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31 March 2010

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

**Re: Senate Legal and Constitutional Committee Inquiry into the *Wild Rivers (Environmental Management) Bill 2010 [No.2]* (Cth)**

Please find attached the submission of the Cape York Land Council Aboriginal Corporation (CYLC) to the Committee's inquiry into the above Bill.

CYLC is an Aboriginal Corporation formed by Cape York traditional owners in 1990 to advance the self determination of Aboriginal people in Cape York Peninsula, and is the Native Title Representative Body pursuant to the *Native Title Act 1993* (Cth) for the Cape York region. We have a proud history of representing Traditional Owners and Native Title Holders in the region.

CYLC has the broadest Indigenous representation of any of the organisations on Cape York and is publicly opposed to the Wild Rivers legislation through a unanimous decision of it's representative Board of directors. Furthermore, it is not aware of support for the Wild Rivers legislation from any of the traditional owner groups it represents across Cape York. It is however

aware that a number of the groups are implacably opposed to the Wild Rivers legislation.

We look forward to further elaborating upon this submission at the Committee's hearing in Cairns.

Yours faithfully

**Peter Callaghan**
**Chief Executive Officer**

# Senate Legal and Constitutional Committee

# Inquiry into

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

## Submission of Cape York Land Council

Cape York Land Council
32 Florence Street
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**Table of abbreviations and acronyms**

| | |
|---|---|
| ALA | *Aboriginal Land Act 1991* (Qld) |
| CYPHA | *Cape York Peninsula Heritage Act 2007* (Qld) |
| NTA | *Native Title Act 1993* (Cth) |
| SPA | *Sustainable Planning Act 2009* (Qld) |
| VMA | *Vegetation Management Act 1999* (Qld) |
| WRA | *Wild Rivers Act 2005* (Qld) |
| WREM Bill | *Wild Rivers (Environmental Management) Bill 2010 [No.2]* (Cth) |

## OPERATION OF THE WRA

The WRA is exceptional and unprecedented legislation. It is unique in the Queensland statute book in its conferral of substantial powers of land use regulation upon a Minister with profoundly limited accountability and oversight.

The most problematic features of WRA are:

- that the areas that may be declared as wild rivers are any part of Queensland[1] rather than a particular wild river and its immediate vicinity;

- that no adequate mechanism exists under the WRA to ensure that the identification of rivers as wild rivers are demonstrably rivers with 'all, or almost all, of their natural values intact'[2] or that areas included within a 'wild river area' are necessary to protect the natural values of identified wild rivers;

- that the WRA does not provide any detailed criteria for the creation of the various management categories which are available within a wild river area;[3]

- that the land use restrictions that apply as a result of a wild river declaration, and its management categories, are inflexible and not responsive to the particular natural values of a wild river that require preservation;[4]

- the absence of any provision for compensation of property owners, including Indigenous beneficiaries of Aboriginal freehold under the ALA and native title holders, whose property is adversely affected by a wild river declaration;

- the absence of any merits review mechanism for development related decisions made under the WRA;[5]

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[1] WRA s.7.

[2] WRA s.3(1) provides:

> The purpose of this Act is to preserve the natural values of rivers that have all, or almost all, of their natural values intact.

[3] WRA s.41 provides:

> **41 Classification of wild river area into high preservation area and preservation area**
>
> (1) The following parts of a wild river area are included in the high preservation area—
>
> (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.
>
> (2) The remainder of the wild river area is the preservation area.
>
> (3) A floodplain management area, a subartesian management area or a designated urban area may be over all or part of the high preservation area or the preservation area.

[4] For example, a variety of land use restrictions are imposed in a wild river area by the *Wild Rivers Code 2007* (Qld). The code applies to all wild river areas and is not tailored to the preservation needs of a particular wild river area.

[5] Property development plans under WRA part 2 division 2A offer the opportunity for development even where such development is otherwise prohibited by reason of a wild river declaration (WRA s.31A). The responsible Minister's decision to approve property development plan is not subject to merits review.

- the existence of rigid compliance standards under the *Wild Rivers Code 2007* (Qld) with no associated capacity for merits review, rather than broad performance objectives accompanied by merits review;[6]

- the absence of proper Parliamentary scrutiny of wild river declarations which, although legislative in character, are not subordinate legislation and so not subject to disallowance, do not require a regulatory impact statement before they are made and are not part of the staged automatic expiry for subordinate legislation (upon the tenth anniversary of the making of the instrument);[7]

- established land uses are protected under the WRA[8] and, in so doing, the past exclusion of Cape York Indigenous people from development opportunities is ignored, barriers to access are created and intergenerational equity is not promoted – all of which creates adverse selection problems;[9]

- wild river declarations, and their enforcement, involve prolix and complex prohibition and approval mechanisms contrary to best practice principles of regulatory design.[10]

Contrary to claims by the Queensland Government, the existence of a wild river declaration does preclude development that is either incompatible with the *Wild Rivers Code 2007* (Qld) or precluded by a management category within a wild river area.[11]

## CAPE YORK WILD RIVER DECLARATIONS

On 3 April 2009, the Queensland Governor in Council approved the following wild river declarations made by the responsible Minister under the WRA:

- the *Archer Basin Wild River Declaration* 2009 (Qld);
- the *Lockhart Basin Wild River Declaration 2009* (Qld);
- the *Stewart Basin Wild River Declaration 2009* (Qld).[12]

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[6] The *Wild Rivers Code 2007* (Qld) was approved by legislation (WRA s.6A inserted by the *Wild Rivers and Other Legislation Amendment Act 2007* (Qld) from 28 January 2007) rather than developed in the normal way for subordinate legislation (which would have required the development of a regulatory impact statement: *Statutory Instruments Act 1992* (Qld) part 5).

[7] Compare *Statutory Instruments Act 1992* (Qld) parts 5-7.

[8] WRA ss.17 and 29.

[9] Adverse selection

[10] See Queensland Government's 'Smart regulation reform agenda', <www.treasury.qld.gov.au/office/services/regulatory-reform/smart-regulation-reform-agenda.shtml> accessed 30 March 2010, Australian Government, Office of Best Practice Regulation, <www.finance.gov.au/obpr/about/index.html>, accessed 30 March 2010.

[11] For example, as a general rule native vegetation may not be cleared within the high preservation area of a wild river area for new development: see VMA s.22A(2A) and SPA schedule 1 item 3. Schedule 1 of the SPA defines 'prohibited development' for the SPA: see SPA schedule 3, definition of 'prohibited development' item 1.

[12] See *Wild River Declaration Notice (No 01) 2009* (Qld), published in *Queensland Government Gazette*, Vol.350, No.76, p.1507 (3 April 2009). This notice states that the approval of the Governor in Council was given on 2 April 2009.

In general, a wild river declaration does not in itself have a direct effect by regulating or prohibiting conduct. Rather, its existence triggers the extensive regulation of activities under 13 Queensland statutes which impose regulatory standards, and prohibit specified activities, on the area subject to declaration.[13]

The concept of 'river' does not inform the area to which the three declarations apply. For example, sections 5 and 6 of the *Archer Basin Wild River Declaration 2009* (Qld) defines the Archer Basin Wild River Area as:

- the catchment area of the Archer River, the Love River and the Kirke River;
- the major tributaries which are Dry River, Geike Creek, Hull Creek, Attack Creek, Piccaninny Creek, Scrubby Creek (tributary of Piccaninny Creek), Coen River, Tadpole Creek, Scrubby Creek (tributary of the Coen River) and Running Creek; and
- special features being Green Swamp-Shady Lagoon Complex, Lower Archer Wetland Complex; Whistler's Lagoon; Lake Archer; and North-East Karumba Plain Wetland Aggregation.

The whole of catchment approach of the three declarations is objectionable and not supported by adequate scientific evidence. Despite this, no accessible forum exists for the traditional owners of Cape York to insist upon rigorous assessments of natural values before land is made subject to a wild river declaration under the WRA.

The wild river declarations classify their area as 'high preservation areas' or 'preservation areas'.[14] Different types of restrictions apply to activities undertaken in these different areas, with severe restrictions applying to activity undertaken in a high preservation area. A high preservation area is made up of:

(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.[15]

For the discretionary area adjacent to the wild river, tributaries or features that is included in the high preservation area, each Cape York wild river declaration (with one exception) is subject to the widest permissible high preservation area of 1 kilometre either side of the primary rivers, major tributaries and special features. This inclusion is not supported by scientific evidence and yet no accessible forum exists for the traditional owners of Cape York

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[13] The 13 statutes are the *Coastal Protection and Management Act 1995* (Qld), the *Environmental Protection Act 1994* (Qld), the *Fisheries Act 1994* (Qld), the *Forestry Act 1959* (Qld), the *Fossicking Act 1994* (Qld), the *Sustainable Planning Act 2009* (Qld), the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld), the *Mineral Resources Act 1989* (Qld), the *Nature Conservation Act 1992* (Qld), the *State Development and Public Works Organisation Act 1971* (Qld), the *Transport Infrastructure Act 1994* (Qld), the *Vegetation Management Act 1999* (Qld) and the *Water Act 2000* (Qld).

[14] WRA s.41(1) and (2).

[15] WRA s.41(1).

to challenge the routine inclusion of the maximum area adjacent to wild rivers, tributaries and features.

## TRADITIONAL OWNERS AFFECTED BY WILD RIVERS DECLARATIONS

The Archer, Lockhart and Stewart declarations include land and waters:

- subject to determinations of exclusive possession native title and registered applications for exclusive possession of native title for the Wik, Olkola, Kaanju and Umpila peoples;

- areas where exclusive possession native title is proposed to be claimed in the future for other Traditional Owner groups;

- Aboriginal freehold granted under the ALA to the Muluna Land Trust, Mangkuma Land Trust, the Lama Lama Land Trust, the Toolka Land Trust, the Wunthulpu Aboriginal Land Trust and the Pul Pul Land Trust and areas where such land is proposed to be granted (including a proposed freehold grant over Archer Bend to be excised out of the Mungkan Kandju National Park in satisfaction of a long running land rights struggle); and

- national park (Cape York Peninsula Aboriginal land) granted under the ALA (as amended by the CYPHA) for the Kaanju, Umpila, Lama Lama Ayapathu peoples (McIlwraith Range National Park) and the Lama Lama National Park (Cape York Peninsula Aboriginal Land) and areas where such land is proposed to be granted (including in relation to the Mungkan Kandju National Park).

The recognition of exclusive native title and the Aboriginal freehold grants are forms of exclusive possession title to the relevant land and waters. Such forms of exclusive possession titles provide, amongst other things, opportunities for Traditional Owners to use the land for social and economic development.

Grants of national park land under the ALA are also exclusive titles but require an immediate re-dedication as national park (Cape York Peninsula Aboriginal land) under the *Nature Conservation Act* 1992 (Qld) to be jointly managed by the Traditional Owners and the State.

CYPHA s.3(c) provides that one of the objects of the Act is:

> to recognise the economic, social and cultural needs and aspirations of indigenous communities in relation to land use in the Cape York region.

CYPHA s.4(d) provides one way in which the objects of the Act will be primarily achieved, namely by providing for:

> the declaration of indigenous community use areas in which indigenous communities may undertake appropriate economic activities.

Traditional Owners from the Kaanju, Umpila, Lama Lama and Ayapathu peoples have entered into tenure arrangements under the CYPHA in good faith that this legislative framework would be honoured. Unfortunately, the three Cape York wild river declarations

frustrate the achievements of the CYPHA. An Indigenous community use area under the CYPHA does not have any status under, or provide any relief from the restrictions arising from, the three Cape York wild river declarations.

## IMPACT OF WILD RIVERS DECLARATIONS ON TRADITIONAL OWNERS' NATIVE TITLE RIGHTS AND INTERESTS

*General comments*

The legal relationship between the wild river declarations and exclusive possession native title go to the heart of whether or not native title is legally recognized as a valuable property right. The profound restrictions imposed by the Cape York wild river declarations may render nugatory native title determinations obtained after much investment of time and resources.

The Queensland Government and some environmental groups state that the wild river declarations will not affect Traditional Owners' native title rights (such as the right to hunt, fish and protect important places on their country). These comments profoundly misunderstand the concept of native title in that they assume native title is a non-exclusive usufructuary right.[16] This is certainly not the case for native title which is a right to possession, occupation, use and enjoyment as against the whole world – which exists for certain Cape York native title determinations.

Exclusive possession native title is the recognition of full beneficial ownership of Traditional Owners' country. It is the recognition that, prior to sovereignty, Traditional Owners as of right under their legal system could use their land as they saw fit to meet all aspects of their social, economic and cultural needs. This includes the right to use the land for economic development. In the 21st century, exclusive possession native title provides Traditional Owners a base for economic development and independence, a fact continually recognized by the Rudd Government. How that is done is a matter for Traditional Owners, in compliance with non-discriminatory government laws.

The extensive regulation imposed by the three Cape York wild river declarations significantly undermine the opportunities afforded by the recognition of native title. In high preservation areas (which are significant in size) the declarations impose significant restrictions on:

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[16] Non-exclusive native title rights are often not 'development' under SPA s.7 and so not activities which require planning approval, a key mechanism for the application of a wild river declaration. Furthermore, WRA s.44(2) provides a qualified exemption from the effect of a declaration for native titleholders. But for that exemption, some non-exclusive native title rights would be subject to wild river declaration related restrictions. For example, a non-exclusive native title right to use natural resources would be constrained by the near prohibition on clearing native vegetation in a high preservation area. SPA schedule 3 defines the verb 'clear' as follows:

> ***clear***, for vegetation—
>
> (a) means remove, cut down, ringbark, push over, poison or destroy in any way including by burning, flooding or draining; but
>
> (b) does not include destroying standing vegetation by stock, or lopping a tree.

Clearing is 'operational work' (SPA s.10(1), definition of 'operational work' para.1(f)) and hence 'development' (SPA s.7(c)). NTA s.211 would provide a limited exemption from the requirement to obtain a development permit for such clearing, but only where a prohibition is not absolute and only then for non-commercial purposes.

(a) minimal clearing of land for outstations;
(b) culturally appropriate economic development such as small scale aquaculture and animal husbandry; and
(c) operational works for residential or commercial purposes.

Many proposed activities on country subject to the declarations will require Traditional Owners to engage in resource intensive assessments of development proposals, including gaining legal and scientific advice. Given the practical realities of many Indigenous peoples' lives in Cape York, such requirements will smother proposals from Traditional Owners before they even get to the Government for consideration. They are regulatory brick walls rather than 'restrictions'.

*Specific native title issues*
WRA s.44(2) purports to shield native title from the direct or indirect affect of a wild river declaration arising from the regulatory mechanisms of the 13 Acts linked to the WRA, subject to specific exclusions.

> **44 Relationship with other Acts**
> ...
> (2) However, a wild rivers declaration or a wild rivers code, in applying for the purposes of any of those other Acts, can not have the direct or indirect effect under the other Act of limiting a person's right to the exercise or enjoyment of native title.
> ...

After obtaining legal advice, Cape York Land Council is of the view that native title is significantly affected[17] not 'under the other Act[s]' but by the operation of the WRA itself. WRA ss.42 and 43 directly constrain native title holders where a wild river declaration is in place. WRA s.42 imposes restrictions upon certain developments concerning agricultural or animal husbandry. WRA s.43(3) relates to subdivisions or operational works for residential, commercial or industrial development. The native title shield of WRA s.44(2) does not apply because the constraint arises from the WRA itself.[18] In this sense, the three Cape York wild river declarations are future acts under the NTA. WRA ss. 42 and 43 mean that the declarations directly affect the exercise of exclusive possession native title rights and interests and as such are required to be subject to the future acts regime of the NTA otherwise they are invalid.

Section 17 of the WRA provides that any activity authorised to be carried out on the declaration area under a licence, permit or other 'approval document' held at the time of the declaration can continue to be done as if the declaration has not been made.[19] It is unclear what is meant by the term 'approval document'. It may mean a document collateral to a tenure instrument or it may include matters authorised by a tenure instrument itself. If the latter, then a freehold interest by its nature includes authorisation to undertake 'an activity or take a natural resource' in the titled area, would be covered by s.17. It is clear that freehold interests in Queensland may include such 'authorisations' in the form of positive covenants,

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[17] Affected in the sense anticipated by NTA s.227, being partly or wholly inconsistent with native title rights and interests, particularly where those rights and interests are exclusive in nature.
[18] And so the constraint is not from a wild river declaration 'applying for the purposes of any of those other Acts' as required by WRA s.44(2).
[19] WRA s.29 is in similar terms for a wild river declaration amendment.

imposed either by registration[20] or as a condition of a grant of freehold.[21] An expansive reading of s.17 in which an 'approval document' includes a tenure document and associated instruments is supported by the explanatory memorandum of the *Wild Rivers Bill 2005* (Qld).[22]

As native title is not governed by any authorising document but is the recognition of prior rights and interests under traditional law and custom, native title would not be protected by s17. The different treatment of native title rights under WRA s.44(2) and rights under an 'approval document' by WRA s.17 violates s.10 of the *Racial Discrimination Act 1975* (Cth) and the freehold test of NTA part 2 division 3 subdivision M.

## CAPE YORK DECLARATIONS ARE RACIALLY DISCRIMINATORY

The restrictions imposed by declarations apply not only to native title, but to the large grants of Aboriginal freehold which exist within the declaration areas. With few exceptions, all forms of exclusive possession title (whether native title or Aboriginal freehold) held within the declaration areas are held by Indigenous people. This means that although the declarations purport to be non-discriminatory, in their practical application they discriminate against Indigenous peoples' right to use and enjoy their land for their social and economic benefit. Such restrictions have not been, and are unlikely ever to be, applied to non-Indigenous owners of freehold. In Cape York Land Council's view, the process undertaken in preparing, deliberating upon and finalising the three Cape York wild rider declarations represents a prima facie violation of s.9 of the *Racial Discrimination Act 1975* (Cth).

## COMMONWEALTH GOVERNMENT'S RECOGNITION OF NATIVE TITLE AS A FOUNDATION FOR ECONOMIC AND SOCIAL DEVELOPMENT

Prime Minister Rudd's eloquent and empathetic 'Apology to Australia's Indigenous Peoples'[23] urged the forging of a new future between Indigenous and non-Indigenous Australians with an 'absolute premium on respect, co-operation and mutual responsibility'. As part of this 'new future', the Commonwealth Attorney General Robert McClelland[24] and Indigenous Affairs Minister Jenny Macklin[25] have consistently recognised native title as

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[20] *Land Title Act 1994* (Qld) s.97.

[21] *Land Act 1994* (Qld) ss.169 and 172.

[22] *Wild Rivers Bill 2005* (Qld), Explanatory Memorandum, p.15 states:

> The Bill recognises that all existing agreements, permits, lease conditions and undertakings are honoured immediately prior to a declaration coming into effect. This clause preserves the existing rights of entities to carry out activities and take natural resources. These rights have been preserved even though this may lead to activities occurring in a wild river area after a declaration is made, that are inconsistent with the purpose of the Bill and the requirements for new activities imposed as a result of the declaration. [*emphasis added*]

[23] Prime Minister Kevin Rudd MP, 'Apology to Australia's Indigenous Peoples', House of Representatives, Debates, 13 February 2005, accessed 29 April 2009, <http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf>.

[24] Hon Robert McClelland MP (Attorney-General), paper presented at the Negotiating Native Title Forum, Brisbane, 29 February 2008. The Attorney-General reiterated these views in his keynote address to the 2009 AIATSIS Native Title Conference, 5 June 2009.

[25] Hon. Jenny. Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Beyond *Mabo*: Native Title and Closing the Gap', 2008 Mabo Lecture, Townsville, 21 May 2008. Minister

*contd.*

'critical to economic development'[26] and other social and political aspirations of Traditional Owners and governments alike. By acknowledging this role for native title, the Commonwealth embraces the real opportunities of the *Mabo* decision, which Minister Macklin quotes Cape York indigenous leader Noel Pearson as the:

> best opportunity for the resolution of colonial grievances between indigenous and non indigenous Australians ... the cornerstone for reconciliation – legally, politically, historically and morally' and not 'simply a legal doctrine relating to real estate.[27]

## AN EXAMPLE OF ARBITRARY AND UNJUST IMPACT OF WILD RIVERS DECLARATIONS

The Archer River Basin Wild River Declaration covers an area referred to as 'Archer Bend'. Archer Bend is currently subject to the Mungkan Kandju National Park. The history of the dedication of this Park is a shameful matter and the cause of considerable grief for all Cape York Traditional Owners. The non-consensual imposition of the Archer River declaration over this area compounds this history.

- Prior to the dedication of the Mungjan Kandju Park in 1977, the Archer River Pastoral Holding was in the process of being acquired by the Commonwealth Aboriginal Land Fund Commission on behalf of the areas Traditional Owners, including the senior law boss Mr John Koowarta. An important element of the purchase was to create an economic base for the Traditional Owners.

- The Commission made an application to the Queensland Minister for Lands for the transfer of the pastoral lease, but the application was refused on the basis that the proposed transfer was for the use of Aboriginal people, and that this was contrary to Queensland Government policy.

- Mr Koowarta commenced legal proceedings against the Queensland Government in the Supreme Court of Queensland.

- In response, the Queensland Government applied to the High Court for a declaration that the RDA was unconstitutional.[28] This challenge was unsuccessful.

- Mr Koowarta then pursued the matter in the Supreme Court, but although these applications were successful, they were rendered redundant as the Queensland Government resumed the pastoral lease and dedicated the area as a national park.

Thirty years later, the Queensland Government has declared wild river high preservation areas over large areas of the traditional lands of Mr Koowarta and the Aurukun Wetlands without consent and despite the long battle of Mr Koowarta for land justice.

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Macklin reiterated these views at the AIATSIS 2009 Native Title Conference in her address to conference delegates, 5 June 2009.

[26] Macklin, supra.

[27] Macklin, supra. Original quote from Noel Pearson, 'Peoples, Nations and Peace', Mabo Oration, Brisbane, 3 July 2005.

[28] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

## OPERATION OF WREM BILL

Cape York Land Council supports the policy principles and object of the WREM Bill. There are, however, amendments required to ensure that the Bill operates with greater facility. These amendments are:

- the amendment of the NTA to ensure that the WREM Bill provisions, if enacted, are properly reflected in the operation of the NTA;

- amending the reference to the WRA to direct the WREM Bill to Queensland legislation with an operation the same as, or substantially similar to, that of the WRA (rather than a reference to the WRA or legislation which replaces it).[29]

## CONCLUSIONS

Cape York Land Council supports the WREM Bill as a just response to unfair and racially discriminatory State wild river declarations. There is no doubt that, if required, the consent of Traditional Owners exists for the WREM Bill to pass as a special measure.

Given the racially discriminatory impact of the WRA on both native title and Aboriginal freehold, Cape York Land Council suggests that the WREM Bill be amended to cover not only native title holders but Aboriginal people who are the beneficiaries of Aboriginal freehold granted under with the ALA and to protect the beneficial aspects of freehold grants under the CYPHA.

**Cape York Land Council**
**31 March 2010**

[29] See WREM Bill cl.3, definition of 'relevant Queensland legislation'.