Submission to Senate Legal and Constitutional Committee
Wild Rivers (Environmental Management) Bill 2010 [No 2]

Introduction

1. The substantive provision in this Bill is section 5, which provides that –

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

2. This proposed Commonwealth legislative provision confirms the position which this submission suggests is the effect of the operation of the *Native Title Act 1993* (Cth) in relation to development or use of land subject to native title affected '*future acts'*, as defined by *Native Title Act 1993* (Cth) and has a wider ranging impact on the validity of the regulatory scheme established under *Wild Rivers Act 2005* (Qld). This is illustrated in this submission by reference to the case of the native title held by the Wik and Wik Way Peoples of Cape York.

Wik Native Title

3. The Wik and Wik Way Peoples were determined by the Federal Court in *Wik Peoples v Queensland* [2000] FCA 1443 (3 October 2000) to hold native title in relation to areas which had always been unallocated Crown lands or lands that have only ever been subject to forms of title granted for the benefit of Aboriginal peoples. The Court determined that the native title rights and interests in relation to those areas conferred possession, occupation, use and enjoyment of the determination area on the native title holders, including rights, duties and responsibilities to:
   (a) Speak for, on behalf of and authoritatively about the determination area and assert proprietary and possessory claims over the determination area;
   (b) Give or refuse, and determine the terms the terms of any, permission to enter, remain on, use or occupy the determination area by others.

4. In a further determination the Federal Court in *Wik Peoples v Queensland* [2004] FCA 1306 (15 October 2004) determined that the Wik and Wik Way peoples held the same native title rights and interests in the areas covered by the Coen River Pastoral Holding and the Napranum and Pormpuraaw Deeds of Grant in Trust by operation of the *Native Title Act 1993* s 47A(1)(b)(ii), the Aurukun Shire lease by operation of the NTA s 47A(1)(b)(i) and Lot 2 on Plan SP161882 by operation of the NTA s 47B(1)(b). It was further determined by the Federal Court that non-exclusive native title rights existed in relation to Lot 7 and 8 on Crown Plan AP9681.

5. The Registered Native Title Body Corporate determined by the Court to perform functions set out under s 57(3) of the NTA as agent for the Wik and Wik Way peoples is the Ngan Aak Kunch Aboriginal Corporation.

Archer Basin Wild River Declaration

6. The *Archer Basin Wild River Declaration 2009* ("ABD") made pursuant to the *Wild Rivers Act* applies to the extent of the catchment area of the Archer, Love and Kirke Rivers, 10 major tributaries and 5 special features, including wetland areas, lagoons and Lake Archer. The wild river area includes high preservation areas, a preservation area, floodplain management areas, sub-artesian management areas, a designated urban area and nominated waterways in the preservation area.

7. The ABD sets out a licensing regime for the taking of water from the wild river area. It further regulates an application for allocation of quarry material under the *Water Act 2000*, s 280, deeming as 'not to have been made' all applications except those relating to 'specified works' or 'residential complexes' in the wild river area and making the ABD a mandatory consideration in deciding an application. Any part of an application under the *Coastal Protection and Management Act 1995*, s 73, for quarry material which relates to the wild river area is declared to be of no effect. The management plan and decisions to grant licences and contracts under the *Forestry Act 1959* must be consistent with the ABD and have regard to the *Wild Rivers Code* (or any approved code for the area).

8. The ABD sets out a comprehensive procedure for the regulation of activities within the wild river area. Regulated activities may be variously identified as 'assessable development', 'self assessable development' or 'taken not to have been made' under the *Integrated Planning Act 1997* ("IPA") or subject to or exempted from the requirements or effect of the ABD. The classes of regulated activities comprise various forms of water works, activities in tidal areas, mining and petroleum activities, residential, commercial and industrial development, management plans for a protected area under the *Nature Conservation Act 1992*, 'master planned areas' under the IPA, authorities, aquaculture development applications and release of non-indigenous fish under the *Fisheries Act 1994*, agricultural activities, animal husbandry activities, native vegetation clearing activities, pest control notice applications and 'Environmentally Relevant Activities'. The 'indicative' map in Schedule 2 to the Declaration shows that there are substantial tracts of High Preservation Area on the coast within the Aurukun Shire and along the courses of the rivers include within the ABD.

Wild River Declaration and Native Title

9. The declaration of a wild river area under the WRA is similar to the creation of a reserve. The High Court in the case of *Western Australia v Ward* said that the

effect of designation of land as a reserve for a public purpose is that it is 'inconsistent with any continued exercise of a power by native title holders to decide how the land could or could not be used': [2002] HCA 28 at [219].

10. The common law will not recognize, as a native title right, the traditional right to say how land can or cannot be used in circumstance where the land in question has been reserved for a public purpose: *Ward* 2000 at [219]. By analogy, the same conclusion must be reached where land is the subject of a declaration under the WRA.

11. The native title right to "speak for country" or exclusive use may be confined or excluded through the exercise of the Crown's authority to create or assert inconsistent rights to control access to land (Ward 2002 HC at [91]). A declaration under the WRA has that effect.

12. If a declaration under the WRA is to have any effect in relation to native title held land it does so by the government taking from native title holders the right to decide how the land can be used.

13. "Acquisition" includes the taking and enjoyment by the Government of "the full fruits of possession": *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286. The prevention of development on a particular site is also an acquisition of the benefit of the use of the land: Deane J in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 283-4 and 286. A diminution of ownership rights affected by a declaration under the WRA constitutes an acquisition of property which "is no less an acquisition of property because it also has a regulatory or other public purpose": *Wurridjal v The Commonwealth* [2009] HCA 2 at [103], and see also at [171] and [436].

14. Deeds of Grant in Trust lands, Aurukun lease lands and Aboriginal Lands under the *Aboriginal Lands Act* on Cape York Peninsula are all lands with native title rights, including the native title right to decide how the land can be used, because of the operation of s 47A of the *Native Title Act*.

15. The declaration of a wild river (if valid) 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 NTA: see NTA s 24AA(5), s 24MD(1) and Subdivision P and *The Lardil , Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland* [2001] FCA 414, at [20].

16. A compulsory acquisition of a native title right is invalid unless done in accordance with the *Native Title Act*: NTA s 24OA.

17. A compulsory acquisition of a native title right may be a valid 'future act' under the NTA if it takes place in accordance with the 'right to negotiate' procedure

under the NTA. That procedure requires that notice be given to the native title party and to the public in the way prescribed in the NTA s 29 and the parties must negotiate in good faith with a view to obtaining the agreement of the native title party to the doing of the act (NTA s 31). If no agreement is reached after 6 months, then a party may apply to have the National Native Title Tribunal determine the matter by arbitration.

18. That procedure has not been adopted by the government before making declarations by way of statutory instrument under the WRA and so such declarations are invalid under the NTA and liable to be declared to be inconsistent with the NTA and invalid pursuant to the Commonwealth *Constitution*, section 109.

19. Section 44 of the WRA provides that 'a wild rivers declaration or a wild rivers code, in applying for the purposes' of any of the Acts that prohibit or regulate activities or taking of natural resources, cannot limit a person's right to the exercise or enjoyment of native title'. That statutory protection is limited to the prohibition of activities under legislation other than the WRA and does not apply to the effect on the native title right to decide use of land resulting from a declaration under the WRA.

20. The Full Federal Court in the case of *Western Australia* v *Ward* (2000) 170 ALR 159;[2000] FCA 191 at [506]-[508] held that sections 104-106 of the *Conservation and Land Management Act 1984* (WA) and regulations under the *Wildlife Conservation Act 1950* (WA), while imposing "very stringent and extensive control over human activities within the nature reserves and wildlife sanctuaries" do not prevent the continued enjoyment of all native title rights and interests in relation to land within them, but do extinguish an "exclusive native title right to control access" and an "exclusive right of possession and occupation".

Validity of the Bill

21. The *Wild Rivers (Environmental Management) Bill 2010 [No 2]*, if enacted into law would have a broader impact in protecting native title than the operation of the NTA. It would prohibit regulation of native title land without the consent of the native title holders. Potentially that would render invalid in relation to such lands any form of regulation of development or use of such land (whether by native title holders or not). The Bill recites that it is an exercise of the power to make laws 'for the people of a race for whom it is deemed necessary to make special laws', pursuant to section 51(xxvi). Given that the law is limited to native title lands, it appears on its face to be an exercise of that legislative power. It appears to be providing a benefit to Aboriginal people, the race of people who hold native title and could be a special law for the people of a race deemed by the Parliament to be necessary: see *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, at 460.

22. Given the potential impact of the *Wild Rivers Act 2005* (Qld) and declarations made under it upon the native title rights of Aboriginal peoples on Cape York it may well be appropriate for the Commonwealth Parliament to enact the legislation proposed by this Bill.