Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010

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About ANTaR

ANTaR is a national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander people. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR seeks to persuade governments, through advocacy and lobbying, to show genuine leadership and build cross-party commitment to Indigenous policy.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Indigenous Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR campaigns nationally on key issues such as Close The Gap, constitutional change, the Northern Territory Emergency Response, reducing Aboriginal incarceration, eliminating violence and abuse, racism and other significant Indigenous issues.

ANTaR has been working with Indigenous organisations and leaders on rights and reconciliation issues since 1997.

Preamble

On 24 June, 2010 the Senate passed a resolution which:

- noted "*that the principle of 'free, prior and informed consent' is reflected in Articles 19 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples which was recently endorsed by the Federal Government but has yet to be implemented in Australian law*;"

- affirmed the view "*that 'free, prior and informed consent' is a fundamental human rights principle for Indigenous peoples*"; and

- called on "*all current and future Australian governments to ensure this principle is taken into account in developing, implementing and administering their laws and programs*."[1]

This resolution was passed without dissent.

ANTaR believes that the principles outlined and actions called for in this resolution should be central to the Committee's deliberations across all of the terms of reference for this inquiry.

Introduction

ANTaR was founded in 1997. As our organisation's name suggests, one of our key interests is in defending and strengthening Native Title as an important mechanism for many Aboriginal and Torres Strait Islander people to escape from poverty and gain greater control over the use and management of their lands and waters for whatever purposes they see fit – whether that be for economic opportunities, protecting and maintaining the cultural and environmental significance of their lands and waters, social or educational enrichment, or a combination of all of these.

Another key principle underpinning our work is to ensure that we work with and alongside Aboriginal and Torres Strait Islander people, rather than attempting to speak on their behalf. The positions we take are based on views and feedback from Indigenous peoples themselves.

Including Indigenous people in the design and delivery of policies and programs

The views of Aboriginal people regarding the Wild Rivers issue and the legislation currently before this Committee and the Parliament vary considerably, both within Cape York and across Queensland[2]. In light of this, ANTaR does not take a position for or against the legislation in this submission. What we do wish to emphasis to this Inquiry is the central importance of enabling Aboriginal and Torres Strait Islander peoples to have a genuine and ongoing say on and involvement in the development and implementation of policies, programs and laws which directly affect them. This is required by the right to

[1] Page 4375, Senate Official Hansard, Commonwealth Parliamentary Debates, 24 June 2010.
[2] For example, contrast Submissions 6 and 9 to this inquiry.

free, prior and informed consent contained in the UN Declaration on the Rights of Indigenous Peoples ('the Declaration').

The principle of free prior and informed consent is not just an abstract human rights concept. It is a fundamental pre-condition for sustainable economic, social and cultural development. As Professor Larissa Behrendt recently wrote

> *As simple as it sounds, a plethora of research shows that the best way to lessen the disparity between Indigenous and non-Indigenous people is to include Indigenous people in the development of policy and the design and delivery of programs into their communities.*
>
> *This engagement assists with ensuring the appropriateness and effectiveness of those policies and programs, ensuring community engagement with them and therefore a better chance of their success. Apart from sounding like common sense, the research shows that this involvement ensures that policies and services focus on the particular needs of a community, are targeted appropriately towards the intended audience, assist in accessing the informal networks across the community to get others involved and are more effective at getting community members through the doors of organisations.*[3]

The Committee's terms of reference require examination of the "options for facilitating economic development for the benefit of Indigenous people and the protection of the environmental values of undisturbed river systems."

Debates around economic development, and around the Wild Rivers issue itself, often portray a simplistic binary choice between environmental protection on the one hand and economic development on the other. This often misrepresents the reality.

Any law or process which seeks to regulate activities conducted on land and/or waters, whether for the purposes of environmental protection, town planning, industry development or any other reason, will by definition make some forms of usage more likely than others.

Stronger environmental protection always has the potential to make certain types of economic activity less viable, but also has the potential to improve the viability of other types of economic activity. The reverse situation also applies. For example, regulations encouraging the development of large scale mining can make economic activity based on tourism, carbon storage or other environmental services less viable.

ANTaR believes the key issue is not about the Parliament – whether at state or federal level – making a choice between environmental protection or economic development. Rather, it is that Aboriginal and Torres Strait Islander people should have the ultimate say in decisions which affect them, particularly when it involves the use or management of their lands and waters. They should not have such decisions imposed on them without their consent. As the resolution of the Senate from June 2010 states, "free prior and informed consent is a fundamental human rights principle for Indigenous peoples."

[3] "Close the Gap and other rhetoric in the place of real policies", The Drum – Unleashed, ABC website, 28 January 2011. http://www.abc.net.au/unleashed/43290.html (accessed 14 February 2011)

ANTaR submits that the barriers to economic development and land use for Indigenous peoples being considered by the Committee, and options for overcoming or reducing those barriers, will be better addressed if considered within the framework of the Declaration.

Native Title

As stated above, one of ANTaR's key areas of interest is in strengthening existing Native Title laws. The *Wild Rivers (Environmental Management) Bill 2010* which the Committee is considering states that it is "to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas."[4]

However, the legislation details six other types of Aboriginal land, including Deed of Grant in Trust land, reserves, freehold and perpetual or other lease under various pieces of Queensland legislation.[5]

The power proposed in Section 5 of the Bill is that "the development or use of Aboriginal land in a wild river area cannot be regulated under the relevant Queensland legislation unless the owner agrees in writing." This extends a power that is greater than that which currently exists under the federal *Native Title Act 1993 (Cth)*.

An example of this is provided in the submission from the Pormpuraaw Aboriginal Shire Council, which refers to the Wik Mungkan Traditional Owners, who are party to the successful Wik Way native title determination (*Wik Peoples v State of Queensland* [2004] FCA 1306). As this submission details:

> "the Traditional Owners of Country within the determination area themselves have no ability to prohibit mining activity on their custodial lands. That right is retained by government through, in our view, fundamentally contradictory resource use and management statutes – limited environmental regulation seeking to conserve 'cultural' and 'natural' resources and, in our view, overly generous mining regulation fostering pro-active resource exploitation."[6]

ANTaR supports strengthening the rights of Aboriginal and Torres Strait Islander peoples under the *Native Title Act* to enable a genuine process of free, prior and informed consent. We believe this should be done via an amendment to the *Native Title Act*, so that it applies equally to all Native Title holders across Australia in respect of all potential actions under federal, state, territory or local government laws, by-laws and regulations.

Enabling Consent

The power proposed in the legislation to require written agreement from the owners of Aboriginal land before that land can be subject to the Queensland wild rivers laws not only provides a right greater than that which currently exists under the *Native Title Act 1993 (Cth)*. It is also extends that power in regards to other types Aboriginal land tenure

[4] Long title of the Wild Rivers (Environmental Management) Bill 2010
[5] See Definition of Aboriginal Land, Section 3, Wild Rivers (Environmental Management) Bill 2010
[6] Submission 9, Pormpuraaw Aboriginal Shire Council/Pormpuraaw Land & Sea Management on behalf of Kuuk Thaayorre and Wik Mungkan Traditional Owners, Pages 13-14

which derive from various Queensland laws.[7] ANTaR believes strengthening the rights of Indigenous peoples to free, prior and informed consent is best done by requiring the principle to be applied consistently for all potential acts, laws or policies, rather than on an ad hoc basis.

It is important to emphasise that the right of free, prior and informed consent as outlined in the Declaration extends beyond Native Title holders and other Indigenous peoples who have some form of tenure or occupation rights over specified lands or waters.

While Traditional Owners may have particular rights both under Australian law and customary Indigenous laws, the principle of free, prior and informed consent is applicable to all Indigenous peoples.

The *Wild Rivers (Environment Management) Bill 2010* contains a requirement that agreement from the owner of Aboriginal land for the development or use of that land must be in writing[8]. However, whilst the Bill also allows for Regulations to be made which prescribe procedures for seeking the agreement of an owner, negotiating the terms of an agreement and the giving and evidencing of the agreement[9], in the absence of any such Regulations, it is impossible to assess whether or not those procedures will be adequate in ensuring genuine free, prior and informed consent, both for owners of Aboriginal land, or for any other Indigenous peoples affected.

We remind the Committee that the Senate resolution not only affirmed free, prior and informed consent as a fundamental human right for Indigenous peoples, but also called on "*all current and future Australian governments to ensure this principle is taken into account in developing, implementing and administering their laws and programs.*"

The recently released Social Justice Report 2010 and Native Title Report 2010 from the Aboriginal and Torres Strait Islander Social Justice Commissioner provide valuable guidance on the application and implementation of the consent principle. Chapter 3 of the Native Title Report 2010 is particularly relevant in this context. The chapter covers "consultation, cooperation and free, prior and informed consent – the elements of meaningful and effective engagement". Appendix 4 of the Social Justice Report 2010 also outlines "elements of a common understanding of free, prior and informed consent."[10]

ANTaR believes adopting these processes, as urged by the Social Justice Commissioner, is essential. Whilst the Committee's current inquiry is focused on Indigenous economic development in Queensland, ANTaR believes the same principles should be applied across the country in relation not just to economic development, but all issues of relevance to Aboriginal and Torres Strait Islander peoples.

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[7] These include the *Aboriginal Land Act 1991 (Qld),*the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld),* the *Land Act 1984 (Qld)* and the *Local Government (Aboriginal Lands) Act 1978 (Qld),* as outlined in the definitions under Section 3 of the Wild Rivers (Environmental Management) Bill 2010

[8] Section 5, Wild Rivers (Environmental Management) Bill 2010

[9] Section 8(2), Wild Rivers (Environmental Management) Bill 2010

[10] Australian Human Rights Commission, Social Justice Report 2010 and Native Title Report 2010. Both reports were tabled in the House of Representatives on 10 February 2011.

ANTaR urges the Committee to recommend action to ensure this principle is applied consistently across all areas of law and administration at the federal level, including but not limited to the *Native Title Act 1993.*