



Queensland Conservation Council and The Wilderness Society Wild Rivers Legislation initial submission

This submission was prepared with legal advice from the Environmental Defenders Office.

1. Purpose, meaning of "river" and of "wild river"

The purpose clause needs to state the scope and object of the Act. Courts refer to the purpose clause to aid in interpreting an Act. A possible simple purpose clause is as follows:

The purpose of this Act is to permanently protect, restore and rehabilitate the wild rivers of Queensland.

This raises the need for a definition of "river" and "wild river". Neither of these terms are defined in the *Water Act 2000* (Qld) or the *Nature Conservation Act 1992* (Qld) at all, and the definitions of "river" in other Queensland legislation seem inappropriate and to focus on bed and banks rather than the flowing nature of the river. One possible definition for consideration is the following from the *Wild and Scenic Rivers Act 16U.S.C. 1271-1287*, October 1968¹ as amended which emphasises "flow" rather than bed and banks.

"river" a flowing body of water or estuary, or a section or portion or tributary thereof, including rivers, streams, creeks, runs, kill², rills and small lakes.

As some of the rivers to be protected overflow a wide flat area as an important part of their natural cycle this definition would include those rivers and their seasonal inclusion of flood plain and wetlands in that expansive state. However as many Queensland rivers have natural periods of low flow or no flow, the definition of either "river" or of "flow" needs to reflect that the flow may be permanent or intermittent or subsurface.

As three categories of "wild river" were discussed with the Queensland Government prior to the election, a simple definition of "wild river" referring to those categories (with categories defined later in the legislation is appropriate.

"wild river" means a pristine river, a natural river or a heritage river.

2. Categories of Rivers

As the inspiration for this new legislation is protection of "wild rivers" the categories of "pristine river" "natural river" and "heritage river" with the emphasis on ecology in the first two categories names and of cultural heritage in the third category makes those names appropriate and more informative than Category one, two etc. After choosing appropriate names, definitions of each category are then needed to further clarify what type of rivers are appropriate for inclusion in each category. We look forward to seeing the proposals for such definitions which we assume will be based on elements of the discussions with the Queensland Government in January

¹Source- <http://ipl.unm.edu/cwl/fedbook/wildrive.html>

² We still need to clarify the meaning of "kill".

2004. A logical connection needs to be then made between each defined category and the regulation or prohibition of activities adversely affecting in each category (discussed later).

3. Designation of wild rivers

The Beattie election commitment³ named 19 wild rivers as examples of those to be designated. Previously the State government had informally identified those 19 rivers in the top category of wild rivers discussed potential candidate rivers in other categories of protection. We strongly support the more extensive three category identification and protection of wild rivers and will reflect on those rivers identified in the three lists.

The most direct way legally to “designate” rivers into the three categories of wild river is to insert a section in the new legislation which refers to a Schedule forming part of the proposed Wild Rivers Act which lists the rivers, described the rivers and designates them.

*“The rivers referred to in Schedule 1, Part 1 are hereby deemed to be Pristine Rivers.
The rivers referred to in Schedule 1, Part 2 are hereby deemed to be Natural Rivers.
The rivers referred to in Schedule 1, Part 3 are deemed to be Heritage Rivers.”*

As the lists of rivers in the three categories are not complete, the legislation also needs a mechanism to designate additional wild rivers on both a permanent and interim basis. One method is to include provisions for ministerial declaration or dedication of additional wild rivers.

We request inclusion of a mechanism for *public nomination* of proposed wild rivers, with the final decision left up to the Minister as part of those provisions. A good example of a public nomination process is that for threatened species under the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)*⁴, which includes clear timelines for Ministerial decision, exclusion of any vexatious nominations, advice to the Minister from an expert panel and reporting back to the nominator on adverse decisions. Public nomination is a valuable process as it enables any member of the community with a strong commitment to a river to formally request the river be declared or designated by the Minister, then to have that proposal considered and scrutinised. In the absence of a public nomination process, pressure of other work on public servants and Ministers might cause delays in additional declarations of rivers.

4. Protection and Management Mechanisms

a. Current Planning and Allocation Processes

There are a number of planning and allocation processes underway with potentially serious outcomes for rivers proposed to be protected. For example it is most important that the Water Resource Plan for the Flinders river (and other Water Resource Plans for areas including proposed wild rivers) provide for no new allocations. As another example, it is most important during the phase out of remnant vegetation clearing that in the regulation to the *Vegetation Management Act 1999 (Qld)* zero clearing allocations are provided for catchments of wild rivers. While Cabinet has decided that there will be a nil allocation for the Cape York region, several wild rivers in the “pristine” category, namely Mornington Inlet; Settlement Creek; Staaton River and the Gregory, are outside Cape York. Those areas need to be provided for with a zero clearing allocation. The provisions of both the *Vegetation Management Act 1999 (Qld)* and the relevant chapter of the Water Act are of broad enough scope to enable the above decisions to be made.

Planning schemes regulating development under the Integrated Planning Act must pass through a “State interest” check prior to public exhibition. The Department of Natural Resources, Mines

³ Peter Beattie and Labor Policy 2004: Protecting Queensland’s Natural Heritage: Wild Rivers
<http://www.teambeattie.com>

⁴ Sections 191 *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* See flow chart at
<http://www.deh.gov.au/biodiversity/threatened/flowchart.html>

and Energy must scrutinise those plans and require changes to any plans that provide for increased intensity of development in catchments of wild rivers.

b. Future Planning, Allocation and Licensing Processes-Prohibitions needed in legislation

It is imperative that protection of wild rivers is achieved by clear cut legal rules rather than by only expressing generalised sentiments in planning documents or decision making criteria. Planning still has a role - see below. The reason the clear cut rules are needed is that often generalised sentiments are balanced against other conflicting sentiments in the same or other document with uncertain results. For example, it is helpful to have a State Planning Policy on Koalas made under the *Integrated Planning Act 1997* (Qld) but that has not stopped extensive destruction of koala habitat in South-East Queensland.

Therefore as one element of protection and management of wild rivers we need express legislative prohibitions and express precise limits on specified activities in or affecting designated wild rivers in the wild rivers legislation itself. Those provisions need to have superiority over more generalised provisions in other legislation. As wild rivers are arguably part of the conservation reserve, it makes sense to look at the *Nature Conservation Act 1992* (Qld) for an example - under that Act, section 27, provides that no mining interests maybe granted over national parks and various protected areas.

If the activity to be prohibited /regulated was “development” under the *Integrated Planning Act 1997* (Qld), then one useful mechanism would be to make the Department a concurrence agency with assessment against a concurrence agency code, created under the wild rivers legislations, which contained specific prohibitions and restrictions. We would suggest that the wild rivers legislation modify the IDAS assessment process to allow refusal by decision makers of specified activities that do not comply with the code. The current provisions of the *Vegetation Management Act 1999* (Qld) modifying the IDAS process and the provisions of the State freehold clearing code with respect to endangered regional ecosystems are examples of this approach. We also propose that a new category of code assessable development, allowing for third party objection and appeal rights, be created for developments that are prohibited or regulated under the *Integrated Planning Act 1997* (Qld) or other legislation, in areas affecting wild rivers.. Provisions added to the *Integrated Planning Act 1997* for aquaculture adjoining the Great Barrier Reef create such a new category of code assessable development with third party objection and appeal rights and we would suggest that similar provisions be added for wild rivers so as to ensure tight adherence to the code.

c. Future Planning, Allocation and Licensing Processes-Planning with Superiority Needed

It is important that planning documents made under various pieces of legislation protect wild rivers so that expectations of land holders are modified at the planning stage not the development or allocation application stage. As well as water resource plans, catchment management plans and individual land and water management plans could be made under the *Water Act 2000*. State planning policies, individual planning schemes and Ministerial declarations affecting planning schemes, made under the *Integrated Planning Act 1997*, are other mechanisms that will also be useful for protecting wild rivers, particularly when implemented as a whole.. Alterations to planning schemes so as to further restrict the development that may affect wild rivers may not be able to be fully implemented for two years after the change, as developers can apply to be assessed under the superceded scheme. However, modifications to planning schemes to ensure that the scheme does not allow for increased development in catchments where current planning schemes do not provide for intensive development, could be an effective mechanism for stopping or limiting development.

One option that we would suggest considering would be the creation of management plans for particular wild rivers, with express statement in legislation that the plans have superiority over other specified plans in different legislation. For example, this approach has been used for the Wet Tropics Management Plan in relation to planning schemes under specific provisions in the

*Wet Tropics World Heritage Protection and Management Act 1993 (Qld)*⁵. However it must be emphasised that management plans need to be in addition to and not a substitute for express prohibitions.

5. Reporting Requirements and Access to information

As for all modern environmental legislation, excellent public access to information provisions for inspection and purchase of copy documents are needed in the new legislation. Those provisions must cover all aspects of this legislation, including:

- (a) the designation process, public nominations, results of public nominations and designation decisions;
- (b) the planning process and planning decisions; and
- (c) applications and supporting information and decisions on individual approvals/licences/permits to be granted under this Act or other Acts that affect wild rivers; and
- (d) reporting on the State of the rivers protected under the new legislation; and
- (e) qualitative and quantitative reporting on decisions made under the Act.

Members of the public make use of the web more and more to gather information. The Department of Natural Resources has a very helpful website that currently has good information on it (for example on individual Water Resource Plans the various moratorium notices, draft WRPS and ROPs are clearly displayed with maps of WRP areas). So as well as making the above key documents available for inspection and purchase at the head office and relevant regional offices of the Department it is requested that they go on the website.

6. Enforcement Mechanisms

Good legislation is useless unless it is implemented and enforced. Third party enforcement mechanisms give the public a valuable watch dog role to stop illegal activity by Court action where the government fails to act. "Third party" enforcement provisions with each side pay own costs rules are now well established in Commonwealth and Queensland environmental and resource legislation, including *the Environmental Protection and Biodiversity Conservation Act 1999 (Cth)*, *Integrated Planning Act 1997 (Qld)* which has wide application, including to illegal vegetation clearing, the *Water Act 2000 (Qld)* and *the Environmental Protection Act 1994 (Qld)*. Last year the Queensland passed amendments to the *Nature Conservation Act 1992 (Qld)* to introduce third party enforcement with each pays own costs rules and extended standing for judicial review for proven environmentalists. That recent package was an excellent one; it enjoyed Cabinet support and we ask that the same features be included in the new Wild rivers legislation.

7. Wild Rivers Unit

We would like to propose the concept of a Wild Rivers Unit, potentially charged with the creation of management plans for wild river catchments, monitoring implementation of legislation and plans, and with reporting on the performance of the legislation. We are currently taking advice from several Departmental representatives on this, and would like to make a proposal on this issue by the 21st of April.

⁵ *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)*⁵.

Section 49 Plans prevail over planning schemes

If there is any inconsistency between a management plan and a planning scheme (whether made before or after the plan), the plan prevails over the planning scheme to the extent of the inconsistency.

Section 50 Local authorities' decisions to be consistent with management plans

A local authority must not issue or give any approval, consent, permit or other authority, in relation to a development on land in the wet tropics area that is inconsistent with a management plan.