SAINT JOHN'S CATHEDRAL

Anglican Diocese of Brisbane

04 May 2010

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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

Dear Madam/Sir,

The Anglican Church (Brisbane Diocese) has conducted research and stakeholder consultation into the impacts of the Queensland Government's *Wild Rivers* legislation on the wellbeing of affected indigenous communities on Cape York. Our consideration of these matters has led us to conclude that the likely impacts of the legislation as it is currently being implemented are negative. In this past week we have released our research and findings which are now part of the public discourse on these matters.

We are aware of your enquiry into the proposed *Wild Rivers (Environmental Management) Bill 2010* and are keen to ensure you have access to our analysis of the wider issues this Bill seeks to address. To this end I have attached:

- our media release issued at the public release of our report on the likely impacts of the Wild Rivers legislation;
- our more detailed position statement;
- our full report on the likely economic impacts of wild rivers declarations; and
- an addendum to this report covering material gained from our consultation with environmental groups with an interest in the wild rivers matter.

I trust this material is of use to your enquiry.

In addition to the material attached I am pleased to make the following comments on the Wild Rivers (Environmental Management) Bill 2010 as it is currently drafted.

1. The use in the Bill of the term **Aboriginal traditional owners** would benefit from further clarification and definition. We note that the submission of the Carpentaria Land Council contains a similar observation and are in accord with the views expressed on this term by that group.
2. The Bill is drafted to cover **land in which native title exists**. This element of the Bill's scope would benefit from further clarification and perhaps should be made broader to include land where a native title application has been lodged.
3. The Bill does not make reference to preservation of environmental values of lands intended to be captured. It is the view of the Anglican Church (Brisbane Diocese) that the goal of preservation of environmental values can coexist with protection of indigenous property rights and that this duality of purpose should be captured in the Bill.

With these observations noted, I am pleased to advise that the Church is supportive of the intent of the proposed legislation.

I would be very please to attend the Senate to discuss in person our work on this matter with your Committee. Please contact Mr Darrin Davies, Diocesan Director of Communications on [redacted] or mob: [redacted] if you wish to arrange such a discussion.

Yours sincerely

The Very Reverend Dr Peter Catt
Dean of Brisbane

Cathedral Office, St. Martin's House, 373 Ann Street, Brisbane, Q. 4000
Postal Address: G.P.O. Box 421, Brisbane, Q. 4001
Telephone (07) 3835 2231 Fax (07) 3832 3173
brisdean@anglicanbrisbane.org.au www.stjohnscathedral.com.au
ABN 33671 722 573

DIOCESE OF BRISBANE
(Anglican Church of Australia)
ABN 32 025 287 736
DIOCESAN REGISTRY
ST MARTIN'S HOUSE, 373 ANN STREET, BRISBANE 4000

28 April, 2010

Media Release

The Anglican Diocese of Brisbane is calling on the Queensland Government to revoke its 2009 Wild Rivers Declarations saying they do not appear to have been obtained with proper consent of Indigenous people.

The Archer, Stewart and Lockhart rivers were declared 'Wild Rivers' in April last year, adding to the six already declared in Cape York and the Gulf of Carpentaria.

The head of the Church's Social Responsibility Committee (SRC) and Dean of Brisbane, Dr Peter Catt, said the objections expressed by affected Indigenous communities in Cape York were legitimate and likely to effect Indigenous well being adversely.

The Church has met with environmental and Indigenous groups as well as Government officials to discuss Wild Rivers. The Church also commissioned its own research which found flaws in the legislation.

"We have listened to views on this issue but we respectfully disagree with some. The Act erodes hard won Indigenous property rights. The effect of this is that Indigenous people in the impacted areas cannot engage in the real economy by developing sustainable projects," said Dr Catt.

Late last year the Church wrote to the Government asking for a moratorium on any new Wild Rivers declarations. Dr Catt called on the Government not to make any further declarations until a framework was in place that protects the property rights of affected Indigenous communities, the environmental values of selected areas, and enables sustainable economic development and engagement with real economy.

"A core issue in the debate is properly informed consent. The processes used in the Wild Rivers process do not, in my view, allow sufficient opportunity for Indigenous engagement and genuine Indigenous consent."

"No future Wild Rivers declarations should be made without the explicit and properly acquired informed consent of affected Indigenous traditional owners.

Dr Catt said Indigenous land use agreements are a viable means of pursuing and capturing consent. "Properly informed consent must be based on an Indigenous land management model. It is also crucial that consenters have access to advice and resources, and sufficient time to consider the impacts of any proposed declaration."

During its research the Church examined three development cases: an estuarine fish farm, a banana farm and an eco-tourism resort. Expert planning advisors looked at the likelihood of them being approved under the Wild Rivers Act. They found that while the Wild Rivers legislative demands on the Eco Tourism venture were not onerous approval would be difficult or very difficult to achieve with the banana and fish farm projects.

More information:
Darrin Davies
Director of Communication

Anglican Diocese of Brisbane

POSITION STATEMENT
Wild Rivers

The Anglican Church in the Diocese of Brisbane has reviewed operation of Queensland's Wild Rivers legislation in an effort to understand the likely effect of the legislation on indigenous well-being for Cape York communities.

The Wild Rivers Legislation touches on at least two of the 'marks of mission' of the Anglican Church, namely:

To seek to transform the unjust structures of society.
To strive to safeguard the integrity of creation and sustain and renew the life of the earth.

Implementation of the *Wild Rivers Act 2005* across Cape York has drawn strong criticism from affected indigenous communities and leadership groups. They have objected that the legislation

- was formulated through processes that did not adequately allow for indigenous consent,
- contravenes prior agreements for land management on Cape York as captured in the Cape York Heads of Agreement, and
- will stifle legitimate indigenous economic opportunities.
- effectively leaves no scope for sustainable indigenous economic development in proclaimed areas; thereby depriving affected indigenous communities of any prospect of opportunity to engage in real economy on traditional lands.

Our review of the Wild Rivers legislation has shown us that the objections expressed by affected indigenous communities and leadership groups are legitimate. The legislation is highly likely to adversely effect indigenous well being. It represents an unjustifiable erosion of hard won indigenous property rights.

In addition to completion of our own research, we have consulted environmental stakeholder groups Some of those groups share our deep concern that indigenous people's legitimate interests in land risk being disenfranchised in the current Wild Rivers process. With other groups we respectfully disagree.

For these reasons, and others documented in our review report, we believe the Wild Rivers legislation, as it has been applied to Cape York indigenous lands to date, is flawed.

We offer the following proposals to improve the Wild Rivers legislation and implementation process and specifically call upon the Queensland government to:

1. Accept a framework for implementation of Wild Rivers legislation specifically and indigenous land management matters generally which protects the property rights of affected indigenous communities; protects the environmental values of selected areas; and preserves a capacity for sustainable economic development and engagement with real economy.
2. Make no future Wild Rivers declarations without the explicit and properly acquired informed indigenous consent of affected indigenous traditional owners. Indigenous land use agreements are a viable means of pursuing and capturing consent. Acquiring properly informed indigenous consent requires an approach built upon an indigenous land management governance model in which consenter/s has/have access to the advice and resources required and sufficient time to consider meaningfully the impacts of any proposed declaration. Achieving indigenous consent as a threshold for future declarations also requires that where such consent cannot be properly acquired, declaration can not proceed.

3. Implement an immediate moratorium on declaration of any additional Wild River areas (i.e. do not proceed with the Wenlock River declaration).
4. Revoke the April 2009 declarations of the Archer, Stewart and Lockhart rivers, given the evident absence of properly secured indigenous consent.
5. Consider a specifically tailored legislative response aimed at ensuring management of water extraction, in-stream mining and dam construction in rivers of high environmental value, with this legislative response developed through proper consultation with affected stakeholders. We are mindful of the legitimate goal to protect the environmental values of Wild Rivers while maintaining a capacity for sustainable economic development in remote indigenous communities.

Attached: Précis of development case studies reviewed in the course of conduct of research on Wild Rivers impacts.

Anglican Diocese of Brisbane

Précis of development case studies reviewed in the course of conduct of research on Wild Rivers impacts.

As part of our research into the likely impact of implementation of the Wild Rivers legislation on affected indigenous communities on Cape York, a series of three development case studies were reviewed by expert planning advisors for the purpose of establishing the likelihood of these case studies being approved to proceed under the Wild Rivers legislative regime. The planning advice is summarised below. Full details of the planning advice are included in the Social responsibilities Committee's paper titled *Wild Rivers Policy – Likely impact on Indigenous Well-Being.*

Summary

- The purpose of the *Wild Rivers Act* is to preserve the natural values of rivers that have all or almost all of their natural values intact.
- This is to be achieved by:
    - Declaring an area to be a Wild River Area (WRA);
    - Categorising various parts of the WRA according to the values in those parts;
    - Prohibiting certain activities and regulating others according to how they are categorised and by application of provisions in:
        - The *Wild Rivers Act*;
        - A Wild Rivers Declaration (WR Declaration);
        - The Wild Rivers Code (WR Code); and
        - *Integrated Planning Act* and various other statutes such as the *Water Act* and the *Fisheries Act*.
- Where it is not possible to obtain approval to a proposed development by virtue of prohibitions, there is a mechanism to apply to the Minister for a Property Management Plan which may result in a change to the WR Declaration.
- This remedy is unlikely to provide relief for most people because of the time, cost and uncertainty associated with its implementation.
- Broadly speaking, a WR Declaration will either prohibit development, or regulate it so as to make it more difficult to achieve than prior to the declaration.
- A number of forms of development, including agriculture and animal husbandry are prohibited in High Preservation Areas (HPA).

Development case studies subjected to planning review were:

- An estuarine fish farm;
- A banana farm; and
- An eco-tourism resort.

Fish Farm: Assessment

Fish farming is prohibited in a High Preservation Area [HPA] or nominated waterways if it interferes with water flow. This could make the establishment and conduct of in-stream aquaculture very difficult to achieve in a WR declared area.

Banana Farm: Assessment

Banana farming for commercial purposes falls under the definition of agricultural activities (Planting, gathering or harvesting a ...food...crop."). Agriculture (and agribusiness) is prohibited in a HPA. In Preservation areas, other restrictions on taking or interfering with water and clearing vegetation could pose significant challenges to the establishment of new agriculture businesses.

Ecotourism: Assessment

The provisions of the WRA and associated instruments are potentially less onerous in relation to ecotourism than other commercial ventures.

Social Responsibilities Committee

Wild Rivers Policy –

Likely impact on Indigenous Well-Being

Authored by
Dr Joanne Copp

August 2009

On behalf of the Social Responsibilities Committee, Diocese of Brisbane

Social Responsibilities Committee

Contents

EXECUTIVE SUMMARY

This report examines the likely effect of the *Wild Rivers Act 2005* on the Indigenous communities in the rural and remote areas of Cape York, Northern Queensland. A wild river is a river system that has all, or almost all, of its natural value intact. The wild rivers policy requires outcomes from specific activities to minimise the negative impacts of development on the natural value of the wild river. This policy is implemented through a framework that links the Wild Rivers Act 2005, a wild river declaration, the Wild Rivers Code and other regulating acts. The regulatory framework for implementing the Wild Rivers Act requires other laws to consider Wild Rivers' objectives when making decisions on certain types of developments and activities in a wild river area. To date, nine wild rivers basins have been declared in Queensland.[1] The Queensland government went to the 2009 polls with 19 rivers nominated for potential wild river declaration, with three basins in Cape York declared (13 individual wild rivers) in April 2009.

The Wild Rivers Act impedes economic development by either prohibiting some forms of investment or increasing the costs of investments, making some investment unviable or non-commercial. In doing so, opportunities for communities to engage in the real economy are restricted. While there is a mechanism to apply to the Minister for a Property Management Plan which may result in an amendment to the wild river declaration, such a remedy is unlikely to provide relief for most people, because of the time, cost and uncertainty associated with its implementation.

To appreciate the full impact of the Wild Rivers Act, and the response of some groups within the Indigenous community to it, it is useful to view such changes in light of the historical legislation impacting on tenure and property rights. In response to the Wild Rivers legislation, Noel Pearson, a spokesman for indigenous groups argues that "*This declaration by the Bligh Government affects a large swath of Wik country that I spent 10 years fighting for. ...takes away the dignity of Wik and all other Aboriginal people.*" The Wild Rivers legislation, in restricting the property rights of both Indigenous and non-Indigenous people within designated areas, decreases the value of their respective land rights (based on "use" value only). The total social benefit associated with the combined value to both indigenous and non-indigenous groups is lower as a result of the legislation. While one can weigh up against this the higher environmental benefits that may accrue due to protection of the wild river and its catchment, there are three important issues which must be addressed:

1. To what extent are the identifiable costs associated with achieving the environmental benefits (some of which are intangible and amorphous) justified;
2. Is there an unequal burden placed on the Indigenous population in bringing about this outcome (distributional/equity-based arguments); and
3. If there are significant distributional/equity issues, how should the policy and legislative arrangements be changed to either stop the extent to which this burden occurs, or alternatively alleviate some of this burden?

Because a relatively larger proportion of indigenous people live in remote areas relative to non-Indigenous people (ie. 24% or 124,000 compared with less than 2% or 420,000 respectively), a greater burden falls on the Indigenous population to achieve these environmental outcomes, giving rise to important moral issues.[2] Economic growth is

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1 The initial six declarations included four areas in the Gulf of Carpentaria, as well as Fraser and Hinchinbrook Island.

2 The Productivity Report *Overcoming Indigenous Disadvantage: Key Indicators* report, July 2009 states that 9% of the indigenous population live in remote areas and 15% live in very remote areas.

relatively important to improving the plight of Indigenous people living in remote areas, especially given the relative levels of disadvantage which exists among this group.

This report asserts that the political processes in Queensland have neither adequately captured the full costs (and benefits) associated with the Wild Rivers legislation, nor adequately dealt with the resultant distributional inequities.[3] A weakness of conventional cost-benefit analysis is that it "*compares expected costs and benefits without attaching specific importance to the groups in society to which those costs and benefits are expected to accrue. For the purpose of public policy-making in a democratic society... decision-makers need to know the identity of the groups which may be expected both to gain and to lose as a result of their decisions, and the nature and size of those gains and losses.*"[4] In addition, both the costs and benefits which accrue to lower-income groups may be underestimated, since the cost benefit analysis proceeds by aggregating across individual's costs and benefits that are measured in money terms. This approach implies that the marginal utility of income is equal for all persons (ie. an extra dollar of income has the same value for a rich person as a poor person). Clearly, this is an important factor in the current context.

The Wild Rivers legislation negatively impacts the well-being of the indigenous population within this area as it reduces the ability of Cape York indigenous communities to engage with the real economy. Noel Pearson has argued that economic relations are an effective driver of change, requiring policies and attitudes that actively promote economic development by encouraging outside parties to invest in the communities, thereby creating employment opportunities. There are also significant risks associated with exposure to fluctuations of a single industry or a limited number of industries, which may also result from the legislation.

The argument put forward which suggests that by not impacting existing authorisations, there is some degree of balance between the needs of economic development and those of environmental protection, implicitly assumes an equitable distribution of existing authorisations. Further, to suggest that a sufficient balance has been struck, is to imply that the maintenance of the standard of living for the protected population, while protecting the environment, is sufficient. This is clearly not the case.

The report concludes that strong property rights are important determinants of productivity. Restricting the type and scale of activities which can occur within wild river areas greatly impacts on the social benefit derived from such rights. While achieving positive environmental outcomes, which align with Indigenous values, the Wild Rivers Act does so at the cost of compromising greater levels of engagement with the real economy. This results in an inefficient allocation of resources and an inequitable burden of the associated costs on Indigenous Australians in remote areas.

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3 Neither a Regulatory Impact Statement nor a Public Benefit Test was undertaken with respect to this policy and associated legislation.

4 Department of Finance 1991 *Handbook of Cost-Benefit Analysis*

Social Responsibilities Committee

WILD RIVERS LEGISLATION

1 INTRODUCTION

This paper has been prepared by the Anglican Social Responsibilities Committee (SRC) of the Diocese of Brisbane. The mission of the Church is the Mission of Christ.

To proclaim the good news of the Kingdom
To teach, baptise and nurture new believers
To respond to human need by loving service
To seek to transform the unjust structures of society
To strive to safeguard the integrity of creation and sustain and renew the life of the earth
To worship and celebrate the grace of God
And to live as one, holy, catholic and apostolic church.

The call to mission invites us to engage with the issues that are of social concern which appear in the political arena. The Wild Rivers Legislation touches on at least two of the above 'marks of mission', namely:

To seek to transform the unjust structures of society
To strive to safeguard the integrity of creation and sustain and renew the life of the earth.

This report examines the likely effect of the *Wild Rivers Act 2005* on the Indigenous communities in the rural and remote areas of Cape York, Northern Queensland. Recent expert commentary and media coverage have revealed deep concerns about the impact of this legislation on the prospects for economic engagement by individuals and groups living in Cape York Indigenous communities.

Within the context of our role to facilitate social justice dialogues across the Anglican Diocese of Brisbane, the Social Responsibilities Committee has been asked to comment on these developments as input into a possible Diocesan leadership response to concerns raised by the legislation and its implementation.

Section one provides a demographic profile of the indigenous population, and provides justification for focusing the analysis on the impact on Indigenous communities in remote areas, and specifically, Cape York.

Section two describes the Wild Rivers legislation and the component elements which collectively determine which future activities are potentially prohibited or deterred due to higher costs.[5] This section also provides a brief history of property rights for Indigenous Australians, both leading up to the Wild Rivers legislation and since.

Section three provides an economic framework for analysing the impact of property rights on economic efficiency, and applies these concepts to the Wild Rivers legislation. It also examines the equity implications of how the burden of costs is shared between Indigenous and non-Indigenous populations.

Section four summarises the arguments around economic development and/or well-being, and argues that, overall, the Wild Rivers legislation impedes engagement with the real economy, which is seen by many to be a key driver in improving the well-being of Indigenous Australians living in remote areas.

5 Note that existing authorisations are not impacted by the Wild Rivers legislation.

Section five asks whether the correct balance has been struck between the needs for such engagement and environmental protection. Fundamental to this evaluation is an understanding of the current context of the Indigenous Australians in remote areas, including the many cultural and social differences between this group and non-indigenous society, and the current low levels of well-being experienced by Indigenous Australians in remote areas.[6] Section 5 provides policy recommendations and concludes the analysis.[7]

2 INDIGENOUS COMMUNITIES LIVING IN REMOTE AREAS

The analysis in this report focuses on the likely impacts on Indigenous Australians living in remote areas.[8] The estimated resident Indigenous population of Australia was 517,000 in 2006 (ie. 2.5% of the total population). Of these, approximately 90% were of Aboriginal origin, with the remainder of Torres Strait Islander or a combination of both origins.[9] Approximately 32% of Indigenous people lived in major cities in 2006, with a further 21% living in inner regional areas. This combined figure of 53% compares with 90% of non-Indigenous people who live in major cities or inner regional areas. An estimated 9% live in remote areas and 15% in very remote areas.

The combined Indigenous population living in remote areas amounts to approximately 124,000. Altman (2004) estimates that this amounts to an average community size of only 100, based on approximately 1200 communities. Within this group, there is a great deal of variation, ranging from tiny outstation and pastoral communities to relatively larger remote townships that are growing quickly and increasingly inter-ethnic.

The age profile of the Indigenous population is relatively young, with 38% of the population aged 14 years and under, compared with 19% for the non-Indigenous population.

Taylor (2000) estimates an arithmetic rate of natural increase of just under 2% per annum for regions in Central Australia. This translates to a rough rule of thumb that outback Indigenous community populations would double in the fifty years after 2001, all other things equal. Based on this, Yarrabah which had about 3000 people in 2001, would have 6000 in 2051, and Arnhem Land would have over 34,000 people.

This analysis focuses on the Indigenous population living in remote areas in Cape York, North Queensland firstly because the 9 rivers and catchments affected by Wild Rivers Legislation lie within this area;[10] secondly, the low socioeconomic status of

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6 Note that regional differences within Indigenous Australia make continent-wide generalisations difficult.

7 Note that some of these differences have pre-colonial roots.

8 Hudson, S, *Statistics obscure the Truth,* The Australian, 7 July, 2009 notes that statistics about the success of various policy measures or "closing the gap" can be influenced by averaging out the outcomes of all people who identify as Aborigines and Torres Strait Islanders. This can downplay the real levels of disadvantage experienced by particular groups of Indigenous people.

9 Productivity Report *Overcoming Indigenous Disadvantage: Key Indicators* report, July 2009.

10 The Queensland government went to the recent polls with 19 rivers nominated for wild river declarations.

these residents provides a context where issues surrounding economic development and well-being are particularly important; and thirdly, most of the Indigenous-owned land in Australia is remote, and issues surrounding Native Title, property rights and economic development "steers one inevitably to those situations where Indigenous people live on their land."[11]

3 WILD RIVERS

A wild river is a river system that has all, or almost all, of its natural value intact. The wild rivers policy is implemented through a framework that links:

- The Wild Rivers Act 2005[12]
- A wild river declaration[13]
- The Wild Rivers Code[14] and
- Other regulating acts.

Within a wild river area, a number of development activities are regulated through other acts.[15] Figure 1 below illustrates the regulatory framework for implementing the Wild River Act. It requires other laws to consider Wild Rivers' objectives when making decisions on certain types of developments and activities in a wild river area.

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11 See Altman (2004), p519.

12 This act sets out the processes for:
- Declaring wild river areas;
- Amending or revoking a wild river declaration;
- Amending the Wild Rivers Code;
- Identifying different management areas;
- Approval of a property development plan.

In addition, the Act exempts certain State projects (eg. Aurukun project) and defines terms used by the Act.

13 A declaration is a statutory instrument under the Wild Rivers Act that details:
- The boundaries of the wild river area and its management area;
- Any rules or limits that must be observed in the declared area; and
- Any development assessment codes that must be applied.

A set process exists for declaring a wild river, including a moratorium on water, vegetation clearing and mining, a release of the declaration proposal for public consultation, a decision by the Minister on whether or not to declare a wild river, which is then sent to the Governor in Council for approval. The Minister is also required to release a report on the consultation undertaken for the declaration.

14 The Wild Rivers Code is a document that outlines requirements to assist decision-makers to make decisions about applications made in wild river areas. In effect, it provides rules for development. The Code operates under the regulating acts and should be read in conjunction with the wild river declaration.

15 Coastal Protection and Management Act 1995; Environmental Protection Act 1994; Fisheries Act 1994; Forestry Act 1959; Vegetation Management Act 1999; Mineral Resources Act 1989; and Water Act 2000.

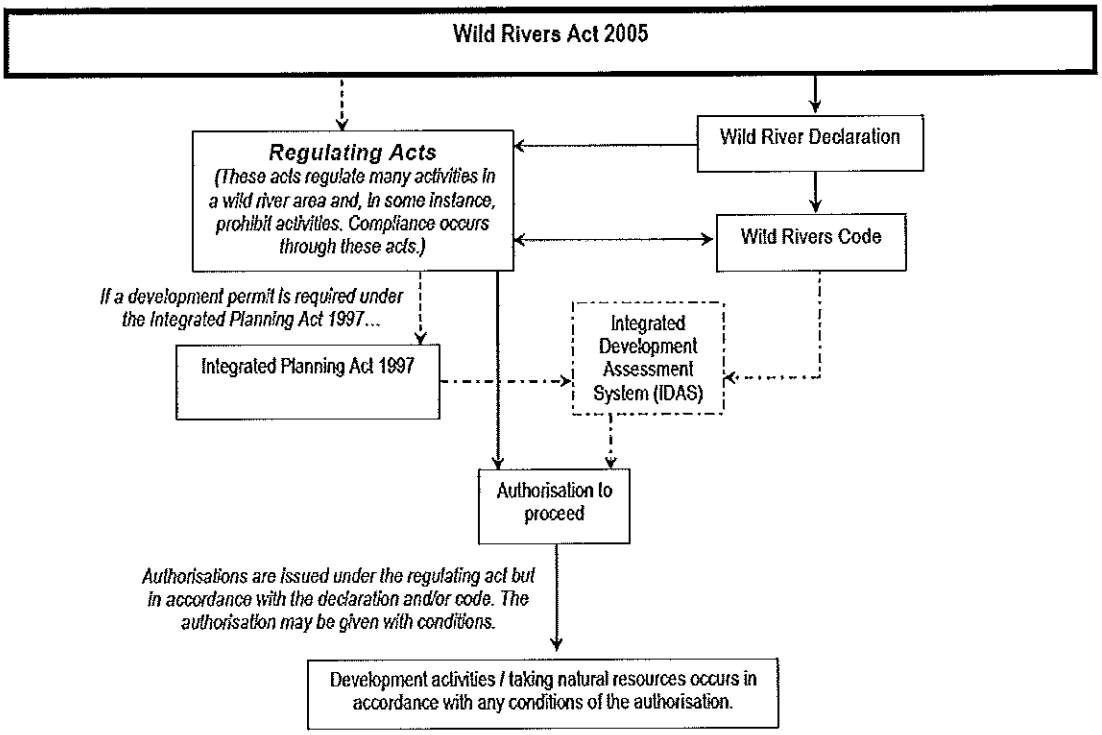

Figure 1
Wild rivers regulatory framework flow diagram showing interconnections
Source: Factsheet, How wild rivers works, DERM, April 2007

The Wild Rivers Act allows for a number of management areas to be included in the declaration, where activities are believed to have different impacts. The Wild Rivers Code requires outcomes from specific activities to minimise the negative impacts of development on the natural values of the wild river. These areas include:

- High preservation area (an area within and immediately adjacent to the wild river, its major tributaries and any identified off-stream special features, such as wetlands;[16]
- Preservation area (the wild river area excluding the high preservation area);
- Floodplain management area (an area where the floodplain flows are strongly connected to the river system and are important to the continued health of the wild river)[17]
- Subartesian management area (an area where groundwater and the river system are strongly connected)[18]
- Designated urban area (a mapped urban area, including space for future urban expansion).[19]

A wild river area can also contain nominated waterways, which are secondary tributaries or streams in preservation areas that have been designated for wild river purposes. The streams are mapped in a wild river declaration.

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16 This is typically a one kilometre zone either side of the river, but can be 500 m in particular cases.

17 Floodplain management areas can overlap other management areas.

18 Sub-artesian management areas can overlap other management areas.

19 For example, towns, settlements, villages.

Three new wild river areas were declared on 3 April 2009:

- Archer Wild River Declaration 2009
- Stewart Wild River Declaration 2009
- Lockhart Wild River Declaration 2009

These followed the first round of six wild river declarations which took effect on 28 February 2007.[20] The SRC engaged Conics Town Planners to explain the legislative basis and consequences of the Wild River Acts and declarations. The Wenlock Proposed Wild River Declaration was chosen arbitrarily to assess the likely impacts of three prospective developments (ie. banana farm, fish farm in river and an ecotourism resort) in the Wenlock River area. (See Appendix A for a copy this report). Of special note is the fact that where it is not possible to obtain approval for a proposed development by virtue of the prohibitions, there is a mechanism to apply to the Minister for a Property Management Plan which may result in an amendment to the wild river declaration (eg. If an agricultural development can demonstrate that a business is viable, that the outcome would benefit the indigenous occupants of the land and there is no significant impact on the environment.)[21] However, Conics were of the view that this remedy is unlikely to provide relief for most people because of the time, cost and uncertainty associated with its implementation.

There are several exemptions from the Wild Rivers Act. Existing activities (ie. all licences, permits and undertakings) at the time of the declaration are recognised.[22] New activities linked to essential services, such as building roads and pipelines, are not prohibited in a wild river area. State interests are also protected under various acts. The Wild Rivers Act does not apply to the Aurukun Bauxite project and a wild river declaration does not effect existing authorisations, for example, activities authorised under special agreement Acts.[23] Special agreement acts protect existing rights granted to mining companies (1957 and 1965) when the State wanted exploitation of resources.[24] In addition, other exemptions include surface mining in a nominated waterway, which is permitted if it is a mining project of state significance. Such projects

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20 The previous six wild river declarations include:
- Fraser Wild River Declaration 2007
- Gregory Wild River Declaration 2007
- Hinchinbrook Wild River Declaration 2007
- Morning Inlet Wild River Declaration 2007
- Settlement Wild River Declaration 2007
- Staaten Wild River Declaration 2007

21 This is similar to similar arrangements under the *Cape York Peninsula Heritage Act 2008* which allows for Property Development Plan Processes to clear vegetation.

22 Note that it is possible that established economic interests may have a bias away from indigenous economic interests.

23 See sections 17, 45 & 46. Submissions to the DERM are only available under Freedom of Information, unless the party submitting makes their submission public. The Council of Church Elders from the Aurukun Uniting Church Congregation publicly submitted on behalf of concerned members of the Parish and the wider Aurukun community with respect to the Archer River Declaration. While their interests align with the DERM in wanting to preserve the rivers and wetlands, they noted that *"their positive and hopeful responses...turned to fear, suspicion and deep concern...when it was pointed out ...that the extensive legislation...contains a startling exemption clause...which effectively says that the massive Aurukun Bauxite Project does NOT have to abide by the legislation."*

24 While the State is powerless to constrain this activity, they work with the company to ensure the company acts as a good corporate citizen.

must be approved under the State Development and Public Works Organisation Act 1971, but only where an Economic Impact Statement (EIS) can demonstrate that the wild river values will be preserved; the resource cannot be accessed via underground mining and the resource is of sufficient value to warrant the grant of a mining lease in such a sensitive location.[25] Similarly, mine transport infrastructure within a wild river area for mining activities (eg. roads, rail, pipelines, conveyors and powerlines) are classified as "specified works" and therefore can be developed in high preservation areas. These will be subject to wild river requirements outlined in the declaration. A port or any other infrastructure that relates to transportation can be prescribed as specified work under a regulation.

Prohibitions are generally applied through the legislation that regulates that particular type of activity. For example, instream weirs and dams are not permitted in high preservation areas through provisions in the *Water Act 2000.* Water storage (eg. dams or weirs) have extreme impacts on rivers, affecting their flow patterns, acting as sediment sinks, which remove silt and nutrients from flowing further down the river to drive nursery production in estuaries. While off-stream storage is allowed under the wild rivers legislation, there are significant increases in costs associated with building to a level where there is an impervious layer, building three walls (as opposed to one wall), as well as additional pumping costs.[26]

4 PROPERTY RIGHTS FOR REMOTE INDIGENOUS COMMUNITIES

> *"Land justice was the outstanding issue for indigenous Australians in the twentieth century, and rightly so. But justice, when it did come for a lucky few with a cultural repertoire that would convince the judiciary, came with a price tag – the loss of opportunities to develop economically and modernise Aboriginal institutions that were no longer effective. The* ***quarantining of the newly won lands from modernisation was the outcome*** *of the policies ..."*[27]

To appreciate the full impacts of the Wild River Act, and the response of some groups within the Indigenous community to it, it is useful to view such changes in light of the historical legislation impacting on tenure and property rights. While all property rights are generally impeded by requirements of government, these are not addressed in the current paper. As such, conclusions drawn about the implications of the Wild Rivers legislation for the efficiency of resource allocation are made on a *ceteris paribus* (ie. all other things being equal) basis. This section briefly describes the legislation related to indigenous tenure and property rights.

Native Title describes the rights and interest of Indigenous people under their traditional laws and customs to land and waters. In the Mabo 1992 decision, the High Court held that the common law of Australia recognised a form of native title to land. In 1993, the *Native Title Act 1993* was passed to recognise and protect these rights and

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25 Department of Natural Resources and Water, Wild Rivers guide – Mining and Exploration, October 2007, pp 2-3.

26 These extra costs are on top of relatively high evaporation costs associated with any form of water storage in this region (ie. approximately 3 metre per year).

27 Professor Marcia Langton, Foundation Chair of the University of Melbourne's Australian Indigenous Studies Program, Foreword in Sutton, P. (2009),*The Politics of Suffering,* Melbourne University Press.

interests.[28] The Queensland Government then introduced its own *Native Title (Queensland) Act 1993* to fit under the umbrella of the Commonwealth Act.[29] Godden (1999) notes that despite populist views to the contrary, the Mabo case did not grant land rights to Indigenous Australians. It simply determined the circumstances under which land had not been taken from them (ie. where native title had not been extinguished).[30]

Since Mabo, a number of other decisions have developed the common law principles of native title. For example, the Wik 1996 decision held that the grant of a pastoral lease did not necessarily extinguish native title. In the Fejo decision, the High Court confirmed that freehold title completely extinguished native title. Land interests on pastoral leases cover some 40% of the Australian land mass.[31] The potential co-existence of access rights to natural resources is not an unusual legal state. For example, mining tenements co-exist with other titles. Likewise, property rights are also frequently restricted by covenants and easements.[32]

Godden (1999) observes that of the 20 points and sub-points in the then Prime Minister's Amended Wik 10 Point Plan, nineteen were directed toward extinguishment or substantial restriction on native title, and one was a transitional arrangement. This led Indigenous representatives to describe this 10 point plan as an 'extinguishment plan' and one which went much wider than the specific Wik issue of native title on pastoral leases. On this basis Godden states that:

> *"This plan may fairly be described as one primarily about distribution, about taking as much as possible from indigenous Australians and giving as much as possible to (largely non-indigenous) pastoralists and other Australians. ...appears to have been developed with little or no input from indigenous people...on a take-it-or-leave-it basis".*

and

> *"Since indigenous people have been largely excluded from lands with value for purposes other than mining, limitation to their right to negotiate over minerals, whether the royalty value of the minerals or the kinds of activities that might occur, effectively removes indigenous peoples' power to negotiate to obtain significant return over land to which they currently have traditional access."*

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28 The Native Title Act 1993 implemented the High Court's decision by importing the relevant common law.

29 Only the Federal Court and the High Court of Australia can make an approved determination of native title, as the National Native Title Tribunal (which facilitates negotiations using mediation processes set out in the Native Title Act 1993) is not a court and cannot make decisions on whether native title does or does not exist.

30 The High Court's decision in *Mabo and Others v State of Queensland*; Mabo 1992 was judge-made law (ie. common law), rather than parliamentary statute.

31 See Godden (1999) for a brief history of pastoral leases in Australia. pp8-9.

32 The Department of Environment and Resource Management (DERM) helps the government ensure that all land and resource dealings take account of native title. This involves negotiations for land use agreements, including:

- Right to negotiate agreements for mining, exploration, petroleum tenements and quarrying activities;
- Indigenous Land Use Agreements (ILUAs) for mining, exploration and petroleum tenements and land use tenements.

Land Rights are not the same thing as Native Title.[33] Land rights are legal rights that are created and granted under Australian law to Indigenous Australians. In a land rights claim, Indigenous Australians can seek a grant of title to land from the Commonwealth, state or territory governments. That grant may recognise traditional interest in the land, and protect those interests by giving Indigenous people legal ownership of that land. Some agreements involve monetary compensation from mining companies, as well as employment targets for Indigenous people and are referred to as Indigenous Land Use Agreements (ILUAs).

In Queensland, the Land Tenure Resolution Program has been running for approximately 10 years, with considerable tracts of land handed back to the Indigenous communities on Cape York, ensuring that "traditional owners" are given formal ownership of the land.[34] To date, 4-5 pastoral lease properties have been handed back, with 13 planned in total.[35] As a result of the handover, ILUAs with the State government are entered into and the land is handed over to a Land Trust. Fifty percent of the land becomes National Park (Cape York Aboriginal Plan) and 50% becomes Indigenous freehold land. The indigenous communities work with the Queensland Park and Wildlife Service to develop a management plan, including ranger activities and camping grounds.

More recently, on 19th September, 2006, the Federal court brought down a judgement in favour of Noongar Native Title over the Perth metropolitan area.[36] Justice Wilcox found that Native Title continues to exist within an area in and around Perth. This is the first judgment which recognised Native title over a capital city and its surroundings.[37] An appeal was lodged in April 2007 with the decision currently pending.[38] If it survives the appeal, this will be a very significant principle for other native title claims in Australia. In April 2008, the Full Bench of the Federal Court upheld parts of the appeal by the Western Australian and Commonwealth governments against Justice Wilcox's judgment.

Other recent legislation affecting property rights is The Cape York Peninsula Heritage Act 2007 which:

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33 Land rights for Indigenous Australians living in the Northern Territory were granted under the *Aboriginal Land Rights (Northern Territory) Act 1976*. It was the first Australian law which allowed a claim of title if claimants could provide evidence of their traditional association with the land. Four land councils were established under the Act:

- Central Land Council
- Northern Land Council
- Tiwi Land Council
- Anindilyakawa Land Council.

In August 2006, the Federal Government amended the Act. The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 added several clauses which intend to promote economic development in remote townships.

34 Much of this has occurred within the last four years.

35 For example, the McIlwraith Range saw 160,000 ha created as National Park and 158,358 ha as Indigenous freehold land. Based on personal communication with a representative of the Department of Environment and Resource Management.

36 This is known as *Bennell v State of Western Australia* [2006] FCA 1243.

37 The claim area itself is part of a much larger area included in the "Single Noongan Claim", which covers the south-western corner of Western Australia.

38 The remainder of the larger Single Noongar Claim remains outstanding and will hinge on the outcome of the appeal process.

- provides for identification of the significant natural and cultural values of Cape York Peninsula;
- provide for cooperative management, protection and ecologically sustainable use of land, including pastoral land, in the Cape York Peninsula Region;[39]
- Recognises the economic, social and cultural needs and aspirations of indigenous communities in relation to land use in the Cape York Peninsula Region; and
- Recognises the contribution of the pastoral industry in Cape York Peninsular Region to the economy and land management in the region.

Finally, in May 2009, the Federal Environment Minister Peter Garrett and his state counterparts agreed to put the Cape York up for World Heritage Listing consideration. While this is a first step in a long process, and the Federal Government has stated that it would not proceed without support of the Indigenous community, Cape York leader Noel Pearson argued that this would stop indigenous economic development of the region, labelling the World Heritage move as an attack on land rights.

4.1 PROPERTY RIGHTS AND ECONOMIC EFFICIENCY

"The Mabo and Wik High Court decisions gave us land rights and native title, and my message has been that we have now to take responsibility for health, education and economic opportunities. ...This declaration by the Bligh Government affects a large swath of Wik country that I spent 10 years fighting for. ...takes away the dignity of Wik and all other Aboriginal people."

Noel Pearson, 2009

This section puts forward a framework for evaluating the implications of the Wild Rivers Act for economic efficiency. It lends heavily from analysis undertaken by Godden (1999), which provides a utilitarian framework for characterising the optimal allocation of resources (in the context of Wik), based on the premise that property rights are valued via their use value. Pareto efficiency refers to the state of an economy in which no one can be made better off without someone being made worse off. Godden (1999) notes that expropriation of resources, even with compensation, is unlikely to be Pareto efficient, especially where non-marketed goods are involved.

Firstly, the co-existing rights of both pastoralists and indigenous Australians in pastoral leasehold land are represented on the horizontal axis of figure 2(a) below. For simplicity, these rights are represented on a continuous axis, with each group's benefit from using the land assumed to increase monotonically as the percentage of the total land rights bundle under their control increases. The vertical axes represent the cardinal utility which each group obtains from a particular sharing of these interests.[40] The social benefit from the exercise of rights in land over which there is pastoral leasehold is represented by the 'total competitive value' curve, comprising the vertical

[39] For example, under this legislation Indigenous people can apply to clear vegetation under the Property Development Plan Process, provided that can demonstrate business would be viable, the outcome would benefit the occupants of the land and there are not significant environmental impacts.

[40] This assumes that utility is cardinal (ie. measurable) and that interpersonal comparisons of utility are possible.

summation of the pastoral and indigenous value curves. Social benefit is maximised at point v.[41]

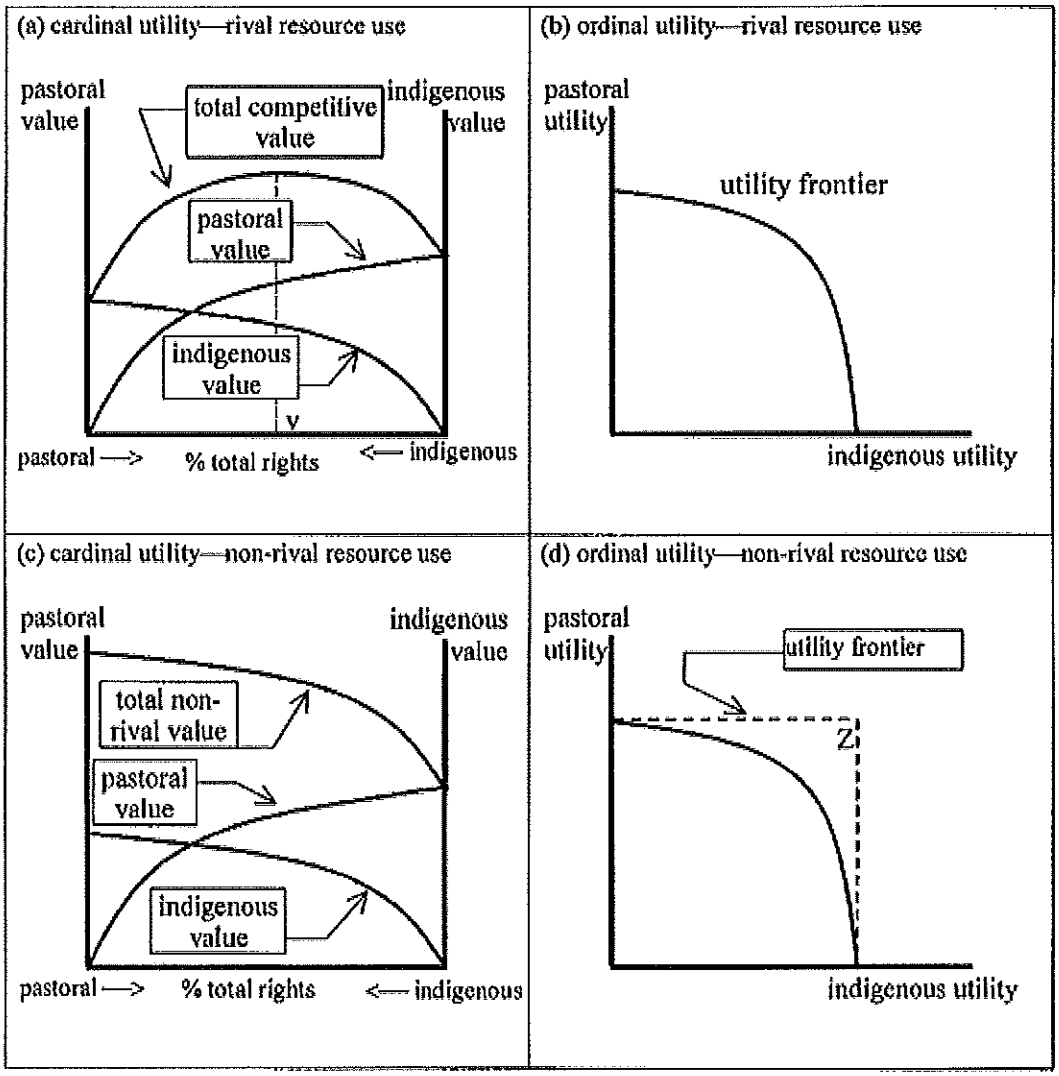

Figure 2
Source: Godden, D. (1999), Attenuating Indigenous Property Rights in *The Australian Journal of Agricultural and Resource Economics*, Figure 3, p15

If one relaxes the assumption of cardinal utility and interpersonal utility comparisons, the situation can be depicted as ordinal preference functions. Here, rather than a maximum utility point being identifiable, a utility possibilities frontier may be identified. All points outside this frontier are infeasible, while all points inside the frontier are Pareto inferior. (That is, it is possible to reallocate resources so that one or both parties are made better off). Whilst it is not possible to identify objectively the social welfare maximising distribution of land rights, a welfare maximum may be attainable as a consequence of bargaining between the parties who value the resource. (See Figure 2(b)).

Godden then allows for the situation where native title uses of land are not competitive with pastoral uses (eg. traditional food gathering and hunting of native animals do not impact on pastoral uses). Again, assuming cardinal utility and interpersonal utility

41 Godden notes that the absence of formally recognised native title does not annihilate these uses; such uses may simply not be able to be exercised. In principle, however, they still exist.

comparisons are possible, the total social benefit arises from the super-imposition of the indigenous value curve on the pastoral value curve (or vice versa), such that social welfare is maximised where both pastoral and indigenous uses have full access to the total bundle of rights. Note that it is still assumed that the value increases monotonically with the proportion of rights. (see fig 2(c))

Again, relaxing the assumptions of cardinal utility and interpersonal comparisons, an ordinalist interpretation shows that welfare is maximized at point Z, even without the social welfare function being known or knowable (see Fig 2(d)).

An important caveat to the above analysis and the conclusions drawn from it is that valuation techniques for non-marketed goods may be inappropriate if indigenous peoples' valuation of land access is non-utilitarian. (That is, they may derive "non-use" value from it which is related to the centrality of land to culture, to law, to tradition and spirituality).

4.2 APPLICATION TO THE WILD RIVERS ACT

The Wild Rivers Act in *"adopting a precautionary approach in order to minimize any adverse affects [of economic development] on natural value"*, restricts the property rights of both Indigenous and non-Indigenous people within designated areas.[42] Therefore, using the above framework, both the pastoral value and the indigenous value curves above would shift down and total social benefit would be lower. Alternatively, applying the ordinal utility frameworks, both groups would be prevented from operating on the utility frontier, such that resource allocation would be sub-optimal, all other things being equal. One might weigh up against this the higher environmental benefits associated with the protection of the wild river and its catchment. To the extent that some of these benefits are intangible, only generally specified (ie. preserve natural values) and amorphous, measurement will be difficult.

This then raises three issues:

1. To what extent are the identifiable costs associated with achieving the environmental benefits (some of which are intangible and amorphous) justified;
2. Is there an unequal burden placed on the Indigenous population in bringing about this outcome (distributional/equity-based arguments); and
3. If there are significant distributional/equity issues, how should the policy and legislative arrangements be changed to either stop the extent to which this burden occurs, or alternatively alleviate some of this burden?

With respect to the first of these issues, discussions with the DERM noted that neither a regulatory impact statement nor a public benefit test was undertaken for successive wild river declarations, since the legislation recognised all licences, permits, and undertakings existing at the time of the declaration. Therefore, any future developments would be 'aspirational' and measurement of the costs and benefits as such would not be valid. In adopting this approach, there has been no economic analysis of the potential future impacts of the legislation, nor any analysis of the relative burden on particular groups within society.

Notwithstanding the difficulties associated with the measurement of the expected benefits and costs, there are several problems with the broad approach adopted by DERM and their underlying rationale. The 1991 Department of Finance *Handbook of Cost-Benefit Analysis* in addressing problems with such analysis states:

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42 Factsheet, Wild Rivers – Guide for Local Governments, Department of Environment and Resource Management, October 2007, p2.

"...conventional cost-benefit analysis compares expected costs and benefits without attaching specific importance to the groups in society to which those costs and benefits are expected to accrue. For the purpose of public policy-making in a democratic society, this is a weakness: decision-makers need to know the identity of the groups which may be expected both to gain and to lose as a result of their decisions, and the nature and size of those gains and losses."

In relation to this distributional problem, it states that it is relatively easily resolved by *recognising* that distributional judgements can be properly and adequately made at the political level.

A second problem with cost benefit analysis is the premise that, under the Kaldor compensation criterion, a project is only approved if those who lose could be compensated for their loss by those who gain, and still leave the latter better off than had the project not been implemented. In addition to the problem that in the majority of cases, there is no automatic mechanism whereby compensation can be assessed and subsequently paid, there is an added dimension to this problem in the current context. The tax and transfer programs designed to remedy the adverse distribution of income would more than likely exacerbate the problem of passive welfare dependency, which some Indigenous leaders are presently trying to combat.

A third problem relates to the possibility that both the costs and benefits which accrue to lower-income groups are underestimated in the cost-benefit procedure, since the analysis necessarily proceeds by aggregating across individuals costs and benefits that are measured in money terms. This approach implies that the marginal utility of income is equal for all persons (ie. an extra dollar of income has the same value for a rich person as a poor person). Clearly, this is an important factor in the current context.

Some of these methodological problems have been addressed in the more recent Treasury Regulatory Impact Statement (RIS) Guidelines which require CBA to identify whether particular individuals or businesses will incur a "disproportionate effect" and to identify the characteristics of these individuals or businesses.[43]

Approximately 24% of the Indigenous population resides in remote areas (approximately 124,000 people), and this is a relatively large proportion relative to the percentage of non-Indigenous people who reside in remote areas (ie. less than 2% or 420,000). This suggests that there is clearly a relatively greater burden on the Indigenous population in order to achieve these environmental outcomes. The moral issues associated with this are even greater when one considers both:

- the relative levels of disadvantage which exists among the Indigenous groups within remote areas; and
- The relatively low levels of economic growth and hence the relative importance of economic growth to improving the plight of Indigenous people living in remote areas.

[43] http://www.treasury.qld.gov.au/office/knowledge/docs/regulatory-impact-statement/ris-guidelines-2009.pdf