WILD RIVERS, CONSERVATION AND INDIGENOUS RIGHTS: AN IMPOSSIBLE BALANCE?

by Meg McLoughlin and Melissa Sinclair

On 3 April 2009, the Queensland Government announced Wild River declarations over 13 rivers and their catchments surrounding the Archer, Lockhart and Stewart River areas under the Wild Rivers Act 2005 (Qld) (‘the Act’). Heralded as a conservation measure, the Act is concerned to preserve the natural values of rivers that have ‘all, or almost all, of their natural values intact.’ There are now nine ‘Wild River Areas’ in the Gulf of Carpentaria, Cape York as well as Hinchinbrook and Fraser Islands, affecting over 20 rivers flowing through these regions. The Gulf of Carpentaria and Cape York declarations, many of which cover large areas recognised as Aboriginal land or waters, were so declared despite ongoing lobbying by Indigenous communities, councils, representative bodies and individuals.

The Act is particularly relevant to Cape York Peninsula as the majority of rivers in this region have been identified by the Government as having maintained the requisite ‘natural values’. A further nine areas have also been proposed. If successful, these proposals will have significant consequences for land use by Indigenous people, who make up 60% of the Cape York population and have native title rights and interests over at least 87% of the Peninsula.

This article argues that Queensland wild rivers regime is oppressive in its preference for environmental protection over Indigenous advancement. It obscures complex issues relating to land use, cultural rights and sustainable economic development. Declarations proposed under the Act will have a disproportionate affect on Queensland’s Indigenous people, further restricting their opportunities for growth and imposing upon them an ill-adapted land management scheme. Introduced without proper regard for their legitimate interests or concerns, the Act will significantly erode the economic capacities of Indigenous communities and further marginalise them from contemporary Australian life.

THE WILD RIVERS ACT AND DEVELOPMENT ACTIVITIES

Once a river has been declared ‘wild’, the Act provides for four types of management zone: the high preservation area, preservation area, sub-artesian area and floodplain management area. The Wild Rivers Code further identifies designated urban areas and nominated waterways management areas. The most stringent restrictions apply to land and waters that have been designated a ‘high preservation area’ (‘HPA’), covering land up to one kilometre on either side of a declared river. Within these limits, activities associated with animal husbandry, agriculture, aquaculture and surface mining are prohibited. The preservation area, comprising the total ‘wild river’ area excluding the HPA, restricts new development activities by requiring applicants to conform to conditions set by the regulating authority, as well as conservation requirements under the Act.

Conservation groups and government discourse point to the devastating environmental and economic damage to the Murray Darling basin to justify this stricter regulation of Queensland’s river systems. But traditional owners reject this comparison as spurious; not only are the affected rivers sparsely populated, they have been carefully maintained by Indigenous people for thousands of years. Further, while imposing strict requirements to ensure that the ‘natural values’ of rivers are not adversely affected by newly-proposed cultural and development activities, the legislation exempts existing activities already underway. This includes activities that have significant and detrimental environmental consequences, such as mining and other large-scale commercial enterprise. The Queensland Government has effectively ensured powerful market players continued access to these ecologically sensitive areas, while implementing prohibitive barriers to small-scale, community-based projects with more environmentally friendly outcomes. In this way, the Act entrenches the status quo, cementing and prioritising current arrangements for the exploitation of land.

The Act amends 13 existing pieces of legislation which, while far from balanced, at least attempted to recognise the validity of Indigenous interests to traditional land and waters. In overriding the environmental protection scheme already in place, the Act has made it even more difficult for communities living on or near the affected
rivers to consider opportunities for land use beyond those strictly related to conservation. The outright prohibition of new agriculture and aquaculture activities in HPAs, for example, will severely curb Indigenous economic opportunities. While the Act allows for some development activities to proceed in preservation areas, restrictions on water access mean that many projects outside the HPAs would be too costly to be viable.

Some communities in Cape York have aspirations to establish market gardens to grow fruit and vegetables. Cooperative market gardens fulfill local sustenance requirements and strengthen cultural ties, providing both incentive and opportunity to visit neighbouring communities. During the 1990s, the Coen community operated a fully functional communal market garden but this has since lapsed. Now, were community members to revive it, they would be prohibited from doing so on HPA land, where water is most easily accessible. While permitted under the legislation to reestablish a garden on a ‘preservation area’, transporting water over this distance involves much greater expense, personal energy and resources than is readily available to many small Indigenous communities. In this way, the new legislation introduces significant barriers to local, community-based projects. At the same time, it provides tacit support for well-funded, large-scale development activities carried out by commercial operations that are better able to circumvent the practical limitations imposed by the Act’s strict requirements.

This criticism is a complex one because Indigenous people have a special spiritual and cultural relationship with water and land: cultural rights, water rights and land rights are inseparable. This connection is recognised under international law, which provides for the right to practice and develop culture, customs, spiritual traditions and to utilise natural resources. The UN Declaration on the Rights of Indigenous Peoples, formally endorsed by the Federal Government in April this year, specifically provides that Indigenous peoples have a right to maintain and strengthen their distinctive spiritual relationships with ‘traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.’ While not binding at law, this formal recognition of the Declaration represents a significant acknowledgement of the unique connection between Indigenous Australians and their lands. No environmental legislation applying to Cape York can be legitimate unless it properly addresses Indigenous lore and custom.

Yet in addition to the economic concerns discussed above, the Act fails to reflect the cultural value that Indigenous people place on their rights to enjoy their lands. Wild river declarations cover significant areas that hold sacred sites, story places and totems, as well as women’s and men’s places. Aboriginal lore and custom require that rules regarding access, recognition and respect for these areas be strictly adhered to by Indigenous people. Yet the legislation makes no attempt to recognise or provide for these complex non-physical concerns. By explicitly excluding communities from their traditional lands, the Queensland Government has shown a complete disregard for the human rights of Indigenous people living in Cape York.

SIDE STEPPING CULTURAL RIGHTS
Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, recently declared that the Australian Human Rights Commission has serious concerns that the impact of the ‘wild rivers’ declarations on the exercise and enjoyment of Indigenous people’s human rights, in particular, those to cultural and economic development rights to their lands, waters and natural resources, have not been adequately considered by the Minister.

This criticism is a complex one because Indigenous people have a special spiritual and cultural relationship with water and land: cultural rights, water rights and land rights are inseparable. This connection is recognised under international law, which provides for the right to practice and develop culture, customs, spiritual traditions and to utilise natural resources. The UN Declaration on the Rights of Indigenous Peoples, formally endorsed by the Federal Government in April this year, specifically provides that Indigenous peoples have a right to maintain and strengthen their distinctive spiritual relationships with ‘traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.’ While not binding at law, this formal recognition of the Declaration represents a significant acknowledgement of the unique connection between Indigenous Australians and their lands. No environmental legislation applying to Cape York can be legitimate unless it properly addresses Indigenous lore and custom.

Yet in addition to the economic concerns discussed above, the Act fails to reflect the cultural value that Indigenous people place on their rights to enjoy their lands. Wild river declarations cover significant areas that hold sacred sites, story places and totems, as well as women’s and men’s places. Aboriginal lore and custom require that rules regarding access, recognition and respect for these areas be strictly adhered to by Indigenous people. Yet the legislation makes no attempt to recognise or provide for these complex non-physical concerns. By explicitly excluding communities from their traditional lands, the Queensland Government has shown a complete disregard for the human rights of Indigenous people living in Cape York.

INADEQUATE CONSULTATION PROCESS
The Act requires community consultation regarding declaration proposals; the Minister must consider issues emerging out of community consultations and ‘properly-made submissions’ before declaring an area to be a ‘wild river’. While the Queensland Government carried out consultations for the Archer, Lockhart and Stewart
River areas from 23 July 2008 to 21 November 2008, these processes have been repeatedly criticised by affected stakeholders.

Traditional owners are concerned that the approach taken by the Queensland Government has not been sufficiently thorough to provide communities with a clear understanding of the long-term or practical implications of the legislation. ‘Consultations’ overwhelmingly failed to consider any economic or social impacts on communities, or to provide this kind of information to community members and local councils. Instead of encouraging two-way community engagement through the provision of appropriate resources and assistance, State Government representatives provided woefully inadequate, unilateral ‘information sessions’. According to Chairman of the Cape York Land Council, Michael Ross, the Bligh Government did not follow a ‘fair and accountable and appropriate process of engagement with traditional owners’ and ignored traditional knowledge and responsibility to take care of Country.

Neither the extensive submissions put forward in response to the proposed declarations, nor the numerous public meetings held during the consultation period, fully reflect the barriers to participation faced by Indigenous communities in Cape York. Both of these failed to adequately address Indigenous concerns with the wild river declarations. Of over 3000 submissions received, the vast majority was generated electronically by the Wilderness Society website. Similarly, the Queensland Department of Natural Resources and Water (‘DNRW’) records approximately 100 meetings held with various Indigenous groups regarding the proposed declarations. But the lack of relevant information available prior to the meetings significantly limited communities in their ability to contribute to the consultation process. Traditional owners in communities such as Aurukun, for instance, would have greatly benefited if the consultations had been carried out with the assistance of translators so that discussions could be held in the local language. As one community member said:

I am not happy with the process on Cape York regarding Wild Rivers. I am alarmed because the Government has come in and declared things on country with no proper recognition or consultation with the traditional owners on what they really would like to see happen on their land … The Government must remember that it is our backyard, our bedroom, our kitchen, our home before we were taken away and introduced to a European style of life … I feel as though the Government doesn’t recognise that we are people.

Submissions from traditional owners and Indigenous organisations overwhelmingly called for declaration processes consistent with the principle of free, prior and informed consent. This principle, while still developing in international and domestic1 law, sets an important benchmark in dealings between Indigenous people and the state. Providing guidelines for appropriate consultation, it is triggered whenever government decisions or actions affect Indigenous peoples and their rights. It is disappointing that Queensland has ignored this emerging principle, preferring instead a tokenistic public interface. The Bligh Government’s ‘consultations’, prioritising form over substance, do little to inspire confidence in the integrity of the legislation, much less its advantages for Cape York communities.

**LAND MANAGEMENT: ONE SIZE FITS ALL**

The Act fails to recognise the rights of Indigenous Australians to develop natural resource management regimes to best serve community priorities. In no way does it encourage or allow Indigenous groups to manage their land according to their own natural and cultural values.

Traditional owners in Cape York have repeatedly expressed concerns at the Act’s silence regarding the management of invasive weeds, erosion and vegetation damage caused by feral animals and roaming cattle in the affected river basins. By imposing blanket conservation legislation, the State Government has avoided necessary discussions about appropriate management plans to address these issues. There has been no commitment to improved infrastructure, resources, or recognition of important traditional management practices. Instead, the Queensland Government has offered to employ 20 ‘wild river rangers’ in Cape York and the Gulf of Carpentaria to ‘protect and promote the world-class natural values of Queensland’s wild rivers’.

This host of new rangers does little to address complex environmental needs going beyond the narrow scope of the legislative regime. In the community of Aurukun, for example, there is currently no land and sea centre where local people can plan and co-ordinate appropriate methods of land and water management. Given that the development of such a centre has been sidelined in favour of broader policy objectives, it is unsurprising that community members have been largely unsupportive of the ranger-employment scheme. Aurukun Mayor, Neville Pootchemunka asked

what are those rangers? Who are those rangers? What are they doing? They are working for those people down South, they are doing the work on behalf of the department.
Similarly, while the Northern Peninsula Area Council is currently preparing to accept ‘wild river’ funds to implement its own land and sea ranger program, it is doing so with reluctance. The offer of funding has been described by some community members as a ‘bribe’ or a ‘con job’ by Government, a mechanism to advance the declaration of wild river areas while achieving little in response to specific local environmental concerns. Other communities in Cape York refuse to employ the term ‘wild river rangers’ at all. Mapoon land and sea centre refers to them as community rangers because, ultimately, rangers must answer to community needs, not the centralised priorities set by the Queensland Government. In this way, Indigenous leaders in Cape York continue to assert their resistance to misconceived, poorly-developed resource management values set by the State, insisting on their right to devise appropriate caring for country programs according to their individual circumstances.

CONCLUSIONS
Clearly, the environmental aims of the Act and subsequent declarations could have been better balanced with Aboriginal rights and interests. The Government’s disregard for community rights to economic development, culture, land and water, its failure to conduct proper consultations, and its broad-brush conflation of distinct regional needs strongly suggest a political appeal to ‘green’ populism rather than a meaningful attempt at environmental conservation.

As a result, the declaration of the three ‘wild river’ areas in Cape York has created a profound tension between the conservation ethic and Indigenous rights. But this need not have been the case; meaningful dialogue and community engagement could have helped bridge this unnecessary divide. The irony for the people of Cape York is that the legislative restrictions on their development choices have overwhelmingly been justified by reference to unsustainable practices and environmental damage caused by non-Indigenous Australians. Ultimately, it should be remembered that Indigenous communities have respected their land and waters for centuries. Indeed, it is only for this reason that Cape York river systems still have ‘all, or almost all, of their natural values intact.’

*Meg Mcloughlin is a policy officer at the Cape York Land Council.

Melissa Sinclair is researching the Wild Rivers regime as part of a Masters of Environmental Management with the Institute of Environmental Studies at the University of New South Wales.

2 *Wild Rivers Act* 2005 (Qld) (‘Wild Rivers Act’), s 5(1).
3 The Department of Environment and Natural Resources has identified the Jardine, Ducie, Wenlock, Watson, Archer, Holroyd and Coleman river basins on the western Peninsula; and the Jackey Jackey, Olive-Pascoe, Lockhart, Stewart and Jeannie river basins on the eastern Peninsula.
4 Op cit, s 5(2).
6 Ibid, 1.
8 Wild Rivers Act, ss (17),(2) (3); Wild Rivers Code, 1.
9 Coastal Protection and Management Act 1995 (Qld), Environmental Protection Act 1994 (Qld), Fisheries Act 1994 (Qld), Forestry Act 1959 (Qld), Fossicking Act 1994 (Qld), Integrated Planning Act 1997 (Qld), Land Protection (Pest and Stock Route Management) Act 2002 (Qld), Mineral Resources Act 1989 (Qld).
12 Art 25.
13 Wild Rivers Act, s 12(1)(p).
14 Ibid s 13(1)(a)(b).
16 Media Conference, Cape York Land Council and Balkanu Cape York Development Corporation, 8 April 2009.
21 Aboriginal Land Act 1991 (Qld), art 83M; Aboriginal Land Rights (NT) Act 1976, s 77A; Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3, Part 1(f), (g), 2(g), s 49(c), s 305(6).