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## CONTEST AND CONSENT:

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### THE LEGACY OF THE WILD RIVERS ACT 2005 (QLD)

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by Timothy Neale

#### INTRODUCTION

The *Wild Rivers Act 2005* (Qld) ('WRA') seems to be not long for this world. Put in place following an election commitment by Peter Beattie in January, 2004, the first comparatively uncontroversial Wild Rivers areas were declared in February, 2007, in the Gulf of Carpentaria, southwest Cape York and on the southeast coast. These were followed by three Cape York areas in April 2009—the Lockhart, Stewart and Archer River areas—and another in June, 2010, over the Wenlock catchment. In December, 2011, three areas were declared in the Lake Eyre basin in the southwest of the State. The central restriction of a WRA declaration is its designated High Preservation Area ('HPA'); (typically) a one-kilometre buffer zone around designated waterways intended to insure that 'the natural values of the rivers declared wild are not impacted'. In practice this means no mining or intensive aquaculture within an HPA, though grazing and other activities are allowed.<sup>1</sup> After vowing, in late 2011, to 'axe' the Act, newly elected Premier, Campbell Newman, has taken the first step by releasing a scoping paper towards a new Bio-Regional Management Plan for Cape York Peninsula. This will, in turn, inform part of a forthcoming Regional Management Plan. One function of this process is effectively to rebrand some aspects of the WRA and remove others.

The Act first drew public criticism, in mid-2006, from an alliance of interests, including the Cape York Land Council ('CYLC'), AgForce, and Cook Shire Council. At an AgForce meeting in central Cape York, former-CYLC chairman, Noel Pearson, summarised the belief that 'the Greenies are in the ascendant' in Brisbane, and the Act, emblematic of that ascendancy, would be 'a death by a thousand cuts'.<sup>2</sup> Nonetheless, the following year stakeholders seemed to bury their disagreement through a negotiated compromise of the *Cape York Peninsula Heritage Act 2007* (Qld) ('CYPHA'). In the words of *The Australian*, the 'native title crusade' had been won.<sup>3</sup> But this was not the end of the disagreement, and in April, 2009, Pearson was reported as having stood down from his role at the Cape York Institute to fight the Act. In February, 2010,

Federal Opposition leader, Tony Abbott, announced he would introduce legislation to 'overturn' the Queensland Act, leading to three Parliamentary inquiries between 2010 and 2011. In May, 2011, Family First Senator, Steve Fielding, revealed he would no longer support the Bill, effectively ending its parliamentary prospects.

The WRA will be replaced only in Cape York, for now, as there has been noted support for the regime in the Gulf and Channel Country. Why the discrepancy? As stakeholders critical of the WRA have explained, the Peninsula declaration areas covered predominantly Aboriginal title. Others point to the Wenlock declaration having jeopardised a bauxite project near Mapoon favoured by traditional owners. Meanwhile, supporters of the WRA argue that the region was subject to a concerted 'misinformation' campaign about the Act's effects. As John Holmes has shown, more generally, the controversy over the Act provided an opportune point of articulation for long-term contests over the Cape's future to gather around,<sup>4</sup> just as elsewhere I have argued that the WRA controversy illustrates the ironic 'duplicity' of government dealings with traditional owners.<sup>5</sup> These are issues and contests that neither originate in, nor are decided by, the WRA. Nonetheless, whatever the cause of the controversy, as one stakeholder put it in Weipa, 'the wild rivers bogey is out there'.<sup>6</sup> This is an appropriate moment to survey the issues that—having been raised by the WRA controversy—must now be faced by the Newman administration.

#### CONSENT / CONSULTATION

Perhaps the most vital issue raised by the WRA controversy has been the issue of negotiating with Aboriginal titleholders. The issue of consultation has been of particular concern to those who consider a declaration to be 'similar to the creation of a reserve' and to therefore constitute a future act.<sup>7</sup> Of course, when the WRA says a declaration 'can not have the direct or indirect effect' on the enjoyment of native title, it is thinking of a legal rendering—usufructuary native title rights—which fall far short of an ability to '[s]peak for, on behalf of and



authoritatively about' country.<sup>8</sup> Nonetheless, consultation with some Indigenous stakeholders occurred in late 2005-06 and, after contracting CYLC-affiliated Balkanu Cape York Development Corporation to help facilitate the process in 2008, the State Government undertook a variety of consultative measures towards specific declarations.<sup>9</sup>

Initial reports on the Act suggested that it had been formulated 'without any consultation with the traditional [I]ndigenous landowners'.<sup>10</sup> In the acrimony that followed it became clear the consultation measures were inadequate. Meetings were few and information was poorly communicated, and, as one inquiry concluded, the involvement of Balkanu may have constituted a conflict of interest, given its executive opposed the *WRA*. But these issues were, in a sense, secondary. As Noel Pearson now stated, in an interview on *Lateline* in July, 2009, the issue was not consultation: 'Our complaint ... is there's been no consent'.<sup>11</sup> The subsequent 'Abbott Bill' proposed that relevant owners of 'Aboriginal land' must first provide consent to any Wild River declaration through an Indigenous Land Use Agreement, involving up to eight forms of 'owner' and seven forms of 'Aboriginal land'.<sup>12</sup> Introducing the Wild Rivers (Environmental Management) Bill 2011 (Cth) to Parliament, Abbott continued to claim that the Queensland Government had conducted 'not the slightest skerrick of consultation' in relation to the 2005 Act.<sup>13</sup> Announcing his own attempt to amend the Act, LNP Premier Campbell Newman recently tempered this by saying there had been 'little or no consultation'.

A right to consent, rather than consultation, goes to the heart of criticisms of contemporary native title. The restricted application of this principle to one piece of environmental legislation raised the suspicions of several traditional owners who refused this Bill to 'protect the interests of Aboriginal traditional owners'. Nonetheless, 'cultural strangeness' of Coalition and LNP politicians publically endorsing an Indigenous right to consent is itself important, particularly given each party's historical antipathy towards the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').<sup>14</sup> As Jon Altman has argued, the Bill would 'take the property rights of owners of Aboriginal land within a wild river area to a level that is unprecedented in Australia'.<sup>15</sup> Subsequently, those who opposed the *WRA* voiced their concerns through the terms and language of the UNDRIP and, specifically, the 'right to own, use, develop and control' traditional lands (Article 26) and the rights to 'free, prior and informed consent' (Articles 19 and 28).

But so far there has been no mention of consent by the Newman administration, stating instead that it will 'replace' the *WRA* after 'extensive' consultation. Initial consultation with primary stakeholder representatives commenced in late June and ended in late September, 2012,<sup>16</sup> and it is anticipated community consultation will begin in early 2013 before the legislating of a finalised plan in October, 2013. In short, a set of parties, identical to those involved in negotiations over the *WRA*, have been invited to partake in a process that plans to renovate the management planning of the entire region in 13 months. The gazettal and declaration of single Wild River areas often took longer. More vitally, the new process is not consent-driven and is therefore vulnerable to exactly the same objections that hounded the *WRA*. There are significant reasons to believe that consent processes deliver the strongest long-term results for Indigenous groups, in part because they integrate the involvement of Indigenous stakeholders into open-ended processes.<sup>17</sup> As LNP Ministers travel the Cape today, they may notice the signs that still hang by the roadsides: 'No Wild Rivers Without Our Consent'.

#### REPRESENTING 'CAPE YORK'

Another issue raised by the Wild Rivers controversy has been over who gets to speak on behalf of Cape York's Indigenous and non-Indigenous residents. For many who opposed the *WRA*, the Act was taken as a typical instance of 'Brisbane' inferring with the Cape to appease urban electorates; Premiers and Ministers were called to account for what was assumed to be a 'preferences deal'. On the opposing side were a dozen traditional owners who, taking exception to Pearson's national prominence and his speaking in the name of 'we in Cape York', travelled to Canberra in September, 2010, to announce that he 'doesn't speak for us'.<sup>18</sup> In the months that followed Murrandoo Yanner, the Chairman of Carpentaria Land Council, also questioned Pearson's role while criticising the Abbott legislation.

In a parallel development, the Queensland Government announced in March, 2011, that future consultation would occur through its own Indigenous Reference Committees of identified traditional owners. The idea, originally circulated in a 2009 discussion paper on 'alternative frameworks for Indigenous engagement', potentially sidelined the CYLC and Balkanu from future discussions. Both organisations are publically affiliated with Noel and Gerhardt Pearson. More recently, the mayors of Cape York communities, collected as the Regional Organisation of Councils of Cape York ('ROCCY'), have presented criticisms of how regional reform projects are funded.



Arguing that communities see too little of approximately \$200 million in annual support, the Pearson-led Cape York Welfare Reform Trial had its funding extended to the end of 2014 on the condition that ROCCY members would participate in the oversight of the program.<sup>19</sup>

As such, it could be argued that part of what the *WRA* controversy has brought to light are ongoing contestations over who represents Cape York Peninsula. While news media tend to focus on the personalities at play, it may be more illuminating to think of the symbolic roles of stakeholders and sources of authority they draw upon. For instance, native title representative bodies and corporations are having their roles as de facto advocates contested, as are non-elected figures. Environmentalists now less frequently make their own claims on the region, and more often cite the positions of Indigenous or scientific authorities. Interestingly, as this controversy has developed, discussions have continued with Cape York traditional owners over areas that may be nominated for World Heritage in February, 2013. While Federal Minister, Tony Burke, has repeatedly stated that any nomination relies on traditional owner consent for the relevant areas, ROCCY mayors and pastoralists have raised concerns about a lack of consultation with the larger ‘Cape York community’. As such, were the new Regional Management Plan processes to implement right to consent—which they presently do not—would this be restricted to traditional owners and the principles of the UNDRIP? Would it include other Aboriginal titleholders, as in the Abbott Bill? As one non-Indigenous pastoralist has stated, the feeling that ‘minority numbers’ are taken as representative presently provokes some bitterness.<sup>20</sup>

### REBRANDING RANGERS

A third legacy of the *WRA* controversy is its program of Indigenous rangers. The Bligh administration committed, with no specific delivery date, to employ a total of 100 Wild Rivers Rangers. Originally bound to *WRA* declarations and, therefore, bound to the *WRA*’s fate, the positions were denigrated by some as ‘green welfare’. Subsequently, the roles were made permanent, immune from the rituals of tri-annual funding or federal funding. By mid-2011 the State Government was employing 40 Wild Rivers Rangers, at an annual cost of \$5.6 million, and it currently employs 45 Rangers, 27 of whom are stationed in regions north of Cairns. Elsewhere, the Queensland Parks and Wildlife Service has set a target of 50 per cent employment of Indigenous rangers on Cape York by 2018. In 2011 it had achieved 36 per cent,<sup>21</sup> though there is no available data on whether these rangers were residents of Cape York prior to their employment.

The Wild Rivers Rangers throughout the State have recently been rebranded as the Queensland Indigenous Land and Sea Rangers. According to Government information, the Newman administration has committed to employing 40 new rangers, possibly bringing the total to 80 by the end of 2015.<sup>22</sup> A large body of research indicates that land management and environment services are important to Indigenous people in remote and regional Australia, providing skills and employment that can be, potentially, converted into Indigenous enterprises while allowing people to achieve aspirations of staying on country.<sup>23</sup> But there has been no concerted assessment of the Wild Rivers Rangers program, its training processes, its allocation of resources, or its effectiveness. Anecdotal evidence suggests it has achieved some successes but few would argue, regarding Cape York, that 27 Indigenous rangers employed to participate in the management of an area of over 13 million hectares is sufficient. How will this rebranded program be managed and assessed by the State Government?

### CONCLUSION

These are three central issues, out of many raised by the Wild Rivers controversy, inherited by the new LNP administration: consent, contested authority and Indigenous employment in land management. What this amounts to, in sum, is a test of its ability to balance the claims made for and about Cape York Peninsula by its Indigenous and non-Indigenous residents within an agreement-making process. This was a task that the Beattie and Bligh Governments both evidently struggled with and it is a task complicated by the acute criticisms that Indigenous stakeholders, pastoralists and federal and state politicians made of the Wild Rivers regime. It is a task within which the retraction and rebranding of the *WRA* serves a largely symbolic purpose.

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1 As Dr Chris McGrath has argued, it is difficult to determine in the abstract what kinds of development can go ahead in Cape York Peninsula, with or without the *WRA*, given the complexity of the environmental legislation regime in place. Chris McGrath, Submission No 35 to House of Representatives Economics Committee, *Inquiry into issues affecting Indigenous economic*



*development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010.*

- 2 Noel Pearson, 'Wild Rivers and the Cape York Heads of Agreement' (Speech delivered at Musgrave, Cape York Peninsula, 3 June 2006).
- 3 Tony Koch, 'Cape Native Title 'Crusade' Won', *The Australian*, 8 June 2007.
- 4 John Holmes, 'Contesting the Future of Cape York Peninsula' (2011) 42(1) *Australian Geographer* 53.
- 5 Timothy Neale, 'Duplicity of Meaning: Wildness, Indigeneity and Recognition in the Wild Rivers Act Debate' (2011) 20(2) *Griffith Law Review* 310.
- 6 Evidence to Economics Committee, *Wild Rivers (Environmental Management) Bill 2010*, Weipa, 30 November 2010, ECO 37 (Dick Foster).
- 7 Greg McIntyre, 'Native Title: Speaking for Their Country', *Online Opinion* (12 October 2009) <<http://www.onlineopinion.com.au/view.asp?article=9554>>.
- 8 Wild Rivers Act 2005 (Qld) s 44(2); *Wik Peoples v State of Queensland* [2000] FCA 1443.
- 9 See, Queensland Government, Submission No 29 to House of Representatives Economics Committee, Inquiry into issues affecting Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010, 13-17, 94-5.
- 10 Tony Koch, 'Freeze on Wild Rivers Protection Bill', *The Australian*, 16 June 2006; Tony Koch, 'Government in Deep Water on Wild Rivers', *The Australian*, 6 May 2006.
- 11 *Pearson Discusses Wild Rivers Laws* (ABC Lateline, Australian Broadcasting Association, 2009).
- 12 The initial Bill solely required the agreement of traditional owners, though this was altered in Wild Rivers (Environmental Management) Bill 2011 No. 2 and all subsequent drafts.
- 13 Commonwealth, *Parliamentary Debates*, 22 February 2010, 1401-2 (Tony Abbott).
- 14 Sarah Burnside, 'Wild Rivers and Indigenous Economic Policy' (2010) *Centre for Policy Development* <<http://cpd.org.au/2010/09/wild-rivers-and-indigenous-economic-policy/>>.
- 15 Jon Altman, 'Wild Rivers and Indigenous Economic Development in Queensland' (CAEPR Topical Issue No. 6, 2011).
- 16 Queensland Government, 'Cape York Peninsula Bioregion Management Plan: Scoping Paper' (28 June 2012) <<http://ehp.qld.gov.au/cape-york/pdf/bioregion-plan.pdf>>.
- 17 Patrick Sullivan, 'Indigenous Governance: The Harvard Project on Native American Economic Development and appropriate principles of governance for Aboriginal Australia' (2006) 17 *AIATSIS Research Discussion Paper* 30.
- 18 Michael Gordon, 'Noel Pearson Not Our Leader, Say Wild River Men', *The Age*, 30 September 2010.
- 19 Maria Hatzakis, 'Cape York welfare reform trial extended', *ABC News*, 13 September 2012.
- 20 Charlie McKillop, 'World Heritage uncertainty blankets Cape York', *ABC Rural*, 31 October 2012.
- 21 Queensland Government, Submission No 29 to House of Representatives Economics Committee, Inquiry into issues affecting Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010, 5.
- 22 In the short term the southeast Cape community of Wujal Wujal will prospectively soon gain 5 rangers and in Lake Eyre basin up to 10 ranger positions are planned over next 3 years. State of Queensland, *Queensland Indigenous Land and Sea Rangers* (2012).
- 23 See Jon Altman et al, 'Indigenous Cultural and Natural Resource Management Futures' (CAEPR, 2011).

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