

Balkanu

Cape York Development Corporation P/L

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Dear Sir/Madam

Balkanu Cape York Development Corporation (“Balkanu”) was recently invited to attend the Integrity and Accountability forum in Cairns on 28 August 2009 chaired by the Hon. Cameron Dick, Attorney-General and Minister for Industrial Relations. This forum discussed how Queensland’s integrity and accountability framework can be improved, and in particular issues of accountability and transparency. Consequently Balkanu has prepared this submission to the Integrity and Accountability review focusing particularly on the experiences of indigenous communities, traditional owners and representative organizations in Cape York Peninsula in relation to the *Wild Rivers Act 2005*.

Indigenous people on Cape York have objected strongly to the declaration of their lands as Wild River areas under this legislation. These objections have stemmed particularly from the fact that the Queensland Government failed to engage with indigenous groups to seek to resolve their issues raised in their submissions, and rushed the gazettal of the wild river declarations within two weeks of the March 21 state election. We submit that fundamental flaws in the *Wild Rivers Act* have resulted in a lack of basic accountability checks and balances and therefore provided the circumstances where government, under pressure from powerful lobby group The Wilderness Society, has overridden the rights and interests of indigenous people.

We note that the review materials seek feedback on a number of review questions. This submission focuses entirely on the issue of transparency – particularly **Question 23. Is information about the decision making processes of Government sufficiently available?** – and the issue of transparency in the administration of the *Wild Rivers Act*.

This submission sets out a number of issues in relation to the transparency of government decision-making where there has been a major injustice perpetrated on the indigenous people of Cape York.



TRANSPARENCY

We submit that there are fundamental flaws in the transparency of the decision-making processes of the Queensland Government in relation to the *Wild Rivers Act* and its implementation, particularly from the perspective of Cape York's indigenous people. These fundamental flaws include:

I. Inadequate consultation period

Issue: a four month consultation period denied Cape York Indigenous people sufficient time to consider and respond to the wild river declaration proposals.

Cape York indigenous people are severely disadvantaged compared to the broader community when considering participation in the decision-making processes of Government. Firstly, Cape York is suffering from an education crisis. Literacy and numeracy levels are considerably below those enjoyed in the broader community and for many people English is a second language. The rate of illiteracy in Cape York is high, and an overwhelming majority of indigenous people in the region would have only a rudimentary English literacy, if anything. This makes a public consultation process based on written submissions highly prejudicial to the majority of indigenous people in Cape York: they are highly disadvantaged in such a process, and are precluded from proper democratic participation sheerly because of the inadequate education they have received from the state over many decades. Secondly, cultural differences mean different strategies for providing information are required. Informing Indigenous communities about the decision making processes of Government involves much greater challenges than would be the case for non-indigenous people in urban Queensland. It is often not until communities can see how particular legislation and policies will impact their lives in a real sense that it is possible to form a view and give meaningful input into decisions. Such was the case with the proposal to declare wild rivers on Cape York.

It was not until June 2008 when Cape York Indigenous communities were able for the first time to see which rivers were proposed and consider maps of the proposed declaration areas. The proposed declaration areas were far more extensive and complex than contained in the Labor Government's 2004 and 2006 election policy commitments. It was not until June 2008 that Indigenous communities were able to start to contemplate the possible impacts that wild river declarations would have on their lives and their futures. Wild River Declaration Proposals are complex legal documents. Declarations impact on thirteen (13) other pieces of legislation. These documents are not readily understood. Government and The Wilderness Society demands that indigenous communities consider thirteen separate wild river proposals, form a view on alien and very complex legal arrangements and provide informed input and submissions within a four month period, were unreasonable and unjust..

For traditional owners to have their views properly considered by the Minister they have the choice of two paths. They must either 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. This is the reasons why thousands of submissions were lodged by non-indigenous, literate supporters of The



Wilderness Society, and there were virtually no submissions from indigenous people within Cape York Peninsula – other than those put forward through representative organizations.

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 on the most part Government denied the traditional owners of the Wenlock River the ability to obtain support to prepare submissions.

To submit their views in a form compliant with the *Wild Rivers Act*, the Act requires indigenous and other groups to set out the “grounds, facts and circumstances” relied upon for their submission. Indigenous communities did not have the financial means to seek expert assistance to prepare responses to these complex proposals. Requests to Government for financial assistance to obtain independent scientific, legal and ecological advice on the wild river declarations were turned down. Consider the example of the High Preservation Areas. Traditional owners objected to the declaration of High Preservation Areas to the maximum of 1km either side of a river. The riparian zone for many of these rivers and for great lengths of them is no more than 50 meters. The High Preservation Areas place unreasonable restrictions on activities traditional owners may wish to undertake within the area. There was no funding available for traditional owners to prepare a case for the reduction of the High Preservation Areas. Compare this to mining companies which have the resources to secure the scientific advice to put the case to government to reduce High Preservation Areas.

In their submissions to the Minister many traditional owners pointed out that:

“there are no imminent development threats to the nominated wild river basins and there is no need to rush wild river declarations”.

Traditional owners submitted that:

“the State must put in place a suitable process to enable traditional owners and the State to resolve issues in relation to wild rivers” and that “We submit that there must be no compulsory declarations of wild rivers and that any declarations of wild rivers must be with the support of traditional owners”.

The Minister ignored these requests by traditional owners and failed to put in place a suitable process to resolve issues. There was no further engagement by the State with traditional owners about their submissions between the closing of submissions on 22 November 2008 and the gazettal of the rivers on 3 April 2009. The Minister proceeded with the compulsory declaration of the wild rivers regardless of the views of the traditional owners.

II. Late submissions

Issue: The Minister denied traditional owners an extension of time to lodge submissions on the advice of The Wilderness Society but considered late submissions from others, including submissions solicited by The Wilderness Society.

In October 2008 traditional owners advised Balkanu that four months was not sufficient time to consider the wild river nominations and that they needed more time to consider the matters and



prepare submissions. A delegation of traditional owners from the Archer, Lockhart and Stewart River areas met with Minister Wallace and the Member for Cook Jason O'Brien and senior officers of the Department of Natural Resources and Water on 29 October, and requested an extension of time. Incredibly they were advised by Mr O'Brien and Minister Wallace to seek the support of The Wilderness Society before Government would give an extension. A meeting was arranged with The Wilderness Society in Cairns on 4 November. The Wilderness Society subsequently advised by letter dated 11 November signed by Anthony Esposito that:

“We are sincerely of the view that to meet your concerns it is best that the Government maintain its current formal closing date for public submissions (which apply to other interests including ourselves)”.

Mr Esposito went on to state:

“We wish to see a meaningful dialogue and negotiation between the Traditional Owners and the Queensland Government regarding the declaration proposals for the Archer, Stewart and Lockhart River basins and we support ensuring this will take place at the earliest opportunity”.

Traditional owners accepted The Wilderness Society's advice in good faith.

Why did Minister Wallace and the State Government delegate the decision in relation to time extension to The Wilderness Society? It was a ministerial power, so why did the Minister tell the Cape York delegation that they needed to get the okay from The Wilderness Society before he was prepared to grant the extension?

The Government subsequently refused traditional owners an extension of time to make submissions. On 27 November Michael Tandy, Senior Policy Adviser to Minister Wallace wrote to Mr Peter Kyle, a representative of the traditional owner reference group and advised:

“Consultation on the declaration proposals has been occurring since 23 July 2008, and in that time the Department of Natural Resources and Water has had over 100 meetings and met with over 300 different individuals. Balkanu Cape York Development Corporation was engaged to ensure that all Traditional Owners in the areas were contacted and given the chance to participate. The Minister has considered your request, but feels that given the time that was provided to enable all interested parties to make submissions, it is not appropriate to extend the submission date for these declaration proposals”.

Balkanu Cape York Development Corporation (Balkanu) was contracted by the State to aid and facilitate consultation with Traditional Owners on wild river declaration proposals. The State Government, through the Department of Natural Resources and Water (NRW), was responsible for the consultation with the Traditional Owners.

On 2 December, in response to a question without notice from Greens member for Indooroopilly, Mr Ronan Lee, the Premier told Parliament in relation to wild rivers:

“The legislation that establishes the wild river declaration process is carefully crafted to get the balance right between graziers, industry, traditional owners and the environment. If it takes a little time to get it right, we will take that extra time. We are not about to ride roughshod, as



appears to be proposed by the member for Indooroopilly, over the interests of the Aboriginal people of Cape York, or indeed any other part of Australia”.

On 4 December Balkanu wrote to the Premier thanking her for the stand she took in Parliament on 2 December and stated:

“I am sure that your government will give proper regard to these issues to achieve an outcome which protects the natural values of Cape York’s rivers in a way which can be supported by the traditional owners of Cape York”.

The Premier gave assurances in Parliament that she would not “ride roughshod” over the interests of the Aboriginal people of Cape York and therefore gave heart to Cape York Aboriginal people that their issues would be addressed and that there would indeed be a process of further consultation and negotiation to resolve issues in relation to Wild Rivers. Other than one meeting between the Director General of the Department of Natural Resources and Water, Balkanu officers and Mr Peter Kyle at which Balkanu asserted the need to properly engage with traditional owners before any declarations, there was no further consultation and negotiation with traditional owners in relation to the wild river declarations.

On 27 January, when there had been no engagement between Government and traditional owners, Balkanu again wrote to the Premier stressing the need for further engagement with Traditional Owners, stating that:

“We are most disappointed that the Department has become silent in relation to Traditional Owner concerns”

And stated:

“Throughout the pre-submission period, traditional owners continually highlighted their desire for these discussions. The Balkanu meeting in December with the Director General, Scott Spencer, indicated that the department considered round table discussions with traditional owners (and the Wilderness Society) could be a solution”.

The letter of 27 January also advised the Premier that:

“The Wilderness Society also expressed their belief in correspondence to Traditional Owners that these direct dialogs would occur after the submission period had closed”.

Despite the assurances of The Wilderness Society prior to the closing date of submissions and the statements of the Premier on 2 December, there was no further engagement by the State with traditional owners between the closing of submissions on 22 November and the gazettal of the rivers on 3 April. The Premier and the Minister proceeded with the compulsory declaration of the wild rivers, ignoring written and verbal requests for more constructive negotiations.

Furthermore while indigenous communities were refused the right to make submissions after the closing date of 22 November, the Archer Basin Consultation report states that an additional 792 submissions were received between 22 November and 31 December. Although deemed not “properly made submissions” the report states they were nevertheless considered for the final declaration of the Archer Basin, Stewart Basin and Lockhart Basin Wild Rivers. The majority of these late submissions were by supporters of The Wilderness Society.



III. Transparency in relation to the declaration of High Preservation Areas

Issue: The State declared large additional areas of land as high preservation areas without informing indigenous landholders during the consultation process. This denied Indigenous people natural justice by denying them the right to make submissions.

The maps included in the Declaration Proposal and Overview Report documents which were shown to indigenous landholders by the State during the consultation phase did not include large High Preservation Areas which were subsequently included in the declarations. The Minister declared more than 20,000 hectares of High Preservation Area south of Aurukun without revealing prior intent to indigenous landholders.

Despite these High Preservation Areas covering much of the traditional lands of some groups, these groups were denied the opportunity to consider and make submissions on these extended High Preservation Areas.

Non-indigenous freehold title holders would not be treated in this manner.

IV. No disclosure as to which Minister made the declarations and when

Issue: The Wild River declarations do not state which Minister made the declarations nor the date of the declarations.

Unlike the previous Wild River declarations in other parts of Queensland, none of the Archer Basin, Stewart Basin or Lockhart Basin wild river declarations include a statement as to which Minister made the declarations, nor the date of the declarations. Similarly the gazette notices do not state which Minister made the declarations or date of the declarations. This information would normally and should be on the public record. It is essential that the public record show the Minister who made the declarations in accordance with s.7 and s.15 of the *Wild Rivers Act* and the correct date on which the declarations were made.

On the Q and A program on ABC television on Thursday 30 July the Premier stated that “the wild rivers were not declared until after the election”.

At a meeting between Minister Robertson, Environment Minister Kate Jones and their advisers, with Noel Pearson, Gerhardt Pearson, Neville Pootchemunka, Allan Creek and Richie Ahmat on 25 August 2009 in Cairns, Minister Robertson stated that his predecessor, Minister Craig Wallace, had made the decision to declare the Cape York Wild Rivers. “Yes, the decision was made before the election but it couldn’t go to the Governor in Council because of the election”, Mr Robertson said

Yet in a letter to solicitors representing the Cape York Land Council dated 26 May 2009, Minister Robertson stated that it was his decision to make the declarations of the Archer, Stewart and Lockhart River basins under s.15 of the *Wild Rivers Act*.

To clarify this matter on 10 September 2009 Balkanu wrote to the Premier to seek advice on the following matters by COB 14 September. The Premier was requested to provide:



- (a) your advice on which Minister made the wild river declarations in accordance with s.7 and s.15 of the Wild Rivers Act
- (b) your advice on the date on which the declarations were made by the Minister in accordance with s.7 and s.15 of the Wild Rivers Act, and
- (c) a copy of the instrument executed by the Minister by which the declarations were made.

The Premier has yet to respond.

As is obvious, it has not even been possible to get clear answers on basic questions such as when wild river declarations were made and by whom. This is information that should be on the public record and should be provided without obfuscation or delay. And yet five months later Cape York indigenous people are still waiting for straight responses.

V. Transparency in relation to election commitments

Issue: There has been a serious misrepresentation by Government of its election policy commitments

The State has continually asserted that the declaration of the wild rivers on Cape York was a result of the 2004 Wild Rivers election commitment. The 2004 Wild Rivers election commitment named 19 rivers as examples of Queensland's rivers which could be designated as Wild Rivers. The Premier has stated that "19 rivers were identified six years ago" (ABC Television Q&A program, 30 August 2009) and that "we went to the 2006 election committing to the names of the rivers, the 19 rivers that we would put through the process" (National Press Club, 4 September 2009).

On 3 April 2009 thirteen separate rivers and creeks were gazetted as Wild Rivers on Cape York, ten of which were not named in the election commitment. The Wild Rivers which were gazetted on 3 April which were not named in the election commitment were: Love River; Kirke River, Claudie River, Nesbit River, Chester River, Rocky River, Massy Creek, Breakfast Creek, Balclutha Creek and Gorge Creek.

Many traditional owners feel the Government has been deceptive and dishonest in relation to the number of rivers it has and is intending to declare on Cape York under the *Wild Rivers Act*.

VI. Transparency during the election period

Issue: The Government was not transparent about its intentions in relation to Cape York wild rivers during the election period.

Minister Robertson in the National Indigenous Times on 16 April 2009 stated:

"The declaration of wild rivers was ready to go before the election but with the calling of the election (known as the 'caretaker period') it couldn't occur."

Minister Robertson has now also stated that it was Minister Wallace's decision to make the declarations prior to the election. The content of the declarations and their implications for indigenous people were concealed from Cape York indigenous people and the electorate until after the election.



We do not know on what date the declarations were made by Minister Wallace, but this should be readily discoverable by the Integrity Commissioner. The Premier has failed to provide the evidence that there was no opportunity for the declarations made by Minister Wallace to be taken to the Governor in Council prior to the March 21 election in accordance with normal procedures prescribed in the Executive Council handbook. To ascertain whether the submission of the Executive Council Minute to Governor in Council was delayed for political reasons, we ask the Integrity Commissioner to request the Government provide an explanation as to these circumstances; and if the declarations did not proceed to Governor in Council in accordance with normal procedures, who was responsible.

VII. Transparency in relation to the Minister’s assessment of wild rivers and the criteria used in the assessment.

Issue: The material on which the Minister based his decision that the declared wild rivers fall under the scope of the Wild Rivers Act is not publicly available.

The Second Reading Speech by Minister Robertson to the *Wild Rivers Bill* on 24 May 2005 states:

“The scope of this bill is limited to those rivers that have all, or almost all, of their natural biophysical values intact”.

Henry Palaszczuk, his successor as Minister for Natural Resources and Mines stated on September 2005 that:

“Only rivers that meet the necessary criteria will be nominated for wild river status”.

According to material circulated by the Department of Environment and Resource Management, prior to nominating a river for declaration under the *Wild Rivers Act* the Minister: “Assesses the natural values of the river”. Of the thirteen rivers gazetted as wild rivers there was virtually no supporting evidence provided by the Department of Environment and Resource Management for nine of them (Balclutha Creek, Running Creek, Breakfast Creek, Massey Creek, Rocky River, Chester River, Nesbitt River, Love River and Kirke River). There is a lack of consistency, transparency and scientific rigour in deciding which rivers fall under the scope of the *Wild Rivers Act*. Neither the assessment conducted by the Minister to determine whether a river qualifies for nomination as a wild river nor the methodology used for this assessment has been made publicly available. This material has been sought under FOI but after five months DERM has failed to release material.

VIII. Transparency in the reasons for nominating a river

Issue: The published statement of reasons for the proposed declaration in the Notices of Intent were grossly inadequate in assisting the transparency of the decision making process.

When the Minister publishes a Notice of Intent, the notice must state ‘the reasons for the proposed declaration’ (WRA s.8(1)(a)). By necessity, the notice must be given in written form (see WRA schedule, definition of ‘publish’). Consequently, the requirements of *Acts Interpretation Act 1954* (Qld) s.27B should apply and the instrument giving the reasons should also—

- (a) set out the findings on material questions of fact; and
- (b) refer to the evidence or other material on which those findings were based.



The reasons for the declarations, set out by the Minister, merely list the relevant natural values to be protected and do not state the facts that are considered material nor the evidence or other material on which the Minister decided that the nominated wild rivers fall under the scope of the *Wild Rivers Act*.

IX. Errors, misleading and inaccurate information in the declaration overview reports and consultation reports

Issue: The State has been misleading about the nature of the natural values of the Wild River areas and the impacts and implications of Wild River declarations.

In conjunction with a Wild River Declaration Proposals the Department of Natural Resources and Water issued *Proposed Wild River Area Overview Reports*. Also, in accordance with s.38 of the *Wild Rivers Act* the Minister released Consultation Reports. The overview reports and the consultation reports for the Archer, Lockhart and Stewart River Wild River Areas are misleading.

Examples of misleading statements in the overview reports and consultation reports include:

- Statements in the Overview Reports that there is “continuous, dense stream-wide and basin-wide vegetation”(see Stewart Basin Overview Report p.15). This statement is incorrect, there is not continuous dense stream-wide and basin wide vegetation on the Stewart, Archer and Lockhart Basins.
- The Stewart Basin overview report (p.15) purports to quote Herbert et al 1995 and states: “thick rainforest and in the drier areas, woodland species, paperbarks and bottlebrushes extend down to the bed for much of the Stewart River”. Herbert made no mention of “thick rainforest”
- from page 25 of the Archer Basin consultation report: “*A Wild River declaration does not affect existing vegetation clearing laws associated with the building of residences and any reasonably associated building or structure. Vegetation clearing requirements for construction of houses are the same in and outside of the wild river area*”. Balkanu’s legal advice is that this statement is incorrect, a wild river declaration does affect vegetation clearing laws associated with the building of residences.
- from p.28 of the Archer Basin consultation report: “*Vegetation clearing for tourism infrastructure and outstations can continue to occur throughout the wild river area and may require a permit.*” This statement is misleading, vegetation clearing, particularly for tourism infrastructure is virtually prohibited in High Preservation Areas.
- from page 35 of the Archer Basin consultation report: “*Residential, commercial and industrial development is able to occur in a high preservation area and is managed by local governments.*” This statement is misleading, there are very few circumstances where commercial and industrial development is able to occur in a high preservation area.

The provision of misleading or inaccurate information is contrary to the DNRW code of conduct under the *Public Sector Ethics Act 1994* (Qld) (DNRW 2007: 34).

X. Lack of appeal and review arrangements within the Wild Rivers Act

Issue: Cape York indigenous people are denied natural justice as there are no review and appeal arrangements under the Wild Rivers Act.



In April 2009 following the declarations of the Archer, Lockhart and Stewart Basin wild river areas the Cape York Land Council requested from the Minister for Resource Management statements of reasons under the *Judicial Review Act 1991* in respect of (a) the Governor in Council's approval of the Archer, Lockhart and Stewart declarations and (b) the decision of the Minister (or his predecessor) to make the declarations.

Minister Robertson responded by letter advising that it was he who made the declarations and declining to give reasons on the basis that his decision to make the declarations and the Governor in Council's decision to approve them, were decisions of a legislative character rather than an administrative character and therefore are not decisions to which the *Judicial Review Act* applies. Legal advice to Balkanu states there are virtually no opportunities for the review of decisions in relation to Wild River Declarations, the Wild Rivers Code and Property Development Plans.

As the Wild River Declarations and Code are statutory instruments they are also not subject to parliamentary debate or disallowance. In Parliament on 2 February 2007 in relation to the *Wild Rivers Act Amendment Bill*, Mr Cripps (Hinchinbrook NPA) stated:

"There will be no provision for an appeal to be lodged against a wild river declaration. This is a fundamental legislative principle. The minister will be the only person who nominates and declares a wild river. No debate about the merits or otherwise of individual declarations will take place here in the Queensland Parliament, nor will the declaration be subject to a disallowance motion. This is a blatant and arrogant subjugation of the parliament".

XI. There have been no FOI documents released by DERM after five months

Issue: The Department of Environment and Resource Management has withheld information under FOI.

On 14 April 2009 the Cape York Land Council submitted FOI applications to the Department of Environment and Resource Management seeking documents relating to the Wild River Declarations for the Archer River, Lockhart River and Stewart River Wild River Areas. After almost five months the Department of Environment and Resource Management has not released one document.

XII. No regulatory impact statements

Issue: As Wild River declarations are statutory instruments there is no requirement for a regulatory impact statement which would have identified economic and social impacts of the declarations.

Wild River Declarations and the Wild Rivers Code are statutory instruments rather than subordinate legislation. As statutory instruments there is no requirement to conduct a Regulatory Impact Assessment. The objectives of the regulatory impact assessment process are to ensure:

- that the costs and benefits associated with the making of subordinate legislation and alternatives to regulation are fully assessed;
- that regulatory proposals are adequately detailed to relevant stakeholders
- that only those regulations which present the most effective response to a policy problem are adopted.



As Regulatory Impact Statements are not required there is no transparent assessment of the economic and social impacts of Wild River declarations.

CONCLUSION

Based on the evidence and material contained in this submission, the Queensland Government should revoke the declarations of the Archer, Lockhart and Stewart Basin Wild River areas and start again.

Yours sincerely

A handwritten signature in black ink, appearing to read "Gerhardt Pearson". The signature is fluid and cursive, with a large loop at the end.

Gerhardt Pearson
Executive Director