Social Responsibilities Committee

Wild Rivers Policy –

Likely impact on Indigenous Well-Being

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On behalf of the Social Responsibilities Committee,
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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 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.

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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.

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.

[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*

1 INTRODUCTION

This paper has been prepared by the Anglican Social Responsibilities Committee (ASRC) 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.

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

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

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 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

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.

11 See Altman (2004), p519.

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 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.

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.

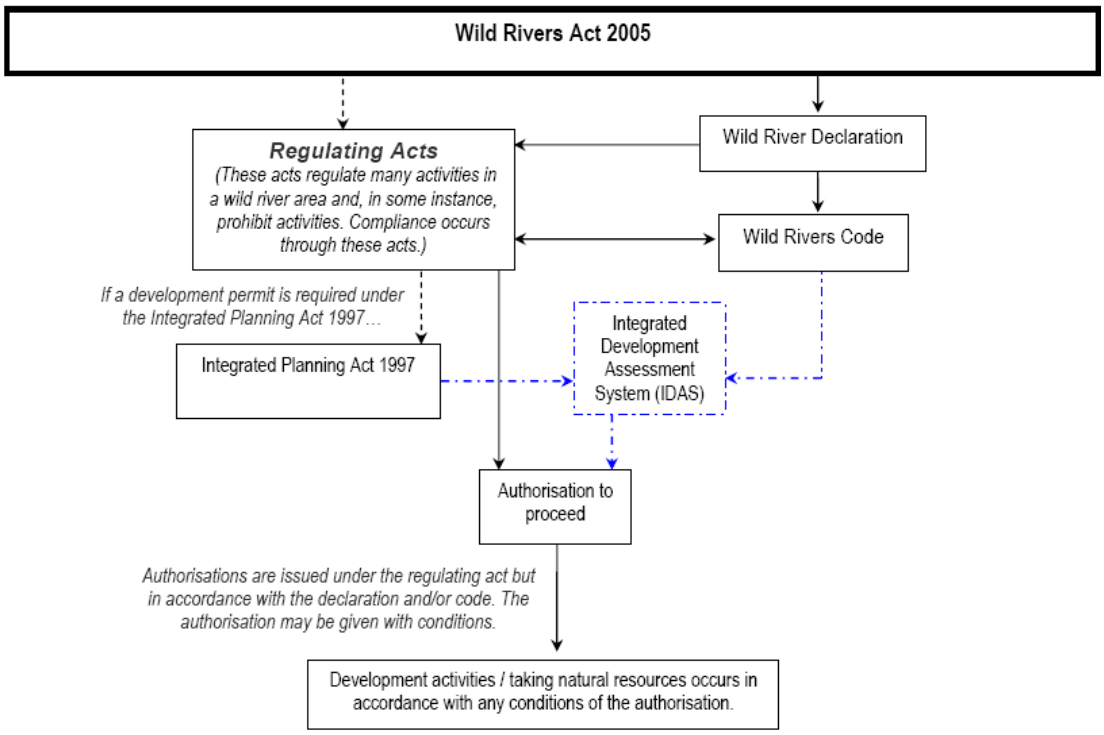

Figure 1
Wild rivers regulatory framework flow diagram showing interconnections
Source: Factsheet, How wild rivers works, DERM, April 2007

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] and
- 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.

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:

1. Archer Wild River Declaration 2009
2. Stewart Wild River Declaration 2009
3. 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 of 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 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

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20 The previous six wild river declarations include:
1. Fraser Wild River Declaration 2007
2. Gregory Wild River Declaration 2007
3. Hinchinbrook Wild River Declaration 2007
4. Morning Inlet Wild River Declaration 2007
5. Settlement Wild River Declaration 2007
6. 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.

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 interests.[28] The Queensland Government then introduced its own *Native Title (Queensland) Act 1993* to fit under the umbrella of the Commonwealth Act.[29]

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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.

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

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."***

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.

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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:

1. Central Land Council
2. Northern Land Council
3. Tiwi Land Council
4. 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.

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

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

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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.

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.

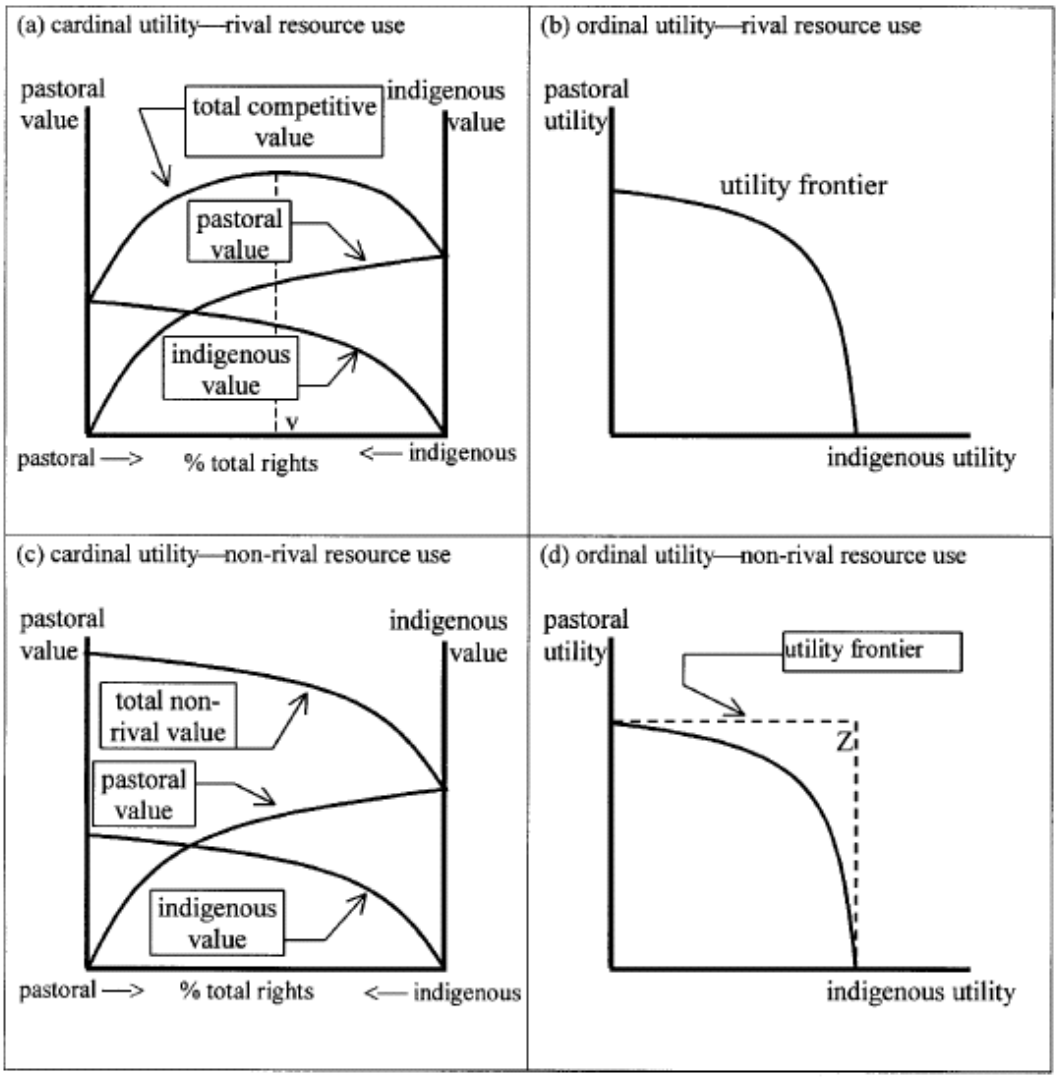

Figure 2
Source: Godden, D. (1999), Attenuating Indigenous Property Rights in *The Australian Journal of Agricultural and Resource Economics*, Figure 3, p15

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 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 Figure 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 Figure 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:

"*…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.

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

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

5 THE IMPORTANCE OF ECONOMIC DEVELOPMENT FOR REMOTE INDIGENOUS COMMUNITIES

Economic development has a range of meanings attached to it. At its most basic, it is defined as monetary (or national) income per capita. At the other end of the spectrum it is defined by Sen (2001) as the capability of people to lead the lives they desire.

This latter definition is adopted by the Cape York Institute (CYI), a leading body dealing with policy and leadership issues within Cape York, when they argue that:

> *"The end goal for the Cape York reform agenda is to ensure that Cape York people have the capabilities to choose a life they have reason to value."*[44]

Sen (2001) defines capabilities as "those attributes that give people the ability to pursue opportunities in their life" and as such include education, health, job status, income, security and so forth. Well-being of a community is then defined as the aggregate of the capabilities of its members.

A community is considered to be economically viable when its economy produces an acceptable level of well-being across a range of capabilities, with an acceptable level of outside support.[45] Of central importance is the particular context of the economy, because it "tells us what the costs and benefits of different activities might be in that economy."[46] For example, the remoteness of the location of the community imposes significant costs on a range of economic activities, and is therefore a crucial part of the context for Cape York communities. Policies of the State and Commonwealth governments towards income provisioning can also shape outcomes. Context can therefore inhibit development of a real economy. Only some factors affecting context are possible to change, with the communities' small size and remoteness constraints on economic viability.

In order to achieve acceptable levels of wellbeing, the following are considered to be important:

- People must enhance their capabilities and be mobile;
- Policies and attitudes must enable engagement with the real economy; and
- People must be engaged in both local and non-local employment.

This analysis focuses on the second of these, and seeks to address the impact of Wild Rivers on the ability of Cape York Indigenous communities to engage with the real economy.

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44 Cape York Institute for Policy and Leadership, 2005 Report, *Can Cape York Communities be Economically Viable."* This was sited from a paper Freedom, Capabilities and the Cape York reform Agenda, CYI, *Viewpoint,* October 2005, http://www.cyi.org.au

45 Community is defined as "a place considered together with its inhabitants. It includes a diaspora of people who maintain their connection with a place, even though they are resident elsewhere.

46 Ibid, p 7.

5.1 ENGAGEMENT WITH THE REAL ECONOMY

The CYI study notes that proximity to a real economy is not enough. Some communities are very close to significant mainstream economic activity (eg. mining and tourism), yet there continues to be very little engagement with that real economy. This suggests that remoteness alone is not a sufficient explanation for capability deprivation in Cape York communities. Overall, CYI found that:

> ***"…economically viable scenarios required policies and attitudes that actively promoted economic development. They included policies and attitudes encouraging outside parties to invest in the communities, thus creating employment opportunities. They also had a welfare system that actively encouraged people to take up these employment opportunities and move away from welfare dependency."***

Noel Pearson has argued on behalf of Indigenous people that, of all the public-domain factors that a government could influence by policy decision and by funding shifts, it was economic relations that would most effectively drive change.[47] The Wild Rivers Act as it currently stands impedes economic development by either prohibiting some forms of investment, especially those within High Preservation Areas or increasing the costs of investments, making some of the investment unviable or non-commercial.[48] In doing so the options for communities to engage in real economy are deliberately restricted by the legislation; this at a time when that engagement is being promoted to those communities as a necessary and positive step for an economically viable community future.

There may also be additional costs associated with legislation which encourages less diversity in the types of economic activity in which people engage. While the State is keen to encourage and highlight the possibilities for eco-tourism in these areas, there are inherent risks associated with exposure to fluctuations of a single industry or a limited number of industries. Generally, regional economic viability is at least in part a product of diversity in that regional economy. A homogenous, single industry economy; especially one built on tourism - an industry characterised by high elasticity of demand - would normally be expected to be exposed to greater degrees of performance fluctuation over time than would a heterogeneous multi-industry economy. In addition, the net benefits associated with the promotion of say eco-tourism over other activities, may decline as successive regions engage in similar activities, depending on the level of demand for such services. It seems improbable that all of the communities affected by the Wild Rivers legislation could have a viable future in competing with each other for the Cape York eco-tourism dollar.

The literature dealing with economic development for remote Indigenous communities emphasises the need to recognise the relative importance of customary activity, potentially enhanced by native title legal rights in resources. Altman (2004) puts forward a three-sector hybrid economy framework as an alternative to the usual two-sector private (or market) and public (or state) model

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47 Sutton, P (2009), with over 40 years experience in Indigenous communities, supports Pearson on this point. He further argues that deep-rather than superficial-cultural redevelopment is necessary if there is to be a radical improvement in people's chances of ending their suffering.

48 For example, the Cape Alumina company is currently undertaking an EIS, with an ILUA being negotiated. If the declaration goes ahead, they will not be able to undertake underground mining, because the mineral is bauxite. Because it is not of state significance, they cannot mine within the High Preservation Area. They also cannot mine overground in nominated water ways (as these are significant contributors to the wild rivers). It is estimated that approximately 20-25% of the resource for this application falls with the HPA. The company is not in a position to push for compensation, because they do not yet have any authorisation to mine. An existing mine owned by RIO also has a situation where 15% of its estimated resource falls within a HPA. However, the resource is of such a magnitude that this is not enough to make it unviable.

to more accurately depict economic activity within the Indigenous economy. This customary or non-market sector is responsible for much activity both inside and outside the household, and involves individual or group rights to resources and associated obligation to share.[49] Altman states that:

> ***"This different approach seeks to blend developed world and Indigenous perspectives on economic development, questioning what I perceive to be conventional notions of property and institutions which merely reflect the dominant power culture's focus on market and materialism."***

Sutton (2009) also captures important differences in his reflections on 'development' or 'modernisation', which he argues only occurs when people seek cultural change for themselves and their own people. He notes that with past attempts at modernisation, "there seemed to be a wilful blindness" to:

- the role of past and present Indigenous egalitarian social organisation and the challenge this offered to performing according to the expectations of a modern society;
- the role of traditional power structures in setting some of the conditions for dependency;
- the ancient need to pursue family loyalties over essentially foreign ideologies such as the doctrine of 'the common good';
- the lingering background of an originally semi-nomadic economy, and its emphasis on demand sharing and its general rejection of accumulation;
- the complementary tradition that the order of things was meant to be, thus rendering notions of general social progress, or indeed any kind of change, deeply alien to those of a classical Aboriginal persuasion.

There is a good case to be made for the assertion of some that the Wild Rivers declarations are reducing the capacity for diversity in local economic activity and hence impact negatively on the prospects for economic viability in effected Cape York communities.

6 HAS THE WILD RIVERS ACT STRUCK THE CORRECT BALANCE?

Policy makers in government will highlight a number of arguments to support the legitimacy of the Wild Rivers legislation and its management since proclamation. These include:

- The river systems on the east coast of Australia are extremely rare. Costs of rehabilitating riverine systems are extremely high. The cumulative impacts of erosion run-off, fertilizer input and polluted water being returned to the system can be quite large to these sensitive river systems. Due to the fact that summer rains dominate, (whereby a lot of rivers do not flow for six months of each year), large storages are necessary in order to have reliable sources of water.

- The Queensland government went to the polls with 19 rivers nominated for potential wild river declaration, due to their high degree of naturalness, this largely due to the fact that they were not developed. Six rivers (Mitchell, Normanby, Embly, Alice and Mission) were not declared wild rivers, due to the level of economic development and water resource development there (eg. dams and irrigation).

[49] Using this approach, Altman estimates the customary activity generated by:
- harvesting wildlife;
- Indigenous fisheries;
- Indigenous arts;
- Indigenous natural resource management; and
- greenhouse gas abatement.

and

- A series of amendments were made to the Wild Rivers Act in 2006 aimed at addressing unintended consequences of the 2005 Act. In particular, 'agriculture' was better defined so that exclusion did not cut out small scale or low impact agriculture. These amendments ensure that only subsistence levels of agriculture are allowed, with the Act still aimed at preventing intensive agriculture in certain areas, thereby making such ventures less commercial.

Each of these arguments places amorphous environmental benefits ahead of economic engagement in Cape York Indigenous communities. This is questionable if only for the reason that the beneficiaries of the legislation remain distributed and anonymous while those incurring the penalty are visible and, through their spokespeople, making their views known.

The fact that existing authorisations are not impacted by the legislation may suggest some degree of balance between the needs of economic development and those of environmental protection. However, to suggest that this balance is sufficient implies an underlying view that the maintenance of the standard of living for the affected population, while protecting the environment, is sufficient. An implicit assumption is also made of the equitable distribution of existing authorisations across the population of Cape York.

Clearly, given the existing standard of living (or level of well-being) reflected by the following indicators:[50]

- The gap between Indigenous and non-Indigenous life expectancy at birth was 12 years for males and 10 years for females;
- Median incomes of Indigenous households were 65% of those of non-Indigenous households in 2006;
- The level of disability and chronic disease among Indigenous people was twice that for non-Indigenous people in 2006;
- The rate of substantiated child abuse and neglect for Indigenous people was 6 times that for non-Indigenous people;
- Indigenous adults were 13 times more likely as non-Indigenous adults to be imprisoned in 2008; while Indigenous juveniles were 28 times as likely to be detained than non-Indigenous juveniles as at 30 June 2007;

there is a very strong case to argue that the correct balance has not been struck in this instance.

[50] Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators*, July 2009.

7 RECOMMENDATIONS FOR CHANGE

The forgoing analysis and observations suggest strongly that the Wild Rivers legislation is operating in a manner that is inequitable for effected Cape York Indigenous communities and counter productive to a policy goal of promoting economic engagement in those communities. There is clearly scope for the Anglican Church to engage in action intended to assist in securing remediation of these undesirable outcomes of the legislation. Application of a principle of subsidiarity would dictate that dialogue is initiated with those effected communities to gain guidance on their preferences for remedial action before any significant public actions is taken by the Church.

Subject to discussion with affected Indigenous community representatives, there are a number of incremental adjustments to the legislation that could be considered.

There are several alternatives which may address the imbalance embedded in the current legislation. Each would have varying economic and political ramifications. Firstly, the level of onerous restrictions could be reduced, especially those within the high preservation areas of the wild river areas. In addition, the number of wild rivers declared could be reduced. Alternatively, the State Government could estimate the cost impact of the Wild Rivers Legislation on potential development proposals with a view to subsidizing activity where potential benefits from the proposed development can be clearly demonstrated.

In conclusion, 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. By denying communities access to the full potential of their land, the legislation also risks repeating effective dispossession of affected communities from their land.

Given the existing relatively low levels of well-being for Indigenous Australians in remote areas, there is a clear case to show that the economic costs in this instance are greater than the environmental benefits. While there are clearly many economic, cultural and social obstacles which make such engagement with the real economy difficult, and in some instances, impossible, not to proceed down this path is to suffer both a loss of hope and certain policy failure, especially with respect to "closing the gap" between Indigenous and non-Indigenous populations on Cape York.

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APPENDIX A - LEGISLATIVE BASIS AND CONSEQUENCES OF THE WILD RIVERS ACT AND DECLARATIONS

Conics Town Planners
June 2009

Wild Rivers Act (WRA)

Instructions
To:

- Summarise the WRA, it's intent and consequences (what is caught and what is excluded);
- High level case studies of possible development applications;
- A critique of the legislation and the resulting Wild River Declarations and Codes.

The Wenlock Proposed Wild River Declaration (the **Wenlock Declaration**) was chosen arbitrarily for the assessment. The discussion below assumes that it will be adopted in its publicised form.

This paper does not discuss the effect of the moratorium which applies during the currency of a proposed declaration (S 10).

Summary

- The purpose of the WRA 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 WRA;
    - A Wild Rivers Declaration (WR Declaration);
    - The Wild Rivers Code (WR Code);
    - IPA 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) which, in the Wenlock Wild River Area (Wenlock Area) constitutes a significant proportion of the total area;
- Development in Designated Urban Areas (Urban Areas) is less likely to be required to comply with the WR Code (see S 43(3) WRA) than in other area;
- Regulated development is generally required to comply with the WR Code which specifies "required outcomes" and "probable solutions" including:
  - Setbacks of 200 meters;
  - Slope restrictions of between 1 and 10%;

  With obvious limiting effect on the location of any development
- The WRA, the Wenlock Declaration and the WR Code will make it very difficult if not impossible to develop in-stream fish farms or banana farms (and other forms of agriculture) in the HPA;
- The same instruments also have potential to make development of ecotourism difficult, but less so than the other examples.

Intent of WRA and its Consequences

Statutory Purpose

The stated purpose of the WRA is to preserve the natural values of rivers that have all, or almost all, of their natural values intact.

Broad Scheme of WRA

The broad scheme of WRA is:

- A river only becomes a Wild River by way of ministerial declaration after a formal process which includes public notification;
- There are 3 broad scenarios which can arise after a ministerial declaration is made:
    - **Certain types of development are prohibited entirely by WRA**:
        - No application can be made for a proposal to carry out the prohibited activity;
    - **Certain types of development (which are not prohibited by WRA) may be prohibited by the WR declaration**, in which case:
        - An application can be made to the Minister for a Property Development Plan (PDP) to remove the prohibitions in the declaration which are impeding the proposal;
        - If The Minister approves the application, then he/she may, after a formal process including public notification, amend the WR declaration to remove the prohibition;
        - The PDP is not an approval to carry out assessable activity under IPA, and must be followed by an amendment to the WR declaration (after public notification and a decision);
    - **Certain types of development will not be prohibited by the declaration, but will be regulated according to the WR declaration and the Wild Rivers Code (WR Code)**:
        - Where development is assessable, approvals will be required under IPA;
        - Certain types of assessable development must "comply" with the applicable WR Code;
        - The WR code requirements generally increase the burden on applicants as compared to the situation where no WR Declaration has been made.
- The extent to which certain types of development may be prohibited or regulated by the WR Declaration or the WR Code may also vary according to the manner in which the area to be developed is categorised in the WR declaration:
    - There are two broad categories:
        - ***High Preservation Area*** which includes:
            (a) the wild river;
            (b) the major tributaries of the wild river;
            (c) any special features in the wild river area;
            (d) the area, stated in the wild river declaration for the wild river area, of up to 1km either side of the wild river, its major tributaries and any special features.
        - ***Preservation area*** - the balance of the area is preservation area;
    - There are three sub-categories which can be located in either High Preservation or Preservation areas:
        - ***floodplain management area;***
        - ***subartesian management area;***
        - ***designated urban area.***

Broadly speaking the prohibitions and regulations are less stringent in Preservation areas than in High Preservation areas, and less stringent again in designated urban areas. There are no designated urban areas in the 7432 sq km area proposed in the Wenlock Proposed Declaration.

Broad Effects of the Wenlock Proposed Declaration under the Wild Rivers Act

The DERM website describes the effects of the proposed declaration as follows:
"Many activities will NOT be affected even if the area is declared a wild river area, including:

- *existing developments*
- *grazing*
- *recreational fishing*
- *boating or refueling*
- *traditional cultural activities*
- *native title*
- *land management such as clearing weeds*
- *traditional burning*
- *taking water for stock or domestic needs*
- *improving pasture (unless using risk species).*

Some high impact activities will be effectively prohibited in the proposed high preservation area, including:

- *instream dams and weirs*
- *animal husbandry (eg. feedlots, emu farms)*
- *aquaculture (eg. hatcheries, grow out ponds)*
- *environmentally relevant activities (except some that are essential for urban areas)*
- *surface mining (except for limited hand sampling instream and low-impact exploration off-stream)*
- *destruction of marine plants.*

Other activities in the proposed high preservation area and preservation area and certain activities in the proposed floodplain management area will be permitted providing they comply with specific codes. For example, aquaculture may be allowed in the preservation area if it complies with the relevant wild river code, and building roads and tracks will be permitted provided the requirements of the code are met."

Effects for Specific Proposals

In this section high level consideration is given to some of the activities potentially associated with in-stream fish farming, banana farming and an ecotourism development in the Wenlock Wild River area.

Fish Farm

Assessment

Fish farming is prohibited in 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.

Interference with Water Flow

If a fish farm will interfere with the flow of water it will be prohibited if it is for operational works:

- In a High Preservation Area (HPA); or
- In a nominated waterway in a preservation area but is not a dam or a weir.

An assessment manager cannot receive the application.

Waterway Barrier Works

An application for operational works for **waterway barrier works**:

- In a HPA is prohibited.
- In any other part of the Wild Rivers area must comply with Part 8 of the Wild Rivers Code ***waterway barrier works*** means a dam, weir or other barrier across a waterway if the barrier limits fish stock access and movement along a waterway.

Part 8 of the WR Code provides for "required outcomes" and "probable solutions" including:

- Not to impede fish passage;
- No release of pollutants during construction or operation.

Fish Habitat Areas

Operational works (building) in a fish habitat area under the Fisheries Act where it is not self assessable will be prohibited if any part of the application relates to development in a HPA.

All other applications in a fish habitat area must comply with Part 4 of the WR Code.

The WR Code specifies "required outcomes" and "probable solutions" which include:

- Fish passage cannot be impeded;
- Fish habitat values cannot be impacted;
- Activities not to impound natural flow paths.

Private Road Access to River

See below for provisions relating to commercial and industrial development.

Land Based Aquaculture

Note also, an application for an MCU for **land based aquaculture** is prohibited if any part of the application is in a HPA. Any other aquaculture application under this section must comply with Part 2 of the WR Code, or Part 3 if an environmentally relevant activity (ERA).

Part 2 of the code provides for required outcomes and probable solutions which relate to preservation of corridor function and water quality.

Banana Farm

Banana farming for commercial purposes falls under the definition of agricultural activities (Planting, gathering or harvesting a …food…crop."). Some of the likely activities in establishing and conducting a banana farm are discussed below.

Assessment

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.

Agriculture MCU or Operational Works

S 42 -Any application for an MCU or operational work approval for agriculture:

- Must not be received by the assessment manager if it relates to a high preservation area or a preservation area in relation to the production of high risk species (there are none specified for the Wenlock Wild River area);
- Otherwise, development must comply with Part 1 of the WR Code.

The code specifies setbacks and slope restrictions (schedule 3) same as above.

Taking of Water

The Wenlock Declaration seeks to regulate only unallocated water. Specific volumes are identified for Indigenous, Strategic and General reserves.

Volumetric limits for each are stipulated (500, 2000, and 1000 mega-litres).

The process will be confirmed in regulations under the Water Act, but the general requirements are in schedule 6 to the declaration. Schedule 6 provides that if demand exceeds supply a market based approach to allocation will be used, except where State purposes or Indigenous social and economic aspirations are involved.

Otherwise the provisions of the Water Act apply.

Taking or Interfering with Overland Water Flow

Operational works for taking or interfering with overland water flow in a HPA or floodplain management area (FMA) which the declaration states to be assessable under IPA (here under schedule 8 part 1 table 4 item 3(c)(i) for taking, and part 2, table 4 item 1(b)(ii) for interference)) must comply with Part 6B of the WR Code.

Otherwise taking of over land water flow in a HPA is prohibited except for stock or domestic purposes, and interference with over land water flow in an HPA is prohibited.

Part 6B of the WR Code has "mandatory requirements", "required outcomes" and "probable solutions'. These include:

- no works in a flood channel;
- natural flow paths are not significantly altered;
- riparian and wildlife corridors are preserved;
- No degradation of receiving waters.

Vegetation Clearance in HPA

Operational works for clearing assessable vegetation **in an HPA** is regulated by WR Code 12. Vegetation in a preservation area is not regulated by the Declaration.

Only applications for "relevant purposes" as defined in the Wenlock Declaration can be received by the assessment manager. The Wenlock Declaration defines "relevant purposes" more restrictively than VMA. The following are **not** relevant purposes for clearing in a HPA:

- a project declared to be a significant project under the *State Development and Public Works Organisation Act 1971*, section 26; or
- for fodder harvesting,
- for thinning,
- for an extractive industry;
- for clearing regrowth outside of an area shown as a registered area of agriculture.

Code 12 is very detailed and deals with four broad categories:

1. Requirements for clearing encroachment;
2. Requirements for clearing for public safety and infrastructure;
3. Requirements for clearing regrowth;
4. Requirements for clearing vegetation for weed or pest management.

The most relevant category for this enquiry relates to clearing "regrowth". Some key features in this category are:

- No clearing of endangered or of concern regional ecosystems;
- Clearing is limited to non remnant vegetation in an area shown as a registered area of agriculture;
- Set backs and slope restrictions apply;
- Minimum sizes of assessable vegetation to be retained for connectivity;
- Avoidance of clearing in discharge areas to avoid salinity.

Ecotourism

Assessment

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

Ecotourism Acknowledged in the WR Declaration

The WRA makes no specific reference to ecotourism, however the foreword to the proposed declaration claims that ecotourism is recognised and supported by the declaration.

The only obvious concessions to ecotourism in the proposed declaration are that:

- unallocated water from the Strategic Reserve can be made available for ecotourism;
- ecotourism is defined as:

  ***ecotourism**, includes commercially based enterprise that encompasses a spectrum of nature-based activities that foster visitor appreciation and understanding of natural heritage that are managed to be ecologically, economically and socially sustainable.*

Commercial Development

As a commercial activity ecotourism will fall under S 43 of the WRA which deals with applications for residential, commercial and industrial development in a Wild Rivers area.

Development applications for residential, commercial or industrial development which is assessable under:

- A Local Government Planning scheme;
- IPA as operational works for the reconfiguration of a lot;

must comply with the Wild Rivers Code (unless in a designated urban area).

The WR Code provides for "Required outcomes" and "Probable solutions".

The probable solutions are minimum setbacks of 200 meters and slope restrictions between 1% and 10% depending on soil stability. (See below).

Such a venture might involve vegetation clearance, water taking and/or interference with overland water flows (see above).

Overview Conclusion

A WR Declaration will either prohibit development, or regulate development in a manner which is likely to make it more difficult to establish or conduct than it was prior to the declaration.