



28th April, 2010

Ms Margaret Cahill
Research Officer/Estimates
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

SUBJECT: Question on notice from Senator Trood re requests for the instrument signed by the Minister by which the wild river declarations were made.

I refer to the Question on Notice put by Senator Trood at the Senate Committee hearing in Cairns on 13 April, when I undertook to provide the dates on which Cape York organizations had requested a copy of the instrument by which Queensland Natural Resources Minister Stephen Robertson allegedly made the wild river declarations.

Background

Contrary to the established practice for delegated legislation, the three Cape York wild river declarations approved by gazette notice on 3 April 2009 (see *Wild Rivers Act 2005* (Qld) (WRA) s.16) do not include a date on which the declarations were made, nor identify the Minister who made the declarations. The consultation reports for the three wild river area declarations prepared (see WRA s.38) by Minister Stephen Robertson state that the wild rivers were declared on 3 April 2009. This date is incorrect. That was the date of the approval notice made by the Governor-in-Council. Additionally, the consultation reports prepared by Minister Robertson when setting out the declaration process at section 1.3 omit detailing the critical steps of the Minister making the declarations and Governor-in-Council approving the declarations and the dates of these actions. Further, Minister Robertson has on at least two occasions claimed that the decision to declare the three Cape York wild rivers was made before the 2009 State election by the previous minister (Minister Wallace). There has therefore been a great deal of uncertainty about which Minister made the declarations and when.

In response to the question on notice from Senator Trood at the Senate Committee hearing in Cairns on 13 April, we provide below an outline of the numerous requests made for a copy of the instrument signed by the Minister evidencing the making of the wild river declarations.

I note that in his submission to the Senate Committee on 21 April 2010, the Minister for Natural Resources, Mines and Energy, Minister Robertson, provided a copy of briefing note CTS 02637/09, about which he makes the following claim:

“On 1 April 2009, the Minister signed the final decision to seek approval by Governor in Council to declare the Archer, Stewart and Lockhart Basins as wild river areas (Attachment E). This decision was made pursuant to s.15 of the Wild Rivers Act”.

The Minister did not validly exercise the power under sections 7 and 15 of the WRA merely by approving a briefing note and it is not possible that the Governor proceeded to approve the declarations of the wild rivers on the strength of that briefing note. There are fundamental errors of law in the Minister’s statement and the briefing note. These are:

- The WRA provides that it is the Minister who declares the area to be a wild river area (s.15). The Governor-in-Council approves a declaration once it has been made (s.16). Governor-in-Council approval comes after the area has been declared, not before;
- The three Cape York wild river declarations that the Minister was requested to approve were not attached to the briefing note. Therefore to approve the declarations, the Minister must have done this through another document;
- The Minister did not approve the wild river declarations to proceed to Governor-in-Council. The declarations were not listed as one of the documents which the Minister was requested to approve to progress to Governor in Council;
- The Minister is advised in the briefing note that “[it] is proposed that there be some changes to the declaration proposals to reflect some issues raised in the consultation process”. Therefore at the time of signing the briefing note the declarations were not in their final form. The Minister can only make the declarations once they are in their final form;
- The Minister appears not to have “noted” the submissions and results of consultation. Also Attachment E appears to be merely a list of all submissions rather than the submissions themselves.

REQUESTS FOR A COPY OF THE INSTRUMENT SIGNED BY THE MINISTER EVIDENCING THE MAKING OF THE WILD RIVER DECLARATIONS.

April 2009 – Freedom of Information Act application

In April 2009, the Cape York Land Council lodged applications with the Department of Environment and Resource Management and the office of the Minister for Natural Resources, Mines and Energy under the *Freedom of Information Act 1992 (Qld)* for the following:

“Any document by which the Minister for Natural Resources and Water, or the Minister for Natural Resources, Mines and Energy declared wild river areas for the Archer Basin, Lockhart Basin or Stewart Basin under the Wild Rivers Act 2005 (Qld) s.7 and the documents relating to wild rivers considered by the relevant Minister at the same time as, or within 7 days prior to the time, the relevant Minister declared each of those wild river areas”

and:

“Any document, created after 21 November 2008, concerning the making of any declaration of a wild river area under the Wild Rivers Act 2005 (Qld) s.7 or the approval of such a declaration under Wild Rivers Act 2005 (Qld) s. 16 for the Archer Basin, Lockhart Basin or Stewart Basin”

To date, the document by which the Minister declared the wild river areas has not been released through the Freedom of Information Act, nor the existence of such a document identified by the department in the materials to which access was denied.

17 August 2009 – letter to the Honourable Stephen Robertson

On 17 August 2009 Chief Executive Officer of Balkanu Development Corporation, Gerhardt Pearson, wrote to Minister Robertson in relation to the date of the declaration of the Wild Rivers as stated in the Consultation Report. Minister Robertson responded that:

“The declaration of a wild river area does not take effect until the Governor-in-Council’s approval of the declaration is notified in the government gazette (see section 16(2) of the WRA). Accordingly, although I decided on 1 April 2009 to declare the Archer Basin wild river area (pursuant to section 15(1)(a) of the WRA), the wild river area was not formally declared until notice of the Governor-in-Council’s approval was published in the Government Gazette on 3 April 2009.”

Minister Robertson’s response is in contrast to the declaration of the Gregory River, for example. On the second page of this declaration there is the statement: “The Minister for Natural Resources and Water made this document on 30 January 2007”. The Department of Environment and Resource Management website advises that this declaration took effect on 28 February 2007. Therefore, in the case of the Gregory River, the wild river was declared on 30 January 2007, but the declaration did not take effect until four weeks later.

Although Minister Robertson was not specifically requested in this letter for a copy of the instrument by which the declarations were made, the Minister would have been aware that a request had been made for this instrument through FOI. He did not provide a copy of the instrument.

10 September 2009 – correspondence to the Premier of Queensland

On 10 September 2009, Gerhardt Pearson wrote to the Premier of Queensland Anna Bligh and copied the letter to the Honourable Cameron Dick, Attorney General, requesting:

- (a) advice about which Minister made the wild river declarations in accordance with s.7 and s.15 of the WRA;
- (b) advice about the date on which the declarations were made by the Minister in accordance with s.7 and s.15 of the WRA; and
- (c) a copy of the instrument executed by the Minister by which the declarations were made.

The Acting Premier Paul Lucas MP responded on 25 September advising that:

“The decision to declare the Archer, Lockhart and Stewart Wild River areas was made by the Honourable Stephen Robertson MP, Minister for Natural Resources, Mines and Energy and Minister for Trade on 1 April 2009”.

Neither the Acting Premier nor the Attorney General provided a copy of the instrument executed by the Minister by which the declarations were made.

16 September 2009 – submission to the Premier’s Integrity and Accountability Review

On 16 September 2009, the Balkanu Cape York Development Corporation made a submission to the Premier’s Department on the Integrity and Accountability review (previously provided to the Senate Committee). In this submission Balkanu stated:

“To clarify this matter on 10 September 2009 Balkanu wrote to the Premier to seek advice on the following matters by COB 14 September. The Premier was requested to provide:

- (a) your advice on which Minister made the wild river declarations in accordance with s.7 and s.15 of the Wild Rivers Act;*
- (b) your advice on the date on which the declarations were made by the Minister in accordance with s.7 and s.15 of the Wild Rivers Act; and*
- (c) a copy of the instrument executed by the Minister by which the declarations were made.*

A copy of the instrument executed by the Minister was still not provided as a result of this submission.

9 November 2009 – correspondence to the Governor of Queensland, Her Excellency Ms Penelope Wensley AO

I attach a letter of 9 November to the Governor of Queensland in which the issue of the validity of the wild river declarations was raised. The Governor was asked:

- 1. What was the date of each of these declarations and which Minister made them under sections 7 and 15 of the Act ?*
- 2. What evidence of the declarations having been properly executed was before you when you gave your approval under section 16 of the Act ?*

Upon receiving this letter it was hoped that the Governor would seek senior independent legal advice in relation to the matters raised in the letter and in particular whether the declarations which she approved with Executive Council had in fact been validly made. The Governor’s Official Secretary, Mr Mark Gower, briefly responded on 14 December 2009 (attached) that:

- The Governor-in-Council acts with the advice of the Executive Council when giving effect to the decisions and actions of Government;

- As the proceedings of the Executive Council are strictly confidential, it is not appropriate for Her Excellency to comment on the deliberations of the Governor-in-Council;
- That the concerns relating to the validity of the declarations were dealt with in the letter from the Acting Premier dated 25 September.

The Governor did not provide a copy of the instrument signed by the Minister evidencing the making of the declarations, a document which should be on the public record and not covered by Executive Council confidentiality.

On Thursday 17 December, the Premier was reported on ABC news, in response to media about the letter to the Governor:

"I am satisfied that the Minister made this decision in relation to Wild Rivers in accordance with the legislation that governs the matter," she said.

"Ultimately the Governor will consider any matters that are brought to her, as she should.

"If she has any concerns, then I'd be more than happy to hear from her."

It is unknown whether the Governor sought legal advice or raised any matters with the Premier, but the Premier did not release a copy of the decision made by the Minister.

15 March 2010 – submission to the Queensland Crime and Misconduct Commission

On 15 March 2010 the Cape York Land Council and Balkanu Cape York Development Corporation made a submission to the Queensland Crime and Misconduct Commission in relation to its inquiry on the issue of the interaction between ministers, ministerial staff and public servants. Among the matters raised with the CMC was that:

"Repeated requests for a copy of the instrument by which the declarations were made have been consistently ignored".

31 March 2010 – submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Wild Rivers (Environmental Management) Bill [No.2] 2010 (Cth)

On 31 March 2010, Balkanu Cape York Development Corporation made a submission to the Senate Wild Rivers inquiry. In that submission Balkanu again raised the matter of the failure of the Government to provide a copy of the instrument by which the declarations were made. On 21 April, the Minister for Natural Resources, Mines and Energy released a briefing note which he asserted is the:

"final decision to seek approval by Governor-in-Council to declare the Archer, Stewart and Lockhart Basins as wild river areas".

As noted above, this document is not a legally effective mechanism by which the Minister could declare the three Cape York wild river areas in accordance with s.15 of the WRA.

Yours sincerely,

Terry Piper
Chief Operating Officer
Balkanu Cape York Development Corporation

attachments



Cape York Land Council

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Balkanu
Cape York Development Corporation P/L

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Tel +61 7 4019 6200 Fax +61 7 40512270

9th November 2009

By Courier

Her Excellency Ms Penelope Wensley AO
Governor of Queensland
Government House
168 Fernberg Road
Paddington Qld 4064

Attachment

Your Excellency,

WILD RIVERS ACT 2005

We seek your urgent response to questions raised in this letter about the validity of declarations under the *Wild Rivers Act 2005 (Qld)* ("the Act") which you approved when sitting in Council on 2 April 2009:

Those are:

1. Archer Basin Wild River Declaration 2009
2. Stewart Basin Wild River Declaration 2009
3. Lockhart Basin Wild River Declaration 2009

Despite the announcement of the declarations by Queensland Premier, Hon. Anna Bligh MLA on 3 April 2009, we have been unable to obtain documentary evidence of who made the declarations under sections 7 and 15 of the Act, and when they were made. We understand from the Government Gazette of 3 April 2009 that you approved the declarations in Council under section 16 of the Act on 2 April 2009.

There are two required steps in the declaration process under the Act.

Section 7 provides the plenary power to the Minister to make declarations as follows:

Minister may declare wild river areas

The Minister may declare a part of the State to be a wild river area.

Note—

See section 16 for when a declaration has effect.

Section 15 refers to how the Minister may exercise this power:

Deciding whether to make declaration

- (1) After considering the matters mentioned in section 13 and any other matters the Minister considers appropriate, the Minister may—

- (a) declare the area to be a wild river area; or
 - (b) decide not to proceed with declaration of the wild river area.
- (2) If the Minister decides not to proceed with the declaration, the Minister must publish a notice advising the decision and the reasons for the decision.

Section 16 sets out the approval process for declarations made by the Minister as follows:

Approval of wild river declaration

- (1) The Governor in Council may, by gazette notice, approve the declaration of a wild river area.
- (2) The declaration has effect when—
 - (a) the declaration is approved by the Governor in Council; and
 - (b) the approval is notified in the gazette.
- (3) The Minister must table a copy of the declaration in the Legislative Assembly within 14 sitting days after the declaration is approved.

Our question concerns the declarations made by the relevant Minister pursuant to sections 7 and 15 of the Act. Neither the Government Gazette of 3 April 2009 nor the declarations reveal who exercised the power under sections 7 and 15 of the Act and when this power was exercised.

In contrast, the Gregory Wild River Declaration 2007 states (inside its front cover) that "the Minister for Natural Resources and Water made this document on 30 January 2007". Further, the Department of Environment and Resource Management website advises that this declaration took effect on 28 February 2007. The absence of this information in the Archer, Lockhart and Stewart Basin Wild River declarations and the Government Gazette is a matter of concern as it questions the transparency and integrity of basic procedures concerning the conduct of the Governor-in-Council.

In response to a letter from Blake Dawson seeking clarification of matters pertaining to the Declarations, the present Minister for Natural Resources, Mines and Energy, Hon. Stephen Robertson MLA, stated on 26 May 2009:

I wish to clarify that my decision to make the Declarations was made under section 15, and not section 7, of the WRA. Section 7 concerns the power to declare Wild River areas, whereas section 15 concerns the making of the decision to declare Wild River areas.

and further:

In particular, I consider my decision to make the Declarations and the Governor-in-Council's decision to approve the Declarations are decisions of a legislative, rather than administrative character.

Minister Robertson also stated:

Having regard to the results of the community consultation and written submissions, as well as other matters, I decided to proceed to make the Declarations although with certain changes in order to address issues raised through consultation and in submissions. The Declarations were therefore submitted to the Governor-in-Council for approval and subsequently approved.

Please see copy of the Minister's letter at **attachment A**.

However, at a meeting held in Cairns on 25 August 2009,¹ Minister Robertson stated that his predecessor, Hon. Craig Wallace MLA, had made the decision to make these declarations under the Act. Minister Robertson stated that "the decision was made before the election but it couldn't go to the Governor -in -Council because of the election".

Minister Robertson also stated in the *National Indigenous Times* on 16 April 2009 that, "the declaration of wild rivers was ready to go before the election but with the calling of the election known as the 'caretaker period' it couldn't occur".

Documents released under the *Freedom of Information Act (1992) (Qld)* to Cape York Land Council received on 29 October 2009 indicate that the declarations had not been finalised on 30 March 2009 - which was after the election. Email circulation between departmental officers reveals that amendments were still being made to the declarations up to and including 30 March.

In a letter to Balkanu Cape York Development Corporation on 29 October 2009, Minister Robertson stated he had "decided" on 1 April 2009 to declare the Archer Basin Wild River area.

Due to the conflicting accounts from Minister Robertson, we still do not have confirmation as to who made the declarations under sections 7 and 15 of the Act and when. This is despite a letter of request for this information to the Premier on 10 September 2009 - see **attachment B**.

Amongst other things, we sought from the Premier in that letter a copy of the instrument signed by Minister Robertson declaring the three Wild Rivers referred to herein. As we have received no response to that letter, could you please provide a copy of the instrument which you relied upon to approve the declaration.

Under the *Freedom of Information Act 1992 (Qld)* - six months after seeking information - we have only now been provided with a copy of an email exchange between senior officers of the (then called) Department of Natural Resources and Water in relation to these declarations: please see **attachment C**.

Debbie Best, Deputy Director-General of the Water and Catchment Division, wrote to Tom Crothers and Scott Buchanan (General Manager Water Allocation & Planning Unit, and Team Leader Wild Rivers Unit of Dept Environment & Resources) on 30 March 2009 as follows:

Can we have a Min brief re wild rivers decs - the three for Thursday just so Min and staff have an overview and can answer questions? Can we attach a draft media release plus Questions and answers to assist them?

Thank you
debbie

¹ Meeting attendees were Minister Robertson, the Minister for Sustainability and Climate Change, Hon. Kate Jones MLA, the Member for Cook, Hon. Jason O'Brien MLA, the Director-General of the Department of Natural Resources, Mines and Energy, John Bradley, and Noel Pearson, Gerhardt Pearson and Neville Pootchemunka, Allan Creek, Richie Ahmat and Prue Gusmerini

On the same day Scott Buchanan responded at 4.59 pm as follows:

Debbie

Can do. What is the current state of play in terms of approval, do we need to get an approval by the Minister, as it appears the previous Minister did not sign CTS 01188/09, to approve the declarations proceeding to GIC.

If this is the case, I propose that I will renew this CTS for the Minister's information and approval. Is that OK?

Regards

Scott

This communication took place three days before you approved these declarations in Council. We have no means of knowing whether Scott Buchanan was correct in his suggestion that "the previous Minister did not sign CTS01188/09, to approve the declarations proceeding to GIC". We also have no means of knowing what "CTS01188/09" refers to. If it refers to the relevant instrument evidencing the Minister's exercise of power under sections 7 and 15 of the Act, then you will appreciate our grave concern for the following reason:

It is the Minister who makes the declaration under sections 7 and 15 who must fulfil the obligations under sections 13 and 15. The present Minister could not have exercised powers under sections 7 and 15 on the basis that his predecessor may have fulfilled the requirements of sections 13 and 15.

If the previous Minister, Hon. Craig Wallace MLA, had not made the declarations under sections 7 and 15 of the Act, then the present Minister, Hon. Stephen Robertson, could not proceed to complete his predecessor's duties under the Act. It was incumbent upon the new minister to himself fulfil the obligations under sections 7 and 15, which must be exercised in accordance with section 13 of the Act. That section provides as follows:

Matters Minister must consider

- (1) In preparing a wild river declaration, the matters the Minister must consider include—
 - (a) the results of community consultation on the declaration proposal; and
 - (b) all properly made submissions about the declaration proposal; and
 - (c) any water resource plan or resource operations plan that applies to all or part of the proposed wild river area.

Our submission to you concerns the basis upon which you accepted the recommendation in Council to approve the Archer Basin Wild River Declaration 2009, the Stewart Basin Wild River Declaration 2009 and the Lockhart Basin Wild River Declaration 2009.

1. What was the date of each of these declarations and which Minister made them under sections 7 and 15 of the Act?
2. What evidence of the declarations having been properly executed was before you when you gave your approval under section 16 of the Act?

We are writing to you and seeking your response to questions strictly in respect to the process in which you were involved, in approving these declarations under section 16 of the Act.

Given the questions we have about what occurred with these declarations, the conflicting, misleading and opaque advices from the State Government, and our inability to discover on the public record answers to basic questions we have about procedures undertaken pursuant to an Act of Parliament, we seek your advice on whether the approvals that you gave in Council on 2 April 2009 under section 16 of the *Wild Rivers Act 2005 (Qld)* were legally valid. If, as it appears prima facie, they are not, for reason that the declarations under sections 7 and 15 of the Act were not duly made by either the former Minister Craig Wallace MLA or the present Minister Stephen Robertson, then we respectfully submit that it is incumbent upon you to take the necessary steps to quash these declarations.

As Wild River declarations are a matter of immense concern to the Aboriginal people of Cape York, and given the serious matters raised in this letter about legislative process and government procedure, we seek your assurance that no further Wild River declarations will be approved by you until such time as you respond to this letter.

We would appreciate prompt consideration of and response to the matters raised herein.

Yours sincerely,

.....
Noel Pearson
Director
Cape York Institute

.....
Michael Ross
Chairman
Cape York Land Council

.....
Gerhardt Pearson
Executive Director
Balkanu Cape York
Development Corporation

Attached: attachments A, B, C



GOVERNMENT HOUSE
QUEENSLAND

RECEIVED
~~13 DEC 2009~~

RECEIVED
13 DEC 2009

BY:

Mr Noel Pearson
Director
Cape York Institute
32 Florence Street
CAIRNS QLD 4870

Attachment

Dear Mr Pearson

Thank you for your correspondence dated 9th November, 2009 co-signed by Mr Michael Ross and Mr Gerhardt Pearson, regarding the validity of declarations made under the *Wild Rivers Act 2005* (Qld) ("the Act"). The Governor has noted the issues raised in your letter and I have been requested to reply to you on the Governor's behalf.

Your letter seeks specific information regarding the Governor in Council process in respect of the declarations made under the Act. I advise that the Governor in Council acts with the advice of the Executive Council when giving effect to the decisions and actions of Government. As the proceedings of the Executive Council are strictly confidential, it is not appropriate for Her Excellency to comment on the deliberations of the Governor in Council.

In relation to your concerns regarding the validity of the declarations made by the Minister, I note that you raised your concerns in a letter to the Premier dated 10 September 2009, a copy of which you provided to me under cover of your letter. I am advised by the Department of the Premier and Cabinet that the Acting Premier responded to Mr Gerhardt Pearson, Executive Director, Balkanu Cape York Development Corporation, by letter dated 25 September 2009.

Thank you for bringing your concerns to the Governor's attention.

Yours sincerely

Mark Gower OAM
Official Secretary

14 December 2009

cc. Mr Michael Ross, Chairman – Cape York Land Council
cc. Mr Gerhardt Pearson, Executive Director – Balkanu Cape York Development Corporation