

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GEORGE WILLIAMS

ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR
AUSTRALIAN RESEARCH
COUNCIL LAUREATE FELLOW
FOUNDATION DIRECTOR,
GILBERT + TOBIN CENTRE OF
PUBLIC LAW

28 March 2011

Committee Secretary
Senate Legal and Constitutional Committees
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Wild Rivers (Environmental Management) Bill 2011

The following submission is developed from my earlier Senate Legal and Constitutional Committee submission to the Inquiry into Wild Rivers (Environmental Management) Bill 2010 [No 2].

In this submission, I examine the validity of the Wild Rivers (Environmental Management) Bill 2011 under section 51(xxvi) of the Constitution, the races power. Section 51(xxvi) provides that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

...

(xxvi.) The people of any race for whom it is deemed necessary to make special laws.

The 2011 Bill in section 4(1)(a) explicitly relies on this provision as its primary, though not exclusive, base of constitutional power. Additionally, the Bill purports to be a 'for the advancement and protection of Australia's indigenous people.'

I consider below each of the criteria for a valid enactment under the races power in regard to the Bill.

'People of any race'

The High Court has interpreted this phrase as being broad in its scope. As Brennan J observed, 'race' 'is not a term of art.'¹ He outlined the range of features that may cause a group to

¹ *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 243.

identify itself, or be identified by others, as a race, including their ‘common history, religion, spiritual beliefs or culture, as well as ... their biological origins and physical similarities.’² Additionally, Deane J believed that the term has a ‘wide and non-technical meaning.’³

There is no doubt that Aboriginal people constitute ‘people of any race’ for the purposes of the races power. The phrase has also been found by the High Court to encompass any particular ‘sub-group’ within Australia’s Indigenous population.⁴ As such, it is within the power of the Commonwealth to legislate specifically for Aboriginal communities in wild river areas.

‘Deemed necessary’

In *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)*,⁵ Gaudron J, while emphasising that it is for Parliament to determine whether a law is necessary or not, considered that there needs to be some difference pertaining to the particular race or their circumstances. There also needs to be some material on which Parliament has based its judgment that a difference of this nature exists. Thus, Gaudron J concluded that an enactment relying on the races power must be ‘appropriate and adapted to a relevant difference.’⁶

The significance, if any, of this particular phrase remains unresolved by the High Court. However, the Bill appears to satisfy this criterion nonetheless. The disadvantage experienced by Aboriginal people is well documented and widely acknowledged. The purpose of the Bill is to secure Aboriginal communities in the Cape York area economic opportunities stemming from the use, development and control of the land over which they hold native title. Consequently, if a condition such as that described by Gaudron J applies, the Bill would likely fulfil it.

‘Special laws’

For legislation to validly rely on the races power, it must apply to a particular race, and not to all races. For example, in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the High Court held that the *Racial Discrimination Act 1975* (Cth) was not a valid law under section 51(xxvi) as it provided protection from discrimination to all races. Thus, it could not be considered a ‘special law’ for the ‘people of any race’.

The High Court expanded on what constitutes a ‘special law’ in *Commonwealth v Tasmania (Tasmanian Dam Case)*⁷. It was suggested by Brennan J that the law need not be special in its terms, but that it is sufficient for it to discriminate in favour of a people in its operation. Additionally, in *Western Australia v Commonwealth (Native Title Act Case)*⁸ it was held that the special quality of a law needs to be ‘ascertained by reference to its differential operation upon the people of a particular race.’⁹ When the law ‘confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race,’¹⁰ it will be a ‘special law’ for the purpose of the races power.

² *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 244.

³ *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 273-274.

⁴ *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 274 and *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337.

⁵ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337.

⁶ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337 at 365-366.

⁷ (1983) 158 CLR 1.

⁸ (1995) 183 CLR 373.

⁹ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 460-461.

¹⁰ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 461.

The Bill explicitly concerns the interests of Aboriginal people in wild river areas. The economic opportunities it potentially provides by allowing the native title owners to use, develop and control their land may also benefit other people. However, this is likely to be a peripheral consequence, with the primary benefit being conferred to the traditional owners of native title land in being able to make such decisions about their land.

I conclude that the Wild Rivers (Environmental Management) Bill 2011 meets the criteria to be a valid enactment under s 51(xxvi) of the Constitution.

Inconsistency

Under s 109 of the Constitution, the laws of the Commonwealth prevail over the laws of a State to the extent of any inconsistency. The *Wild Rivers Act 2005* (Qld) empowers the relevant Minister to make a wild river declaration in order to preserve the 'natural values' of that area. Consequently, future development and other activities must meet certain conditions before they will be authorised.

The Bill on the other hand provides in s 5 that a wild river area subject to native title cannot be regulated in this manner without the written consent of the Aboriginal traditional owners. If the Bill is enacted, it would be inconsistent with the *Wild Rivers Act 2005* (Qld). The High Court held in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 that s 109 will be engaged where one law claims to confer a right or entitlement that another law attempts to eradicate or diminish. The *Wild Rivers Act 2005* (Qld) diminishes the decision-making power of Aboriginal native title holders over their land as would be conferred by the Bill.

Enacting the Wild Rivers (Environmental Management) Bill 2011 would render the *Wild Rivers Act 2005* (Qld) inoperative to the extent of the inconsistency. Thus, the Queensland government would not be able to regulate wild river areas that are also subject to native title without first obtaining agreement from the Aboriginal traditional owners.

Yours sincerely

Professor George Williams