

Lestar Manning – Partner

Michael Neal – Partner

Mark Baker-Jones

Tracey White

Madonna Griffin

Marlies Hobbs

Matt Patterson

Clare Farley

Andrew Williams



25 March 2010

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

E: legcon.sen@aph.gov.au
AND BY POST

Dear Secretary

**ENQUIRY INTO THE WILD RIVERS (ENVIRONMENTAL MANAGEMENT)
BILL 2010 [2]**

P&E Law is a Queensland based legal practice which specialises in Planning, Environment and Native Title law.

Effect of Wild River Act on Community Development Aspirations

In the course of the past 18 months, we have been asked to provide advice to various Aboriginal groups and representative organisations including local government organisations on Cape York Peninsula about the likely effect on the aspirations of Aboriginal communities whose land is subject to a Wild River declaration under the *Wild Rivers Act 2005 (Qld)* (WRA).

Please find **attached** a copy of our advice of 30 June 2009 in respect of a property called “Batavia Downs” described as Lot 22 on SP171852 forming part of the Wenlock Basin Wild River Declaration Proposal which was previously released for public comment. Our advice was provided to Balkanu Cape York Development Corporation for the purposes of advising traditional owners who have native title rights and interests in Batavia Downs.

In summary, our advice was that:

- (a) The proposed Wenlock Basin Wild River Declaration is likely to prevent or at best, significantly limit opportunities for vegetation clearing within the Wild River High Preservation Area.
- (b) The ability to make an application for a property development plan to vary the declaration of the wild river area to, for example, allow for vegetation clearing is possible but problematic. A consideration of the decision making criteria suggest that the prospects of a achieving a variation to the declaration is remote.



-
- (c) The construction of a permanent camp-site, including relocatable infrastructure such as safari tents and permanent infrastructure such as ablutions, would likely be required to be setback from a nominated waterway within a Wild River declaration by 200 metres.
 - (d) Construction of a permanent Eco Tourism Resort would be required to be setback from a High Preservation Area of a wild river by 200 metres.
 - (e) Any application for construction of permanent private residential accommodation would be required to be setback from a nominated waterway of a wild river by 200 metres.
 - (f) The establishment of agricultural or horticultural operations for commercial purposes, including the construction of supporting infrastructure such as irrigation and sheds, is prohibited in all High Preservation Areas of a Wild River declaration.

The legal effect of the proposed Wenlock Basin Wild River Declaration was by p&e Law assessed against the scheme operating under the WRA which included consideration of the Cook Shire Council planning scheme, the relevant local government planning scheme for the proposed declaration, and against the *Integrated Planning Act 1997 (Qld)*, and the Wild Rivers Code. Since our June 2009 advice, the Queensland parliament has repealed the *Integrated Planning Act 1997 (Qld)*, and enacted the *Sustainable Planning Act 2009 (Qld)*. Despite this change, the summary of our advice outlined above remains accurate.

Wild Rivers “similar to a Local Government planning scheme”

Numerous claims have been made that a Wild River declaration is similar to a Local Government planning scheme or that the WRA “acts” as a planning scheme.

In a document produced by the Department of Environment and Resource Management by the Queensland Government, titled “Frequently Asked Questions – Wild Rivers”, the Department states:

“A Wild River declaration is akin to a “planning tool”, similar to a Local Government planning scheme.

It does not remove peoples legitimate rights, but it does manage future development to protect the natural values of the wild rivers.”¹

Similarly the Archer Basin Wild River Declaration Consultation Report 2009, and the Lockhart Basin Wild River Declaration Consultation Report 2009, produced by the Queensland Government, state:

¹ http://www.derm.qld.gov.au/wildrivers/pdf/wild_rivers_web_faqs.pdf

“A Wild River declaration is similar to a Local Government planning scheme in that it guides development to protect specific river related natural values.”²

A wild rivers factsheet produced by the Wilderness Society similarly states:

“The legislation acts as a planning scheme, so when a development application is lodged in a wild area it is assessed against wild river requirements.”³

In our view, the comparison of Wild River Declarations and the WRA to Local Government planning schemes is misleading and likely to confuse. The WRA does not act as or like a planning scheme.

(a) Purposes

Planning schemes are made in accordance with Queensland’s local government planning legislation, the *Sustainable Planning Act, 2009* (Qld) (SPA).

The purpose of SPA is to set out in section 3 of SPA as follows:

3 Purpose of Act

The purpose of this Act is to seek to achieve ecological sustainability by—

- (a) managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes; and
- (b) managing the effects of development on the environment, including managing the use of premises; and
- (c) continuing the coordination and integration of planning at the local, regional and State levels.

Section 79 of the SPA states that a planning scheme is an instrument that –

- (a) is made by a Local Government under division 2 and part 5; and

²www.derm.qld.gov.au/wildrivers/pdf/archer_consult_report.pdf,
www.derm.qld.gov.au/wildrivers/pdf/lockhart_consult_report.pdf

³ <http://qld.greens.org.au/content/front-page-content/Wild%20Rivers%20Fact%20Sheet.pdf>

-
- (b) advances the purpose of this Act by providing an intergraded planning policy for the Local Government's planning scheme area.

Achieving ecological sustainability by managing development processes, managing the effects of development on the environment and continuing the coordination and integration of planning is very different from the purpose of the WRA, which is stated at section 3 to be to "preserve the natural values of rivers that have all, or almost all, of their natural values intact". The former requires a balancing process to be undertaken in assessing applications for development. The latter has the sole purpose of seeking environmental preservation.

(b) Core matters for a Planning Scheme

Section 89 of SPA designates core matters for the preparation of a planning scheme being:

- "(a) land use and development;
(b) infrastructure;
(c) valuable features."

Infrastructure includes the extent and location of proposed infrastructure having regard to existing infrastructure networks and their capacities and thresholds for augmentation.

Valuable features includes resources that are of ecological significance, areas that contribute significantly to amenity, areas or places of cultural heritage significance and resources or areas of economic value, including, for example, extractive deposits, fishery resources, forestry resources, water resources, sources of renewable and non-renewable energy and good quality agricultural land.

A Local Government and the relevant Minister must be satisfied that a Local Government's planning scheme coordinates and integrates the core matters (section 88, SPA).

By comparison the WRA and Wild River Declarations, do not require consideration of land use and development, infrastructure or valuable features of the sort identified in SPA.

In our submission, a Local Government planning scheme under SPA is intended to be a coordinated and comprehensive land use plan for a Local Government area. By comparison a Wild River declaration under the WRA is intended to restrict land and water use in order to achieve the stated purpose of the Act which is to preserve the natural values of rivers.

(c) Regular review and community consultation

Local Government planning schemes are, to some extent, intended to reflect community views and attitudes towards their Local Government area. For that reason, Local Governments are required to regularly review their planning schemes – at least every 10 years (section 91, SPA).

By comparison, the WRA does not provide for regular review or amendment of Wild River declarations.

(d) No Appeal Rights Against Wild Rivers Declarations

When a proposal for development of a particular type require assessment against a planning scheme, provided the development is of a sufficient scale, decisions of the assessment manager can be reviewed by the Planning and Environment Court. The review is conducted by way of an appeal comprising a hearing anew. For development that is of a higher order and might require, for example, a material change of use of land or a reconfiguration of a parcel of land, public notification of the development proposal is required, and submissions are invited from members of the public. An appeal against a decision of an assessment manager can be lodged by affected landholders, members of the public or by State government agencies.

SPA also enables any person to bring a proceeding in the Planning and Environment Court for a declaration about the construction of a planning scheme and, amongst other things, the lawfulness of land use or development.

By comparison, neither landholders nor members of the public are entitled to appeal against a Declaration or the terms of the Declaration of a Wild River under the WRA.

Section 8 of the WRA requires the Minister to publish a notice of the Minister's intention to declare an area to be a wild river area and invite written submissions about the declaration proposal. Section 13 of the WRA requires the Minister to consider the results of any community consultation on the declaration proposal and all properly made submissions about the declaration proposal.

There is no opportunity for a merits review of the decision to declare an area to be a Wild River by either affected landholders or members of the public.

(e) No Right to Compensation for Reduction in Value of Land Due to Wild River Declaration

As communities views evolve over time, so to do their views about land use in their region. On occasion, planning schemes are changed to accommodate the views of the community following consultation as part of the regular review of a local government planning scheme. SPA allows for an owner of an interest in land to be paid reasonable compensation by a Local Government if a change to a planning scheme reduces the value of that interest. This compensation is generally known as "injurious affection" and has been in place since the inception of town planning laws in Queensland. It is a

statutory system of compensation for the owners of land that have been affected by the commencement or amendment to a planning scheme.

No such right to compensation arises from the operation or effect of a Wild River Declaration. The reduction in land value without right to compensation by the operation of a Wild River Declaration indicates a significant departure in policy in Queensland and a fundamental difference between the operation of local government planning schemes and the WRA.

For the reasons set out above, it is misleading and unhelpful to state that the WRA or Wild River Declarations are "akin to" or "act as" as a planning scheme.

More Equitable Dealings with Property Rights

It is clear that the object of the WRA relates to the preservation of environmental services. As such it forms part of a larger interplay of legislation that deals with those environmental services.

Our current submission to the Natural Resource Management Ministerial Council about Australia's Nature Vegetation Framework – consultation draft is generally apposite to this submission as the WRA forms a part of the current command and control legislation that should be set aside to allow a more equitable dealing with property rights and interests. A copy of our draft submission is attached.

Thank you for the opportunity to provide this submission.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Matt Patterson', with a long horizontal line extending to the right.

Matt Patterson BA LLB
Solicitor - Maroochydore Office
e matt@paelaw.com