SUBMISSION TO THE SENATE COMMITTEE ON THE WILD RIVERS ACT (QLD)

This submission concerns some of the unfortunate features of the Wild Rivers Act 2005 (Qld) (WRA) which are offensive to constitutional government, the rule of law, the democratic principle, due process of the law and property rights of persons, particularly the rights of the traditional owners of land.

Rule of law

The rule of law ideal which lies at the heart of Australian constitutionalism requires all public authorities to be subject to the governance of non-arbitrary laws known in advance and capable of observance. Under the ERA, the law is effectively made by the minister in his absolute discretion. A Wild River Declaration has the effect of conferring enormous arbitrary law making power on the minister with respect to land use, resource management and environmental regulation. As shown below there is no democratic oversight of these powers. Under s 12 of the WRA, a Wild River Declaration grants the minister power to legislate, inter alia, on the following matters.

(h) the way in which the moratorium has effect for the proposed wild river area;

(i) any carrying out of activities or taking of natural resources proposed to be prohibited or regulated in the proposed wild river area;

(j) the matters that must be considered in deciding whether to allow the carrying out of an activity or the taking of a natural resource in the proposed wild river area;

(k) the types of works for taking overland flow water in the proposed wild river area that are intended to be assessable or self-assessable development under the Integrated Planning Act 1997;

(l) the types of works for interfering with overland flow water in any floodplain management area in the proposed wild river area that are intended to be assessable or self-assessable development under the Integrated Planning Act 1997;

(m) the types of works for taking subartesian water in any subartesian management area in the proposed wild river area that are intended to be assessable or self-assessable development under the Integrated Planning Act 1997;

(n) the proposed threshold limits and codes, including codes for IDAS, for carrying out activities and taking natural resources in the proposed wild river area;

(o) a process for granting, reserving or otherwise dealing with unallocated water in the proposed wild river area.

The codes formulated under s 12(i)(n) govern land use under the declared areas and these codes are not subject to judicial or parliamentary review in the way local zoning laws are scrutinized.

Subversion of the democratic ideal

As mentioned above, the virtual legislator in this field is the minister, The Governor simply formalises the declarations and codes that the minister determines. The WRA establishes a consultative process before declarations are made but the ultimate arbiter is the minister. Declarations are required to be placed before the Legislative Assembly but they are not subject to parliamentary approval. These kinds of instruments are considered beyond judicial review as they are of a legislative nature.

Property rights

The WRA represents the classic case of regulatory takings without compensation. It applies particularly harshly on traditional owners. Let me explain. In the case of a landowner under statutory title, governments have been able to regulate land use (within limits) without physically taking the land. In the case of traditional owners, their rights in land do not consist of exclusive possession of parcels by individuals but takes the form of an individual member's right to use the land as sanctioned by indigenous customary law. Whereas regulatory takings leave statutory ownership largely intact, they completely destroy indigenous land rights.

I believe for the above reason that the WRA discriminates against indigenous peoples. The law is not even facially neutral because its disparate impact is visible to anyone with a rudimentary knowledge of post-Mabo property law. The traditional owners might even consider examining this legislation against the constitutional test in *Mabo (1)*.

Due process

The WRA is not a 'stand alone' statute. It locks into and harnesses the investigation and enforcement provisions of statutes such as the notorious Vegetation Management Act (Qld) which contravenes practically every constitutional norm of a functioning democracy. On this Act see my paper, 'Constitutional Vandalism under Green Cover' in *Upholding the Australian Constitution* Volume 17, Sydney: Samuel Griffith Society, 2005, 39-72.

I am making this submission under severe time constraints. However I remain at the service of the Honourable Senators should they wish to receive further submissions.

Suri Ratnapala
Professor of Public Law
T C Beirne School of Law
University of Queensland

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