‘(Dis)Integrated Assessment: the pulping of an integrated assessment process’

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Abstract

Tasmanian law provides for integrated assessment of major projects by an independent, quasi-judicial statutory body, the Resource Planning and Development Commission (RPDC). A bilateral assessment agreement between Tasmania and the Commonwealth accredited this integrated assessment process for the purposes of the Environment Protection and Biodiversity Act 1999 (Cth) ['EPBC Act'].

Gunns Limited proposes to construct and operate the world's fourth largest pulp mill at Bell Bay in Tasmania's Tamar Valley. In November 2004, the Tasmanian Government declared Gunns' proposed pulp mill a 'project of State significance' and referred it to the RPDC for integrated assessment. The Australian Government decided, under the EPBC Act, that the RPDC's integrated assessment was the appropriate assessment method for Commonwealth purposes.

By March 2007, the RPDC assessment panel had formed the view that Gunns was critically non-compliant with certain requirements. Gunns then withdrew from the RPDC process, saying it was taking too long and that project delays would cost the company about $1 million per day. The State Premier immediately announced project-specific legislation: the Pulp Mill Assessment Act 2007 (Tas).

When Gunns resubmitted the same project to the Australian Government, then Minister Turnbull agreed to EPBC Act assessment on 'preliminary documentation', excluding public hearings and wood supply issues. EPBC Act environmental impact assessment is limited to matters of national environmental significance.

Gunns' withdrawal from the RPDC's integrated assessment, and associated events, had profound consequences.

This paper examines how the independent, Commonwealth-accredited integrated assessment of Gunns' $2 billion pulp mill proposal was abandoned (at the proponent's behest), then replaced by separate State and Commonwealth 'disintegrated' assessments. It is argued that the sum of these two 'disintegrated' assessment paths is of less value than the holistic integrated assessment being undertaken by the RPDC prior to Gunns' withdrawal.

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1. Introduction

This paper highlights some flawed provisions of the EPBC Act’s impact assessment and approval regime by reference to a controversial current pulp mill proposal.

Section 2 outlines objects of the EPBC Act relevant to integrated assessment of development proposals. Section 3 describes the Act’s ss 38-40 exemptions for day-to-day RFA forestry operations, and Section 4 the s 75(2B) forestry exemption extension for project assessment.

The paper then considers aspects of Gunn Limited’s pulp mill saga which commenced with an integrated assessment by an independent, quasi-judicial statutory body, the Resource Planning and Development Commission (RPDC) (Section 5). This trusted integrated assessment process was abandoned at the proponent’s behest (Section 6) and replaced with far narrower, dichotomised State (Section 7) and Commonwealth (Section 8) processes. Both the replacement assessments left out vital impacts (Section 9), exacerbated in the mill’s 50-year EPBC Act approval by a weighting flaw in s 136(1) (Section 10). As such, the two dichotomised 'disintegrated’ assessments’ sum is inferior to the holistic integrated assessment being undertaken by the RPDC prior to Gunns' withdrawal.

It is argued (Section 11) that these EPBC Act provisions currently mitigating against integrated assessment and sustainable development ought be repealed or reformed.

2. Environment Protection and Biodiversity Conservation Act 1999 (Cth) Objects

The EPBC Act is Australia’s primary environment and heritage statute.1 A decade ago it replaced various separate acts which were each focused on specific environmental issues or processes (eg endangered species or environmental impact assessment (EIA)). In this respect, the EPBC Act was promoted as a welcome integration of national environmental legislation under one statutory roof.

The omnibus EPBC Act now, amongst other matters, ‘provides the domestic legal framework for implementing Australia’s obligations under a number of international conventions related to the environment’2.

This is reflected in the objects of the EPBC Act which include, *inter alia*:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

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(c) to promote the conservation of biodiversity; and

(ca) to provide for the protection and conservation of heritage; and

....

(e) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and

....

The matters of ‘national environmental significance’ (NES) in object (a) consist of key environmental icons, the subject of international conventions or otherwise subject to national jurisdiction under the Australian Constitution’s external affairs power.

Linked to object (b), the Act s 3A defines five ‘principles of ecologically sustainable development’ (ESD). These are principles of:

- integrated assessment;
- the precautionary principle;
- inter-generational equity;
- conservation of biodiversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms.

The wording of object (e) reflects Australia’s federal system of government, and suggests an approach of ‘co-operative federalism’ involving the States in implementing the Australian Government’s obligations under international environmental law.

The Act s 3(2) asserts that, in order to achieve its objects, the Act:

(a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national

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3 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3(1).
4 EPBC Act ‘matters of national environmental significance’ include World Heritage, National Heritage, declared Ramsar wetlands, nationally-listed threatened species and communities, listed migratory species, nuclear actions and the Commonwealth marine area.
5 Australian Constitution s 51(xxix).
6 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3A.
7 See also Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 391 defining the precautionary principle and listing EPBC decisions in which it must be considered.
8 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3A.
environmental significance and on Commonwealth actions and Commonwealth areas; and
(b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and
(c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and
(d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and

As flagged in s 3(2)(b) and (c), bilateral assessment agreements are now in place between the Australian Government and most States, through which the Australian Government accredits certain State EIA processes, and thereafter may rely upon them in EPBC project assessment.

This paper will argue that, contrary to the claim in s 3(2)(d), the Act’s Commonwealth environmental assessment and approval process does not ‘ensure activities that are likely to have significant impacts on the environment are properly assessed’. One reason for this failure is the Act’s express exemptions for RFA forestry operations from the Act’s environmental protection and assessment schemes.

3. Exemption of RFA forestry operations from EPBC Act Part 3

The EPBC Act Part 3 contains the Act’s primary protections for matters of NES. These prohibit the taking of an action that does, will or is likely to significantly impact certain aspects of a matter of national environmental significance, unless approved (under Part 9) by the Federal Environment Minister. These prohibitions provide the basis for various civil penalties and offences in Part 3. However, all of Part 3 is subject to exceptions in Part 4 of the Act.

Most notable for present purposes in Part 4 of the EPBC Act is s 38, which provides:

(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

RFA or regional forest agreement has the same meaning as in the Regional Forest Agreements Act 2002.

RFA forestry operation has the same meaning as in the Regional Forest Agreements Act 2002.

Subsection 40(1) provides:

(1) A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.

Note 1: This section does not apply to some forestry operations. See section 42.
Note 2: The process of making a regional forest agreement is subject to assessment under the Environment Protection (Impact of Proposals) Act 1974, as continued by the Environmental Reform (Consequential Provisions) Act 1999.

In s 40(1):

*forestry operations* means any of the following done for commercial purposes:

(a) the planting of trees;

(b) the managing of trees before they are harvested;

(c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), *forest products* means live or dead trees, ferns or shrubs, or parts thereof.12

Thus, all such ‘forestry operations’ in an RFA region, or ‘RFA forestry operations’, are exempt from EPBC Act Part 3 protections and prohibitions. The EPBC Act explains this exemption by reference to RFAs which the Act describes as involving ‘protection of the environment through agreements between the Commonwealth and the relevant State’.13 However, the extent to which RFAs deliver actual environmental protection is limited and remains a hotly contested argument.14

Section 6 of the Regional Forest Agreements Act 2002 (Cth) provides, under the heading “Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations”:

(1) RFA wood is not prescribed goods for the purposes of the Export Control Act 1982.

(2) An export control law does not apply to RFA wood unless it expressly refers to RFA wood. For this purpose, export control law means a provision of a law of the Commonwealth (other than the Export Control Act 1982) that prohibits or restricts exports, or has the effect of prohibiting or restricting exports.

..., Part 3 of the Environment Protection and Biodiversity Conservation Act 1999 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

The Tasmanian RFA applies across the State.15

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12 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 40(2).
13 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 39.
15 The agreement expires in 2017 so a scheduled review in 2012 will consider processes for renegotiation of the agreement.
4. RFA Forestry Exempt from Impact Assessment: EPBC Act s 75(2B)

RFA forestry operations are exempted not only from the EPBC Act’s Part 3 protections. They are also now expressly excluded from the Act’s impact assessment scheme by s 75(2B).

Section 75 is a fundamental provision ‘screening’ whether a development proposal requires Australian Government approval (s 75(1)(a)) and, if so, ‘scoping’ the parameters of EPBC Act EIA (s 75(1)(b)). In December 2006, the Australian Parliament passed substantial amendments to the EPBC Act. These included, _inter alia_, the insertion of a new s 75(2B). Section 75 now relevantly reads, in part (emphasis added to new s 75(2B)):

75 Does the proposed action need approval?

  Is the action a controlled action?

(1) The Minister must decide:

(a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and

(b) which provisions of Part 3 (if any) are controlling provisions for the action.

Note: The Minister may revoke a decision made under subsection (1) about an action and substitute a new decision. See section 78.

....

Considerations in decision

(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

(a) the Minister must consider all adverse impacts (if any) the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3; and

(b) must not consider any beneficial impacts the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3.

Note: _Impact_ is defined in section 527E.

....

(2B) Without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), the Minister must not consider any adverse impacts of:

(a) any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply; or

(b) any forestry operations in an RFA region that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

The amending Act’s Explanatory Memorandum explained the reason for new s 75(2B) as follows:

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16 _Environment and Heritage Legislation Amendment Act 2006_ (Cth).

17 Subsection 75(2B) commenced on 19 February 2007: EPBC Act Note 1.
New subsection 75(2B) is to clarify that in making a controlled action decision, in relation to proposed developments, such as, a factory which will use timber from [an] RFA region, the Minister must not consider any adverse impacts of any RFA forestry operation (as defined in section 38) or a forestry operation in an RFA region (as defined in section 40). Sections 38 and 40 of the Act exempt RFA forestry operations and forestry operations in RFA regions from the need for approval under the Act. If these sections do not apply because of section 42 then new section 75(2A) [sic] inserted by this item also does not apply.18

New s 75(2B) effectively prohibits the Minister, in making fundamental s 75 screening and scoping decisions, from considering any adverse impacts of any RFA forestry operation or forestry operations in RFA regions.19

Soon after its commencement on 19 February 2007, s 75(2B) was applied by then Minister Turnbull in relation to Gunns Limited’s controversial proposal to construct a bleached Kraft pulp mill in Tasmania’s Tamar Valley. This provides a useful case study illustrating some of the problems inherent in s 75(2B).

5. Integrated Assessment of Gunns’s Pulp Mill by the RPDC: twice directed by State and Federal Governments

Gunns Limited proposes to construct and operate the world's fourth largest pulp mill at Bell Bay in Tasmania's Tamar Valley, north of Launceston.

On 22 November 2004, Tasmanian Premier Paul Lennon declared Gunns' pulp mill proposal a 'project of State significance' under s 18(2) of the State Policies and Projects Act 1993 (Tas).20 He referred it to Tasmania’s Resource Planning and Development Commission (RPDC), an ‘independent statutory body that is responsible, under the State Policies and Projects Act 1993, for carrying out integrated assessments of projects of State significance.’21

The RPDC is established by the Resource Planning and Development Commission Act 1997 (Tas). While not a court, it is a quasi-judicial body in the sense that its statute provides for it to conduct hearings, affording procedural fairness to all parties, in order to make legally binding determinations (appealable on questions of law to the Supreme Court of Tasmania).22

Once the Minister declares a proposal to be a ‘project of State significance’, the RPDC is invested with jurisdiction to assess the project against relevant guidelines. This integrated assessment process involves examination of all environmental, social, community and economic impacts of a proposal.23 The breadth of the assessment, which overrides other state laws, saves the proponent from having to make multiple applications to multiple authorities for permits, licences and other approvals.

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18 Environment and Heritage Legislation Amendment Act 2006 (Cth), Explanatory Memorandum, 30, [82].
19 For ‘factory’, read pulp mill. In particular, it seems likely that the controversial Gunns’ pulp mill proposal was a major driver in the Government’s drafting of new s 75(2B).
20 State Policies and Projects (Project of State Significance) Order 2004 (Tas).
The RPDC’s integrated assessment includes submissions then normally public hearings24 where competing evidence can be presented and tested through cross-examination:

The assessment of a project is an open and transparent process, designed to encourage public participation and input throughout the assessment. Public consultation is vital in allowing community, conservation, industry, local government and State government agencies the opportunity to contribute to the overall assessment process.25

The RPDC determined that both public submissions and hearings were necessary for the pulp mill assessment.26

On 23 March 2005, the Federal Minister decided that the RPDC’s integrated assessment (accredited by the EPBC Act bilateral agreement between Tasmania and the Commonwealth) was also the appropriate assessment method for EPBC purposes.

In August 2005 Gunns withdrew its first referral from the Commonwealth and referred an altered proposal, now specifying the company’s sole preferred location (Bell Bay) and excluding its previous alternative site (Hampshire in NW Tasmania). Furthermore, Gunns had originally claimed that ‘Only world’s best technology utilising a low impact Total Chlorine Free (TCF) mill will be looked at.’27 However, Gunns’ second referral proposed not TCF, but rather an Elemental Chlorine Free (‘ECF’) mill, thereby allowing use of chlorine compounds.

On 26 October 2005 the Federal Minister again decided that the second referral should be assessed by the RPDC’s integrated assessment.28

6. Gunns Withdraws from RPDC's Integrated Assessment: due process pulped

The RPDC process continued, but with disquiet - due largely to perceived Government interference. In early January 2007, the RPDC announced in rapid succession the resignations of two of the four members of its Pulp Mill Integrated Assessment Panel. These were:

- Dr Warwick Raverty, a Panel member with specialist pulp mill scientific expertise; and
- Julian Green, chairman of the Panel, the RPDC’s Executive Commissioner, and a highly respected former Secretary of Tasmania’s Department of Justice.

Both resignations were related to activities of the State Government’s Pulp Mill Task Force, which some perceived as giving rise to an apprehension of bias in Dr Raverty through its dealings with his employer. Green had previously asked the Premier to

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rein in the Task Force. The RPDC’s Annual Report later quoted Green’s notification to the RPDC that:

Upon investigation of the application by the Tasmanian and Australian Greens for the disqualification of Dr Raverty, fellow panel member, it has been discovered that activities of the Pulp Mill Task Force from as far back as February 2005 have given rise to circumstances which no longer make it possible for me to remain as chair and panel member.29

The Annual Report also made clear that the RPDC “…. did not receive a consistently high level of cooperation from [Gunns]”30 and that perceived delays in the assessment process were due to:

- vital information from Gunns containing “a number of omissions and errors”,31 and
- Gunns’ failure to supply corrected information within various timelines directed by the RPDC.32

For example, at a Directions Hearing on 22 February 2007, the new chair of the RPDC Pulp Mill Integrated Assessment Panel, former Supreme Court judge Christopher Wright QC, declared that responsibility for delays in providing material to the RPDC rested with Gunns. He set out a time line detailing remaining steps to complete the assessment process by the end of 2007, saying in relation to a December 2005 indication that the RPDC process may be concluded by 28 May 2007:

However, it has become quite apparent that due to accumulated delays, all or most of which appear to have resulted from Gunns failure or inability to comply with their own prognostications or the panel's requirements, that time line can no longer apply. This was obvious well before the October directions hearing last year and I think should come as no surprise to interested parties, least of all the proponent.33

Wright subsequently directed the RPDC’s Acting Executive Commissioner to write to Gunns telling the company it was critically non-compliant with certain RPDC requirements. The letter was drafted but delayed due to intervention by the Secretary of the Premier’s Department.34 Before it was sent, Gunns abandoned the RPDC integrated assessment process.

On 14 March 2007, Gunns announced in a statement to the Australian Stock Exchange and media release that it was withdrawing from the RPDC integrated assessment process and ‘had referred the project to the State Government’.35 This later phrase is curious as there was no State Government process to refer the project to, Gunns having deserted the extant (and only) process. As the RPDC’s Annual Report later noted:

30 Ibid at 9.
31 Ibid at 11.
32 Ibid at 11-13.
Of course whether an integrated assessment of a project of State significance proceeds, and upon what terms, is a matter for Parliament and not for a proponent.36

Gunn's justification for abandoning the RPDC process - previously endorsed by it - was that it was taking too long and the company required the project to be assessed within what it described as a 'commercial timeframe'. Suddenly, time was of the essence. Gunn's CEO, John Gay, claimed that delays were costing the company $1M a day. However, given that the RPDC had made clear that Gunn was responsible for the delays and Gunn had not countered this criticism, the real reason for abandonment of the RPDC has not emerged. It may be that Gunn saw its chances of approval through the RPDC process becoming increasingly remote.

7. Pulp Mill Assessment Act 2007 (Tas)

The next day, 15 March 2007, Premier Lennon made a Ministerial Statement to the Lower House of the Tasmanian Parliament. He brazenly announced the creation of a new and separate approvals process for the pulp mill, with legislation to be introduced into parliament the following week. Apparently, in the space of about 24 hours, the government had decided to legislate an assessment and approval process solely for Gunn's pulp mill.37

On 17 April 2007 the Pulp Mill Assessment Act 2007 (Tas) passed the Parliament and on 30 April 2007 received Royal Assent. It abandoned the RPDC's integrated assessment38 and instead provided for the Minister to appoint a consultant39 to assess the entire “project”40 against “guidelines”. However, the PMA Act’s “guidelines” were not the RPDC’s ‘Final Scope Guidelines for the Integrated Impact Statement (IIS): Proposed bleached kraft pulp mill in Northern Tasmania by Gunn’s Limited’, December 2005.41 Instead, the PMA Act defined “guidelines” as the ‘Recommended Environmental Emission Limit Guidelines for any new Bleached

37 Mr Lennon has since maintained, including on two occasions before an Upper House Select Committee, that he had no advance knowledge of the intention of Gunn to withdraw from the RPDC process on 14 March 2007. However, the Parliamentary Committee heard evidence from at least two key witnesses inconsistent with this account: Legislative Council Select Committee on Public Sector Executive Appointments, ‘Interim Report’ (Parliament of Tasmania, 2009), <http://www.parliament.tas.gov.au> 64-70.
39 Pulp Mill Assessment Act 2007 (Tas) s 4(1).
40 “project” is defined extremely widely in s 3(1) as meaning:
“the project declared by the Administrator to be a project of State significance on 22 November 2004 in Statutory Rules 2004, No. 111, being the proposal by Gunn Limited (ACN 009 478 148), as amended, for the development and operation of a bleached Kraft pulp mill in northern Tasmania including any use or development which is necessary or convenient for the implementation of the project, including but not limited to the development and operation of any facility or infrastructure for –
(a) the supply or distribution of energy to or from the mill; and
(b) the collection, treatment or supply of water; and
(c) the treatment, disposal or storage of waste or effluent; and
(d) access to or from the mill; and
(e) transport to or from the mill; and
(f) the storage of pulp at, or transport of pulp from, a sea port in the northern region or the north-western region; and
(g) the production of materials for use in association with the operation of the mill”.
Eucalypt Kraft Pulp Mill in Tasmania’, August 2004. These latter PMA Act “guidelines”, self-described as “non-statutory”, were inherently far narrower in scope, more generic than, and had been superseded by, the RPDC’s later work!

For example, the PMA Act guidelines contain one paragraph headed “Implications of various feedstocks”, noting “… some differences in the specific chemical composition between BEK effluents and effluents produced from other feedstocks”, and stating, \textit{inter alia}:

\begin{quote}
... There guidelines focus on emission limits and it will be up to any new pulp mill proponent to evaluate the capability of a potential mill to meet those limits. …
\end{quote}

By contrast, the ‘Final Scope Guidelines for the Integrated Impact Statement (IIS): Proposed bleached kraft pulp mill in Northern Tasmania by Gunns Limited’, December 2005 had specified 14 separate types of detailed information regarding the mill’s pulpwood supply – hardwood and softwood – that should be included in the IIS project description.54

Wood supply had been one of the concerns (along with the mill's water requirements and the Tamar Valley's air pollution problems) publicly raised by Dr Raverty following his resignation from the RPDC.46

Thus, the PMA Act, \textit{inter alia}:

\begin{itemize}
\item ended the integrated assessment;47
\item replaced the RPDC, \textit{et al}, an independent, quasi-judicial statutory body, with a consultant to be appointed by the Premier;49 and
\item grossly mismatched its vastly defined “project” with an assessment against narrow, generic, outdated emission “guidelines”.51
\end{itemize}

Once assessed, if the consultant recommended approval, then the Minister was to prepare a draft permit for consideration and approval by the parliament. Once both Houses endorsed the permit, the project was deemed to be approved, notwithstanding any other Tasmanian law.52

Furthermore, in terms of public participation, the PMA Act removes not only all public hearings which the RPDC had determined essential, but by s 11 precludes all appeal and review rights. Section 11 provides:

\textbf{11. Limitation of rights of appeal}

(1) Subject to subsection (3) and notwithstanding the provisions of any other Act –

(a) a person is not entitled to appeal to a body or other person, court or tribunal;

\begin{itemize}
\end{itemize}
(b) no order or review may be made under the *Judicial Review Act 2000*; or
(c) no declaratory judgment may be given; or
(d) no other action or proceeding may be brought –

in respect of any action, decision, process, matter or thing arising out of or
relating to any assessment or approval of the project under this Act.

(2) For the purposes of subsection (1), "any action, decision, process, matter or thing
arising out of or relating to any assessment or approval of the project under this
Act" includes any action, decision, process, matter or thing arising out of or
relating to a condition of the Pulp Mill Permit requiring that the person proposing
the project apply for such other permits, licences or other approvals as may be
necessary for the project.

(3) Subsection (1) does not apply to any action, decision, process, matter or thing
which has involved or has been affected by criminal conduct.

(4) No review under subsection (3) operates to delay the issue of the Pulp Mill Permit
or any action authorised by that permit.

Subsection 11(4) is most extraordinary in preventing even review for criminal
conduct from delaying issue of the Pulp Mill Permit or any action authorised by that
permit. The Bill, and s 11 in particular, were strongly criticised before the Bill was
passed and remain a source of much consternation in Tasmania.

The Supreme Court of Tasmania recently held that s 11(1)(b) precludes affected land
owners from obtaining any orders under the *Judicial Review Act 2000* (Tas),
including a statement of reasons for the conditions imposed on the Pulp Mill
Permit.

8. Effect of EPBC Act New s 75(2B) in Assessment of Gunns’ Pulp Mill

With the abandonment by Gunns and the Tasmanian Parliament of the RPDC
process, which had been assessing the project under the EPBC Act as well as State
legislation, Gunns now had no assessment process in place to secure approval under
the EPBC Act. So, on 28 March 2007 Gunns withdrew its second EPBC referral
then on 2 April 2007 resubmitted another (third) referral of its pulp mill proposal.

On 2 May 2007, the Hon. Malcolm Turnbull, (then) Minister for the Environment
and Water Resources (the Minister), made two critical assessment decisions under
the EPBC Act. First, assessing Gunns’ pulp mill as a controlled action, he
determined that the project be assessed only by ‘preliminary documentation’,
excluding public hearings. Second, he allowed 20 days for public comment on the
proposal. It must be acknowledged that the range of issues to be assessed under the
EPBC Act, ie matters of NES, were narrower than the RPDC process, which also
had to look at non-NES (State) issues. However, given that public involvement in

*Tasmanian Times* [http://tasmaniantimes.com/index.php/?weblog/article/comments-on-pulp-mill-
assessment-bill-2007] a copy of which was provided to all Legislative Councillors at a briefing by
the authors; Philippa Duncan, ‘Mill Bill under fire’, *Mercury* (Hobart), 27 March 2007.
54 See eg Tom Baxter, ‘A Tale of Two Municipalities – What About the Rest?’ 7 February 2008,
*Tasmanian Times* [http://tasmaniantimes.com/index.php/?article/pulp-polls-a-tale-of-two-
municipalities-what-about-the-rest] and numerous other articles and reports at [http://www.
tasmaniantimes.com] and elsewhere in Tasmanian media.
55 *Landon-Lane v Minister for Economic Development and Tourism and Premier of Tasmania*
the decision-making process had been stripped back from a right to participate and cross-examine witnesses in RPDC public hearings – which would have occurred over some months – to no involvement in the consultant’s desktop analysis under the Pulp Mill Assessment Act 2007 (Tas), the role of the national assessment had now become critical.

The Minister’s above two decisions were assisted by the fact that he avoided wood supply issues; his subsequent statement of reasons for the decisions stating:

… as required by subsection 75(2B) of the EPBC Act, I did not consider any adverse impacts of forestry operations before 2017 for the supply of wood chips to the proposed mill.56

Neither did the Minister examine such arrangements after the 2017 expiry of the Tasmanian RFA, describing these as uncertain and essentially speculative.

On 17 May 2007 The Wilderness Society instituted an application seeking judicial review of relevant decisions by the Minister. On 9 August 2007 this application was dismissed by Marshall J.57

The Full Court of the Federal Court (Branson, Tamberlin and Finn JJ) heard the Society’s appeal from 17-19 October 2007. On 22 November the Full Court, by majority (Tamberlin J dissenting), dismissed the appeal.58

Following is an extract from the Full Court’s summary of the effect of its reasons for judgment.

… The decisions [challenged] concerned the selection of the process by which the proposal by Gunns Limited to construct and operate a pulp mill at Bell Bay in northern Tasmania was assessed under the EPBC Act, the time provided for public comment as part of that process and the identification of the matters of national environmental significance to be considered in the course of that process.

The Full Court, in a majority decision, has dismissed the appeal from the judgment given by the primary judge.

All members of the Full Court rejected the following submissions of the Wilderness Society:

(1) that the referral by Gunns Limited to the Minister of its proposal to construct and operate a pulp mill at Bell Bay was invalid because Gunns Limited had withdrawn an earlier referral relating to the same proposed action;

(2) that the Minister denied the Wilderness Society procedural fairness in respect of his final approval decision by setting a period for public comment on the pulp mill proposal that was too short; and

(3) that in setting a period of 20 days for public comments on the pulp mill proposal the Minister acted for an improper purpose, namely to accommodate a time frame that suited the commercial interests of Gunns Limited.

The majority of the Court also rejected the submission of the Wilderness Society that the Minister was obliged to consider any adverse impacts on matters of national environmental significance of the forestry operations necessary to provide the wood chips to feed the pulp mill. The majority took the view that the EPBC Act discloses a


\[57\] The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1178. This trial judgment of Marshall J sets out various aspects of the pulp mill decision-making process, most beyond the scope of this paper.

clear legislative intent ordinarily to exclude forestry operations undertaken pursuant to Regional Forest Agreements (RFAs) from the assessment regime established by the EPBC Act. It noted that the Regional Forests Agreements Act 2002 (Cth) makes provision for a separate regime built upon RFAs which are required to take into account environmental and other values of national significance in relation to forestry operations. The Tasmanian Regional Forest Agreement was signed by the Australian and Tasmanian Governments in 1997.

The dissenting judge took the view that the obligation of the Minister to consider all adverse impacts of the proposed pulp mill was not limited by the Tasmanian Regional Forest Agreement in the way the majority held. Concluding that the Minister failed to consider whether the forestry operations necessary to supply wood chips to the pulp mill were incidental to the construction and operation of the mill, the judge held that the Minister erred by not considering the adverse effects which those forestry operations would have on matters of national environmental significance, as required by s 75(2)(a) of the EPBC Act. The judge accepted the submission of The Wilderness Society that the Minister had not properly understood or complied with his obligations, and that his decisions are therefore invalid.

At the time of the judgment the subject of this appeal the Minister had not given approval for the construction and operation of the pulp mill. The legality of that decision was therefore not directly challenged on this appeal. However, had the Full Court upheld the challenges made by the Wilderness Society to the Minister’s decisions, it would have found that the assessment process required by the EPBC Act was not conducted as required by law.

It is necessary to stress that the Federal Court has no jurisdiction to consider the merit or wisdom of any decision of the Minister. The sole concern of the Federal Court in this matter, both before the primary judge and on appeal, was the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge.59

Thus, the Court upheld the legality of the assessment process and its exclusion of adverse impacts of ‘upstream’ forestry operations to supply the mill’s wood. Given the facts of the case (see the trial judgment), its outcome also raises various other concerns as to the operation of EPBC Act, most beyond the scope of this paper.60

9. Pulp Mill Sustainability Issues Not Adequately Assessed
The Court’s application of s 75(2B) upheld the Minister’s refusal (in the face of many public submissions seeking the contrary) to consider any adverse wood supply impacts of any RFA forestry operations. Such impacts include, firstly, quantitative sustainability issues, eg ‘Can Tasmania’s forests produce enough

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59 Ibid.
60 For example, other concerns warranting further consideration include:

- the exclusion of public hearings from both the PMA Act and Turnbull’s EPBC Act assessment on preliminary documentation (especially given the importance the RPDC attached to public hearings);
- the ability of the proponent to withdraw one EPBC referral then submit another (its third) referral of the same proposed action, thereby obtaining a significantly less rigorous assessment method than the RPDC integrated assessment previously determined appropriate; and
- the decision that interested parties (eg the Wilderness Society) were owed no duty of procedural fairness by the Minister (especially in comparison to the RPDC’s statutory duty to provide procedural fairness to all parties to its hearings: see above n 24).
wood to supply a world-scale pulp mill for the next few decades?"61 A well-respected and experienced professional forest scientist considered this issue, concluding that:

projected wood supplies may not meet the requirements of the mill over its lifetime, and that supplying large amounts of wood to a pulp mill neglects existing and new opportunities to add greater value to wood.62

....

I can only conclude that omitting independent scrutiny of the wood supply from the ongoing assessment of the proposal was a flawed decision. ....63

Secondly, the case also leaves as lawful the perverse situation where the Minister considered impacts on members of threatened species unfortunate enough to inhabit the pulp mill construction site, but ignored the far greater ecological footprint of forestry operations required to supply the mill over its lifetime. Such forestry impacts affect nationally-listed endangered species which the Australian Government has international legal obligations to protect, eg the endemic Wedge-tailed Eagle – Tasmanian (Aquila audax fleayi) – total population estimated at less than 1,000 birds, consisting of an estimated 95 successful breeding pairs.64

Such wider forestry impacts were also excluded from the Minister’s subsequent approval decision whereby he granted Gunns Limited a 50-year approval to construct and operate the pulp mill and associated infrastructure.65 EPBC Act approval decisions are beyond the scope of this paper, except insofar as s 136(1) discussed below.

10. Unbalanced Triple Bottom Line Cost Benefit Analysis in Approvals and Conditions: EPBC Act s 136(1)(a)

Another problem for integrated assessment and ESD lies in the EPBC Act’s approval provisions, specifically s 136(1)(a).

Section 136 sets out the matters which the Minister must consider in a project approval decision. Subsection 136(1) provides:

136 General considerations

Mandatory considerations

(1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:

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62 Ibid.
63 Ibid, 33.
65 Minister’s Approval, EPBC 2007/3385. 4 October 2007, effective until 31 December 2057, did contain Conditions 14 and 15 to mitigate impacts on eagles from mill construction, but not upstream forestry.
(a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
(b) economic and social matters.

Impacts on / costs to controlling matters of NES are thus considered with (and liable to be weighed against perceived benefits of) ‘economic and social matters’ in the vital s 136 approval decision.

The current Independent Review of the EPBC Act persuasively identified a key problem regarding s 136. On the face of s 136(1)(a), there seems a real risk that it could be interpreted as ‘blinkering’ the Minister by limiting him/her to matters relevant to the controlling NES provisions, thereby preventing the Minister from considering any:

- non-controlling NES impacts or costs (there may be some, not considered ‘significant’ impacts); or
- non-NES environmental impacts or costs (eg significant impacts or costs on non-NES aspects of the environment).

There is the risk that the matters of NES limitation in s 136(1)(a) is liable to unduly restrict holistic Commonwealth environmental assessment and approval considerations, thereby undervaluing total (NES plus non-NES) environmental impacts/costs.

The approval problem is that, in marked contrast to s 136(1)(a), s 136(1)(b) simply requires the Minister to consider ‘economic and social matters’. Thus s/he is likely to consider the sum total of all economic benefits of a proposal, and not restrict these to economic benefits of ‘national significance’ as occurs under s 136(1)(a).

This could produce a systemic underweighting of environmental impacts relative to social and economic matters in s 136 approval decisions. This in turn could unduly weight s 136 approval decisions in favour of approval, or prevent the Minister imposing environmental conditions suitably adapted for the needs of the whole environment.

One might (optimistically) hope that State assessment processes would assess all non-NES environmental impacts. But even if this occurred, the State will not assess impacts on the whole environment (eg it can leave NES impacts to the Commonwealth). The State will compare non-NES environmental costs with the proposal’s total economic benefits. So State approval is also likely to be granted, again weighing a limited basket of environmental costs against the proposal’s total economic benefits.

An unedifying example of this problem occurred in the assessments of Gunns’ Tamar Valley pulp mill proposal after Gunns withdrew from the RPDC’s

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67 Especially given that s 136(5) expressly prohibits the Minister from considering any matters beyond the relevant considerations contained in Division 1 of Part 9 of the Act.
68 Note that in considering all the s 136(1) matters, s 136(2) requires that the Minister must take into account various factors, including the principles of ESD: s 136(2)(a), etc. Sections 137-140A contain some further environmental protections. However, while these extra provisions are very important, they do not overcome the imbalance between environmental and economic and social matters inherent in s 136(1).
Commonwealth-accredited integrated assessment which had been examining all environmental impacts, both non-NES and NES. Neither of the subsequent State nor Commonwealth separate assessments considered all environmental impacts, yet doubtless the approvals granted by both tiers of government were each based on assessments of total economic benefits, largely dependent on data provided or commissioned by the project proponent.69

Such a systematic flaw is liable to mitigate against balanced cost benefit analysis, the best interests of the overall environment, and achievement of the Act’s objects, including ESD.

It has, of course, been axiomatic to the Act that it restricts Commonwealth consideration of environmental matters to matters of NES.70 However, this is one limitation now worthy of reconsideration, at the very least in this s 136 context. Given that the Commonwealth’s extensive Constitutional power is now so apparent, particularly regarding corporations,71 it is less a question of what the Commonwealth can regulate than what it should. Section 136 is an area which should be reformed.

A better and more holistic approach would be if, once Commonwealth involvement is triggered by any matter of NES, then all environmental impacts (of NES and non-NES) are considered by the Commonwealth in:

- the EPBC assessment (possibly with some reliance on State processes if these provide adequate assessments of non-NES matter); and
- certainly, in the s 136 approval decision.

This would move EPBC Act approvals, and hence assessment, towards more of an integrated assessment approach.

To balance consideration of environmental matters with the ‘economic and social matters’ in s 136(1)(b), current s 136(1)(a) should be replaced with a provision to the following effect:

‘(a) matters relevant to any matter protected by a provision of Part 3 or any other aspect of the environment;’.

11. Conclusion

The EPBC Act’s objects purport, inter alia, to promote ESD principles, including integrated assessment. However, the Act’s RFA forestry exemptions mitigate against this and the Act’s environmental protection and biodiversity conservation goals.

The EPBC Act ss 38-40 RFA forestry exemptions are highly problematic. Adverse impacts of forestry operations in RFA regions may significantly damage

70 Independent Review of the EPBC Act (2009), Interim Report at [2.135]-[2.136].
matters of NES, eg nationally-listed threatened species such as the Tasmanian Wedge-tailed Eagle. Hence, such adverse impacts ought not be exempt from EPBC Act protections.

The s 75(2B) wholesale exemption from EIA of RFA forestry operations goes even further and is clearly ‘a bridge too far’. Assessment of a development such as construction and operation of Gunns’ Tamar Valley pulp mill ought (eco)logically include its impacts in:

- entrenching or furthering ‘upstream’ forestry operations to supply the mill; or
- otherwise affecting the intensity, locations, scale, timing, etc of forestry operations during the mill’s lifetime.

These are ‘impacts’ of such a project, even as that term is narrowly defined in the EPBC Act s 527E. Yet, s 75(2B) prohibits the Minister from considering such adverse impacts, thereby (as held by the Full Federal Court majority) preventing inclusion of their damaging effects on matters of NES in EPBC Act assessment. This illogically fetters Ministerial discretion with adverse environmental consequences.

Subsection 75(2B) (and various other amendments to the EPBC Act) commenced in February 2007. In March 2007, Gunns withdrew from the RPDC assessment which would have considered, inter alia, wood supply to the mill. In May 2007, s 75(2B) facilitated exclusion of forestry impacts from the EIA of Gunns’ pulp mill.

The Full Federal Court later upheld, by a 2-1 majority, the lawfulness of the Minister’s decision, s 75(2B) being instrumental to the Minister’s defence. However, as the Court was at pains to point out, it ‘has no jurisdiction to consider the merit or wisdom of any decision of the Minister’,72 its sole concern being ‘the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge’.73 Such legalistic limitations of ‘judicial review’ as undertaken by the Federal Court pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) are widely recognised. By comparison, most State environment courts and tribunals have broader jurisdiction enabling them to engage in merits appeals where they ‘stand in the shoes of decision-maker’ (as does the Commonwealth’s Administrative Appeals Tribunal). There is a strong argument that merits appeals should be available for a much wider range of EPBC Act decisions than is currently permitted, which would encourage better, more holistic, environmental decision-making.

Replacement of the RPDC’s integrated assessment with the far narrower Pulp Mill Assessment Act 2007 (Tas) and EPBC assessment on ‘preliminary documentation’, provided no such decision-making. On the contrary, by excluding inter alia, forestry impacts and public hearings, it split, dichotomised and truncated the assessment process. This ultimately enabled Minister Turnbull to grant a 50-year conditional approval for the pulp mill on 4 October 2007, shortly before the Federal election was called and the Howard Government entered caretaker mode.

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73 Ibid.
That approval decision, while beyond this paper’s scope, is subject to the s 136(1)(a) imbalance described in section 10 of the paper.

A further problem with the ss 38-42 and s 75(2B) exemptions is that they unfairly advantage forestry operations and forest-related development proposals over other industries which must obtain EPBC approval (possibly subject to conditions) before significantly impacting matters of NES. Deletion of these sections would place the forestry industry and forest-related development proposals on a level playing field (at least in EPBC Act terms – then there are subsidy issues!).

The best way to protect matters of NES from the impacts of RFA forestry operations would be to delete the EPBC Act ss 38-42 and s 75(2B). The EPBC Act contains plenty of mechanisms through which the Commonwealth could then assess the impacts of forestry operations in a place such as Tasmania and issue approval(s) as appropriate, subject to suitable conditions, eg to protect nationally-listed species. Subsection 136(1) ought also be reformed in the manner this paper has recommended.

These are only some of the reforms currently under consideration in the first ten year statutory review of the EPBC Act. They would, however, be a start in better equipping the Act to realise its objects in respect of sustainable development.

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74 In association with repeal of EPBC Act ss 38-42, the equivalent s 6(4) of the Regional Forest Agreements Act 2002 (Cth) should also be repealed.