2009 Section 38 (2)(a)(b) and (3)(a)(b)(i)(ii)(iii)). In so doing, the Act applies the precautionary principle discriminately to state and mining interests over the potential interests of traditional owners that interested in agriculture and aquaculture.

Thank you for the opportunity to make this submission.

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