Submission to the Senate Legal and Constitutional Affairs

Legislation Committee inquiry into the

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

by

ANTaR Qld

25-27 Cordelia Street

South Brisbane 4101

Introduction

Australians for Native Title and Reconciliation (ANTaR) was established in Queensland in 1998 from an affiliation of organisations working to promote and defend the Native Title rights of Aboriginal and Torres Strait Islanders peoples. ANTaR Queensland is an incorporated association and part of the national organisation, ANTaR Inc. However, we wish to stress that this submission is on behalf of ANTaR Queensland, as it relates to legislation which impacts solely on our state.

Since 1998 ANTaR Qld has worked on Native Title, Reconciliation, the Sea of Hands and Stolen Wages issues. Current campaigns of ANTaR Queensland include Close the Gap, Reducing Aboriginal and Torres Strait Islander Imprisonment in Qld and the Learning More Program.

Wild Rivers and Native Title

The Wild Rivers (Environmental Management) Bill [No 2] 2010 (hereafter called the Bill), deals specifically with Native Title rights of Traditional Owners, and thus is of direct interest to ANTaR Queensland.

The Bill deals with the Native Title rights of Traditional Owners in Queensland, solely in relation to how those rights are affected by a single piece of Queensland legislation, namely the Wild Rivers Act 2005 (Qld).

The Consent Principle

The Bill specifically requires the agreement of the Traditional Owners before a wild rivers declaration can be applied to land and waters over which they have recognised Native Title rights.

ANTaR Qld believes that receiving the free, prior and informed consent from Aboriginal and Torres Strait Islander people for legislative proposals which directly affect them is a fundamental aspect of good governance and best practice. The failure to obtain such consent is a key reason why political parties and governments of all varieties have such a lamentable record of failure with respect to Indigenous Australians over most of our history since colonisation.

The Process of Consultation is fundamentally different from the Principal of Consent and one does not automatically lead to the other00000. Nor is consultation++++++ a mandate for final decision making, nor a replacement for free, prior and informed consent

ANTaR Qld acknowledges the complexity of the politics of the issues and enormous efforts made in negotiating the Wild Rivers legislation by the effected TO's, the Qld Government and the NGO's involved.

As an advocacy organisation working with Aboriginal and Torres Strait Islander Queenslanders for rights, justice and reconciliation the call for submissions gives us an opportunity to

- emphasise the need to uphold the rights of Traditional Owners to control over their land now and into the future and

- to emphasise the need to uphold the principle of consent in all negotiations with all Aboriginal and Torres Strait Islander peoples

The International Declaration on the Rights of Indigenous Peoples

As the Senate Committee would be aware, on 13 September 2007, the United Nations General Assembly, by Resolution 61/295, adopted the Declaration on the Rights of Indigenous Peoples (hereafter called the Declaration).

ANTaR Qld was disappointed that the previous federal government did not support this Declaration, and we congratulate the current federal Labor government for subsequently adopting a position in support of the Declaration. We recognise that the Declaration does not have legal force under Australian law, but it none the less establishes benchmarks which Australia as a nation has indicated a preparedness to support.

Whilst the Declaration contains a sizeable Preamble, and 46 separate Articles, the central principle of free, prior and informed consent is evoked a number of times throughout the Document.

Some relevant Articles in the Declaration include:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

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.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Consistently applying the consent principle

We recognise that the precise meaning and application of “free, prior and informed consent” is one that is still developing in practice, including in an Australian context.

ANTaR Qld believes it would be highly desirable if all political parties and all levels of government indicated a willingness to support the principle of free, prior and informed consent into the future, and to work with Aboriginal and Torres Strait Islanders across Australia to develop clear procedures and protocols to ensure this principle is consistently applied across all laws and levels of government.

Agreement vs Consent

We note that sections 5 and 6 of the Bill before the Committee would effectively require the "agreement" of Aboriginal Traditional Owners before a wild river declaration could have effect under the relevant Queensland law. Whilst this principle is welcome, there is no further detail about how this "agreement" should be sought and recognised.

Section 7 of the Bill provides for Regulations to be able to be made which could detail procedures for seeking the agreement of Aboriginal Traditional Owners, negotiating such an agreement and evidencing that agreement. In the absence of any draft Regulations being presented with this Bill, it is impossible to be sure whether processes under this Bill would be any better than those which have already been followed at the state level in Queensland in respect of wild rivers declarations. If the Bill were to become law, in the absence of such Regulations, it is difficult to know how it might operate in practice. In theory at least, it may be possible that Regulations could be adopted which would measure the "approval" of Traditional Owners in such a way as to allow a less satisfactory process than that which has occurred to date in regards to the wild rivers declarations.

We also note the statement in Submission 7 to this Inquiry from the Cape York Institute that "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."

If the Bill were to become law and no Regulations were subsequently made, it is reasonable to speculate that courts might interpret the Bill in such a way as to take into account the principle of free, prior and informed consent as detailed in the UN Declaration. Whilst the Declaration does not have the status of full international law, it draws heavily on other pre-existing international treaties and conventions.

In light of the above points ANTaR Qld asserts that were this Bill to become law, the definition of the concept of "agreement" should be applied in a way which is consistent with the consent principle as outlined in the UN Declaration and follows the already established mechanisms for obtaining free, prior and informed consent.

It is Possible

It is appropriate to acknowledge that the Queensland government has been successful in other circumstances in receiving unequivocal consent from Traditional Owners in Cape York with Native Title rights over some lands which, as part of that consensual agreement, have been designated National Park.

This example demonstrates that it is clearly possible for free, prior and informed consent to be given by Traditional Owners in regards to environmental initiatives negotiated with the Queensland state government.

If this can be achieved in some circumstances, it should be aimed for in all circumstances.

Giving Indigenous issues priority and respect

ANTaR Qld would like to see this principle applied consistently not just across the entire state, but across our entire nation across all proposed laws and policies which would directly impact on Aboriginal and Torres Strait Islander peoples.

When the consent principle is to be applied in context of Traditional Owners with recognised Native Title rights, it would be better if this were to be explicitly recognised in the Native Title Act.

However, it should be recognised that the consent principle in the Declaration relates to all Indigenous peoples, not just those who can demonstrate continuing traditional connection to land and waters as defined in Australia's Native Title laws.

The need for Action in All Areas

ANTaR Qld has worked on a number of issues and campaigns over the last decade, within the constraints of being predominantly a volunteer run organisation funded by members and supporters. As noted in the introduction to this submission, one of the major issues ANTaR Qld has worked on is the Stolen Wages issue. We are aware that this Committee also conducted an inquiry into that issue, which reported in December 2006.

We are both concerned and disappointed that, despite this being a unanimous report, there has been no government response to the Committee's report more than three years later – which is somewhat ironic for a report which was entitled "Unfinished Business".

The lack of response to the Stolen Wages report – an issue which affects many Aboriginal people in Queensland directly and deeply – only serves to undermine the political environment in which free, prior and informed consent is being negotiated.

To quote some clauses from the preamble of the International Declaration on the Rights of Indigenous Peoples:

- Concerned *that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,*

- Recognizing *the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,*

- Convinced *that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,*

- Recognizing *that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,*

We therefore urge Committee members, both collectively and individually, to seek a prompt response from the government to Committee reports where Indigenous Australians are directly affected. It is both a matter of respect and a recognition that such matters deserve priority from government at all times.

Recommendations

1 That the Committee explicitly express its support for the consent principle as detailed in the International Declaration on the Rights of Indigenous Peoples

2 Noting in particular ***Article 19*** of the Declaration, which reads that*:*
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;

the Committee recommend that the government and the Parliament start immediately on developing a set of processes which would ensure this consent principle is appropriately applied for all proposed laws, policies and practices which impact on Aboriginal and Torres Strait Islander Australians.

3 The Committee ask the government to urgently provide its long overdue response to the 2006 report on the Stolen Wages issue.