Submission to the Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999

Michael Stokes*

I wish to submit that for the proper operation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA), the EPBCA should be amended in two ways to reverse the decision of the Full Court of the Federal Court in the Wilderness Society Case.[1] That decision weakens the system of environmental assessment established by the EPBC Act in two unfortunate ways:

1. It extends the exemption given to forestry and associated industries from assessment as controlled actions by exempting them from the requirements of the Act whether or not they are complying with Regional Forest Agreements. This undermines the system of environmental protection for forests which the Agreements establish by leaving the Commonwealth without any means of enforcing the Agreements or of requiring that forestry be conducted in accordance with the Agreements.

In my opinion, the decision ought to be reversed by amending s 38 of the EPBCA to read:

(1)Part 3 does not apply to an RFA forestry operation that the proponent can show will be undertaken in accordance with an RFA.

(1A) A proponent may show that an RFA forestry operation will be undertaken in accordance with an RFA by showing that it has systems in place to ensure compliance:

or some similar provision. The idea is not to force an environmental impact assessment of the proposed forestry, as that would defeat the purpose of the exemption, but to ensure that the proponent is taking reasonable measures to ensure compliance with the RFA.

2. the decision allows the proponent of an action which needs to be assessed and approved under the Act to walk away from an assessment process in order to seek a lower level of assessment. This appears to be inconsistent with the general purposes of the EPBCA, as it ignores the limits on the minister's power to reconsider the method of assessment and the costs to government and to interested third parties of allowing the proponent to force such a change.

In my submission, s 170C of the Act, which permits a proponent of a referral of an action for assessment and approval to withdraw the referral, should make it clear that a proponent who withdraws a referral does not have an unqualified right to re-refer the proposal. There are a number of ways in which this could be done. One is to impose a time limit, for example of two years in which a proponent who withdrew a referral would not able to re-refer substantially the same proposal. Such time limits are common in

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* LL B (Tas) M Phil (Oxon), Senior Lecturer, Law School, University of Tasmania, Locked Bag 89, Hobart Tas 7001.

[1] *Wilderness Society v Minister for the Environment and Water Resources* [2007] FCAFC 175

development control legislation. Another would be to prevent the Minister from considering a re-referral of a withdrawn proposal where a major reason for the withdrawal and re-referral was to force the Minister to reconsider whether the proposal was a controlled action or whether the required method of assessment was appropriate.

The Regional Forest Agreement exemption

I do not intend to argue that there should be no Regional Forestry Exemption or that all forest operations should be subject to assessment as controlled actions under the EPBCA. That would be impractical as it would be difficult to maintain a forest industry if all logging in every coupe had to be assessed and approved as a controlled action. Instead, the EPBCA should be amended so that before giving exemptions for large scale forest operations, there should be some obligation on the minister to ensure that logging operations will be conducted in accordance with the relevant Regional Forestry Agreement.

One of the major purposes of the EPBCA is to ensure that all actions, including development, which is likely to have an impact on the environment of concern to the Commonwealth are approved by the Commonwealth after an appropriate environmental impact assessment either by the Commonwealth or a State. It achieves this purpose by prohibiting actions which are found to be controlled actions under the Act until they have been assessed and the Minister has approved them on the basis of that assessment. A controlled action under the EPBC Act is an action which the Minister considers may have an adverse impact on matters of environmental concern to the Commonwealth.[2] Controlled actions are prohibited unless approved by the Minister after assessment and consideration of their relevant environmental impacts.[3] Impacts are relevant for this purpose if they are impacts on environmental matters of concern to the Commonwealth under the EPBC Act and include impacts on threatened species among others.[4] Under section 87, any assessment is limited to assessment of the relevant impacts of the controlled action, so that if an impact is not a relevant impact, it cannot be assessed or considered by the Minister, no matter how serious.[5]

In the *Wilderness Society Case*, the Full Court of the Federal Court decided that the Minister, when considering whether a proposed action was a controlled action, was not entitled to consider the adverse environmental impacts of forestry operations carried out for the purpose of that action. The effect of this decision was to rule out any assessment of the environmental impacts of forestry operations required for a major development, in

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[2] Environmental matters of concern to the Commonwealth are listed in Part 3 of the Act.
[3] EPBC Act s 67.
[4] Relevant impacts are impacts that the proposed action is likely to have on any matters protected by Part 3 which the Minister has decided may be affected by the action; EPBC Act s 82.
[5] Of course, it may be assessed and considered at the State level as the EPBC Act does not rule out the need for a State environmental approval.

this case the Tasmanian pulp mill, and to exclude them from consideration when deciding whether or not to approve that development.

The Court based its conclusion that the Minister was not entitled to consider the environmental impacts of forestry operations on its interpretation of the relationship between the EPBCA and Regional Forest Agreements, especially on s 75 of the EPBCA. Section 75 empowers the Minister to decide whether a proposed action is controlled and requires the Minister to take into account all the adverse environmental impacts of the action in making the decision. Section 75(2B) creates an exception to the duty to consider all adverse impacts, requiring that the Minister:

> must not consider any adverse impacts of:
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> (a) any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply; or
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> (b) any forestry operations in an RFA region that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

Part 4 Division 4 section 38 of the EPBC Act exempts any RFA forestry operation that is undertaken in accordance with an RFA from Part 3. When combined with s 75(2B), it prevents the Minister from taking into account adverse impacts of RFA forestry operations undertaken in accordance with the relevant RFA. Although not offering an explicit definition of 'undertaken in accordance with RFA' it is clear that the majority judgment interpreted that phrase as being equivalent to 'under an RFA' or 'on land subject to an RFA'.

This interpretation entails that the Minister is not to consider the impacts of RFA forestry operations on land subject to an RFA whether or not the forestry is or is likely to be carried out in a way which complies with the RFA. The majority's interpretation greatly weakens the RFA regulatory regime, because it exempts RFA forestry operations whether or not there is any evidence that they will be undertaken in accordance with the RFA, leaving the Commonwealth almost no role in the enforcement of RFA's. The relevant Commonwealth legislation, the *Regional Forest Agreement Act*, 2002, does not impose any duties on the Commonwealth or the States to enforce RFA's – and such a duty imposed on the States might well be invalid under the Melbourne Corporation Case implied immunities doctrine.[6] It also does not impose any duty to comply with RFA's on persons carrying out forestry operations in areas subject to RFA's.

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[6] In *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (the Melbourne Corporation Case) the High Court held that States were immune from Commonwealth laws which discriminated against them and/or interfered with their essential or basic functioning. The principles have been applied in a number of cases since and probably rule out any Commonwealth legislation attempting to impose a duty on the States to use their governmental powers in one way rather than another.

Another interpretation of the words of the second requirement is that 'undertaken in accordance with' means 'undertaken in compliance with', so that s 75(2D) only requires the minister to ignore the impacts of RFA forestry operations where there is evidence that they will be undertaken in compliance with the RFA. This interpretation is supported by the definition of RFA forestry operations itself, which, in the case of Tasmania, does not include all forestry operations on land subject to the Tasmanian RFA. Forestry operations on land where the RFA prohibits such operations are excluded from the definition and hence from the exemption from assessment under the EPBCA given by s 75(2D). Hence at the very least, the minister ought to be bound to consider whether forestry operations for a development such as the mill will be confined to land on which forestry operations are permitted by the RFA and to consider the impacts of forestry operations on land where such operations are prohibited by that agreement. In considering those impacts, the minister has the opportunity to enforce the prohibitions in the RFA, which are not enforceable under the RFA Act or the RFA itself, and which are not necessarily enforceable under State law.

In my opinion, this interpretation is more consistent with the policy behind the exemption, leaving RFA's to regulate the environmental aspects of RFA forestry operations and enforcing that system of regulation by providing that where there is no evidence of likely compliance, the operations fall to be assessed under the EPBC Act. It is unlikely that the EPBCA and the *Regional Forest Agreement Act* intended that there be no method of enforcing compliance with Regional Forest Agreements. The reason for section 38 was described in the explanatory memorandum as :

> The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the Environment Protection (Impact of Proposals) Act 1974. … The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management. These objectives are being pursued in relation to each region. The objects of this will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.

Those objects cannot be achieved unless there is some method of ensuring that RFA forestry is conducted in compliance with the relevant RFA.

For these reasons, in my opinion, the EPBCA should be amended to require the minister to consider whether RFA forestry will be undertaken in accordance with the RFA before exempting its impacts from consideration. As the RFA imposes a regulatory regime designed in part to protect the environment, the answer to this question in large part depends upon the systems the proponent of an action involving forest operations proposes to have in place to ensure compliance with its terms. Under my proposal, in the Tasmanian pulp mill case, as the Tasmanian RFA continues for close to another ten years, Gunns would have had to show that the systems it was proposing to have in place would have ensured compliance with the RFA during that period. If Gunns could not

show that, the minister would have had to assess the likely impact of forest operations for the mill on matters of Commonwealth concern during that period.

Alternatively, the *Regional Forest Agreement Act* should be amended to make it an offence to carry out logging in breach of an RFA. Although simpler, this proposal may fall foul of constitutional difficulties.

Allowing the proponent to restart the assessment

In the *Wilderness Society Case*, Gunns had referred the project to the Commonwealth for environmental impact assessment and approval under the EPBC Act in 2005 and the Commonwealth Minister for the Environment had accepted the Tasmanian RPDC integrated assessment for the purposes of the Commonwealth under s 87(1) of the EPBC Act. Gunns announced their withdrawal from the integrated assessment on 14 March 2007 and withdrew their referral of the proposal to the Commonwealth under the EPBC Act on 28 March 2007. On 30 March 2007, Gunns submitted a new referral of the project to the Commonwealth in substantially the same terms as the one they withdrew on 28 March.

Gunns withdrew and resubmitted the project to restart the approval process under the EPBC Act. Having withdrawn from the RPDC assessment, the only way to obtain Commonwealth approval was to restart the process from the beginning, by referring it again, allowing the Commonwealth minister to select a different method of assessment under s 87of the EPBCA. On 2 May 2007, the Minister decided that the project was to be assessed on the preliminary documentation under s 87(1) (b) of the Act and gave it his approval on 4 October 2007.

The Full Court decided that there was no bar to prevent Gunns from referring the proposed pulp mill a second time after having withdrawn the first referral. The Wilderness Society had argued that s 170C of the EPBC Act, which allowed the proponent of an action to withdraw it from the approval process, barred the proponent from resubmitting it at a later date. It relied on what it claimed was the natural meaning of s 170C(4), which reads:

> If the referral is withdrawn, the provisions of this Chapter that would, apart from this subsection, have applied to the action cease to apply to the action,

arguing that that provision entailed that once a referral had been withdrawn, sections such as s 75 and s 87, which require the minister to decide whether the referred action was a controlled action and to determine the method for assessing its impacts, cease to apply to the referral, preventing the minister from reconsidering it.

The Full Court rejected this argument and held that if a withdrawn referral was referred again, the minister's powers revived and he or she could reconsider the project. They arrived at this conclusion for two reasons. First, they relied on the natural meaning of 'cease', which they equated with 'stop', not 'permanently stop', pointing out that what

has ceased or stopped may start again.[7] Secondly, they held that the interpretation on which the Wilderness Society relied would lead to inconvenience as it would prevent a proponent who withdrew a proposal for financial or other good reasons, from ever resubmitting the proposal.[8] They also found support for this interpretation in the fact that the minister must consider actions, not referrals, so that it was logical to put in a provision laying down that once a referral of an action was withdrawn, it was no longer necessary for the minister to consider that action.[9] However, there was nothing in s 68, which requires that the proponents of controlled actions to submit them to the minister, to prevent a proponent who has withdrawn a referral, from re-referring the proposal.[10]

Although these reasons support the conclusion that the Act does not prevent a proponent who has withdrawn a referral from re-referring the same proposal, they do not justify the conclusion that the proponent has an unlimited right to do that. In the Gunns case, at the time that they withdrew and resubmitted the proposal, Gunns had withdrawn from the assessment process which the minister had selected under the EPBC Act, s 87(1)(a), an integrated assessment by the RPDC under the SPP Act (Tas). The Premier of Tasmania had announced that the State parliament would be asked to enact special legislation providing for the assessment of the mill by a consultant, but that legislation did not pass the State parliament for another month. That legislation revoked the Order declaring the project a Project of State Significance, taking away the RPDC's jurisdiction to assess it.[11] But at the time Gunns withdrew the referral, the project remained one of State Significance so that an integrated assessment by the RPDC was still possible.

This raises the question, does a proponent who has withdrawn from the selected assessment have the right to withdraw the referral and restart the process, effectively requiring the minister to reconsider the original choice of assessment process. If the answer to that question is an unqualified yes, it opens up real possibilities of abuse of process. Some of the assessment processes are extremely time consuming and expensive, such as that of a public enquiry. If a proponent can withdraw a referral and resubmit it a couple of days later, there is nothing to stop a proponent from withdrawing from an expensive assessment, such as a public enquiry, because of a perception that it is going badly, and resubmit in order to seek a different assessment a few days later.

Common sense suggests that if the Act permits such strategic withdrawals, the appropriate decision for the minister would be to require that the proposal be resubmitted to the original assessment, which could then continue from where it left off. But it is not clear that such a decision would be valid. The Act is silent on the issue of how the re-referral of a withdrawn referral is to be dealt with. Therefore, if a proponent re-refers a withdrawn proposal, it seems that the process must start again, requiring the minister to

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[7] *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 at [16]
[8] id.
[9] Ibid [20].
[10] Ibid [21].
[11] *Pulp Mill Assessment Act* section 13 and Schedule 2.

make fresh decisions about whether the proposed action is a controlled action and, if it is, how it is to be assessed.

These problems suggest that there may be limits on the right of a proponent to re-refer a withdrawn proposal, especially as the minister only has a limited power to reconsider a decision that a proposed action is a controlled action for the purposes of the Act, and almost no power to reconsider a decision to select one method of assessment rather than another. The power to reconsider whether an action is a 'controlled action' is limited to cases in which the Minister of the State or Territory within which the action is to occur requests that the decision be reconsidered,[12] new information about the likely impacts of the action is available to the minister or there has been a substantial change in circumstances affecting the likely impacts of the action or the power to authorise the action had been vested in a State by a provision of a bilateral agreement which is no longer in force or in a Commonwealth agency under an accredited management arrangement or authorisation process which is no longer in force.[13] The power to reconsider a decision with reference to the method of assessment, is much narrower, being limited to the power to order an enquiry instead of a public environment report or environmental impact statement.[14]

There would be little point in imposing these limits on the minister's power to reconsider a decision that an action is controlled or that it is to be assessed in a particular way if the proponent could force the minister to reconsider these decisions by the expedient of withdrawing and re-referring the project. Hence it is likely that the EPBCA intended that the proponent should not be able to withdraw and re-refer a proposal for no other reason than to avoid the limits on the minister's powers to reconsider an earlier decision that the proposal was a controlled action or that it was to be assessed in one way rather than another. The purpose of the sections of the EPBC Act which empower the minister to decide that an action needs to be assessed and to determine the method of assessment is to ensure the proper assessment of proposals which have the potential to harm aspects of the environment which are of concern to the Commonwealth. It is inconsistent with that purpose for a proponent to withdraw and re-refer a proposal with the aim of obtaining a more favourable method of assessment by a back door route. Therefore, s 170C, which permits a proponent of a referral of an action for assessment and approval to withdraw the referral, should make it clear that a proponent who withdraws a referral does not have an unqualified right to re-refer the proposal. There are a number of ways in which this could be done. One is to impose a time limit, for example of two years in which a proponent who withdrew a referral would not able to re-refer substantially the same proposal. Such time limits are common in development control legislation. Another would be to prevent the Minister from considering a re-referral of a withdrawn proposal where a major reason for the withdrawal and re-referral was to force the Minister to reconsider whether the proposal was a controlled action or the proposed method of assessment.

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[12] EPBC Act section 79
[13] Ibid section 78.
[14] Ibid section 90.