17th February 2009

Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eca.sen@aph.gov.au

Dear Sir/Madam

Updated Submission: operation of *Environment Protection and Biodiversity Conservation Act 1999*

I refer to my submission of 22nd September 2008 to the above inquiry. In anticipation of tomorrow's hearing, please find following an updated version of my submission. I would be grateful if you could please distribute copies of this update to members of the Committee.

My updated submission still concerns the Inquiry's Terms of Reference (2)(e), namely, "the effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply".

I consider some of the Act's objects, legislative amendments and recent judicial decisions regarding the EPBC Act's exemptions for RFA forestry operations. My conclusion is that these leave nationally-listed forest species and habitats grossly under-protected and thereby prevent Australia meeting certain of its international obligations. Accordingly, EPBC Act amendments are urgently required and I respectfully urge the Committee to consider those I have proposed.

My updated submission largely mirrors a submission I made to the Independent Review of the EPBC Act and which has now been published on the Review's website.

Please note that views expressed in this updated submission are my own and do not claim to represent views of my employer, the University of Tasmania.

Yours faithfully

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In s 3(1)(ca): Replace 'provide for the protection and conservation of' with 'protect and conserve'.

2. Sections 38-42: Forestry operations in certain regions

Delete ss 38-42 inclusive.

Delete s 6(4) of the *Regional Forest Agreements Act 2002* (Cth).

3. Subsection 75(2B): Does the proposed action need approval?

Delete new subsection 75(2B) from s 75.

Justifications for these recommendations follow.

B. Recommended Key Amendments to the EPBC Act and Justifications

1. Subsection 3(1): Objects of the Act

1.1 Recommendation:

In s 3(1)(a): Replace 'provide for the protection of' with 'protect'.

In s 3(1)(c): Replace 'promote the conservation of' with 'conserve'.

In s 3(1)(ca): Replace 'provide for the protection and conservation of' with 'protect and conserve'.

1.2 Justification:

For the reasons outlined below, the current wording prefacing ss 3(1)(a) and (ca) 'to provide for the protection ….':

- legally, does not require the actual provision of protection; and
- as such, is insufficient to meet Australia's obligations under international conventions.

1.2.1 Objects of the Act - paragraphs 3(1)(a) and (ca)

The objects of the EPBC Act set out in s 3(1) 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
>
> (c) to promote the conservation of biodiversity; and
>
> (ca) to provide for the protection and conservation of heritage; and
>
> …[1]

1.2.2 Meaning of 'to provide for the protection of …' and inadequacy thereof

Case law makes clear the legal inadequacy of 'provide for' in the objects of the Act which governs the select aspects of the Australian environment deemed 'matters of national environmental significance'.[2] For example, in the *Wielangta case*,[3] the Federal Court was asked to consider whether the Tasmanian RFA met the definition of 'RFA' in the *Regional*

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[1] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1).

[2] 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.

[3] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (Marshall J, 19 December 2006). See also: *Forestry Tasmania v Brown* [2007] FCAFC 186 (Sundberg, Finkelstein and Dowsett JJ, 30 November 2007); Vanessa Bleyer, '*Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (19 December 2006) – Federal Court finds logging unlawful' (2006) 4 *National Environmental Law Review* 25-30; Shashi Sivayoganathan, '*Forestry Tasmania v Brown*: Biodiversity Protection – An Empty Promise?' (2007) 3 *National Environmental Law Review* 21-28: *Brown v Forestry Tasmania* [2008] HCATrans 202 (Kirby, Hayne and Crennan JJ, 23 May 2008); <http://www.on-trial.info>.

Forest Agreements Act 2002 (Cth) ('RFA Act'). Section 4 of the RFA Act defined 'RFA' as an agreement in force between the Commonwealth and a State in respect of a region or regions and which satisfied certain conditions, relevantly including:

> (b) the agreement provides for a comprehensive, adequate and representative reserve system; and
> (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions ...

Justice Marshall stated in his judgment, *inter alia*:

> **The Commonwealth's contentions**
>
> 195 The Commonwealth submits the phrase 'provides for' in the definition of RFA in the RFA Act does not mean 'requires' or 'establishes' in a legally enforceable manner. All that is relevantly required, according to the Commonwealth, is that the RFA establishes a structure or policy framework which facilitates or enables the creation or maintenance of a CAR Reserve System and the implementation of ESFM practices.
>
> 196 The Commonwealth notes the use of 'provides for' instead of 'provide' and refers to dictionary definitions of 'provides for' which emphasise the making of arrangements for, rather than the actual provision of, something.
>
> 197 The Commonwealth and Forestry Tasmania refer to the judgment of the Full Court of the Supreme Court of New South Wales in *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932 ('*Stocks and Parkes Investments'*) at 940, where the Court said:
>
> *'There is a great difference between the verb "provide'' and the verb "provide for" or "make provision for" and it is this difference which gives a clue to the construction of cl. 16. The difference between "provide" and "provide for" is that the former means to give or to make available in fact, while the latter looks to the planning stage alone. You provide for a school site by "looking forward" and planning accordingly. You provide a school site by actually making it available.'*
>
> **Consideration**
>
> 198 I accept the submissions of the Commonwealth and Forestry Tasmania concerning the meaning of 'provides for'. I see no reason to doubt the analysis of the Full Court of the Supreme Court of New South Wales in *Stocks and Parkes Investments*.[4]

If interpreted as in the above quote, the 'provide for' preface in EPBC Act ss 3(1)(a) and (ca) would drastically qualify the remainder of both paragraphs. The objects of the EBPC Act – Australia's primary environment and heritage statute[5] – ought be to provide or ensure the protection and conservation of the environment, biodiversity and heritage: the Act ought not risk these goals being undermined by retaining the 'provide for' qualification.

Furthermore, the EPBC Act 'provides the domestic legal framework for implementing Australia's obligations under a number of international conventions related to the environment'.[6] As such, Australia's obligations under these conventions provide minimum

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[4] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (Marshall J, 19 December 2006) [195] – [198]. See also *Forestry Tasmania v Brown* [2007] FCAFC 186 (Sundberg, Finkelstein and Dowsett JJ, 30 November 2007) [70] – [73].

[5] Australian Government Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Discussion Paper* (2008) i <http://www.environment.gov.au/epbc/review/publications/discussion-paper.html>.

[6] Ibid 3. The Discussion Paper lists:

baseline content which ought be adequately incorporated in relevant objects of the Act. Relevant conventions include, for example, the World Heritage Convention[7] under art 4 of which each State Party:

> … recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.[8]

The World Heritage Convention also provides under art 5:

> To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country … to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.

- the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* done at Ramsar on 2 February 1971 (Ramsar Convention);
- the *Convention Concerning the Protection of the World Cultural and Natural Heritage* done at Paris on 23 November 1972 (World Heritage Convention);
- the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* done at Washington on 3 March 1973;
- the *Convention on the Conservation of Migratory Species of Wild Animals* done at Bonn on 23 June 1979 (Bonn Convention); and
- the *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (Biodiversity Convention).

[7] Convention Concerning the Protection of the World Cultural and Natural Heritage. Adopted by the General Conference of UNESCO, 17th Session. Done at Paris, 23 November 1972. 1037 UNTS 151, 11 ILM 1367 (entered into force 17 December 1975).

[8] World Heritage Convention art 4. The World Heritage Convention arts 1 and 2 define "cultural heritage" and "natural heritage" in arts 1 and 2 respectively:

> **Article 1**
>
> For the purposes of this Convention, the following shall be considered as "cultural heritage":
>
> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.
>
> **Article 2**
>
> For the purposes of this Convention, the following shall be considered as "natural heritage":
>
> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
>
> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The 'provide for' preface in EPBC Act objects ss 3(1)(a) and (ca) does not meet the standards required by the World Heritage Convention arts 4 and 5. These articles require Australia to 'ensure' protection, conservation, etc, not merely 'provide for' them – particularly given the weak meaning of 'provide for' under Australian law.

For the reasons outlined above, the words 'provide for' should be deleted from ss 3(1)(a) and (ca) and replaced with 'provide' or (preferably, consistently with the World Heritage Convention arts 4 and 5) 'ensure'. Specifically:

In s 3(1)(a): Replace 'provide for' with 'provide' or 'ensure'.

In s 3(1)(ca): Replace 'provide for' with 'provide' or 'ensure'.

Either amendment would be preferable to the status quo, though my preference would be the latter, replacing 'provide for' with 'ensure' to make the language consistent with Australia's obligations under the World Heritage Convention.

I have not researched the legal meaning of 'promote', however, consistently with the above (and in order to ensure Australia's compliance with its international obligations such as under the Biodiversity Convention), I also recommend amending ss 3(1)(b) and (c) to replace 'promote' with 'provide' or preferably, 'ensure'. Specifically:

In s 3(1)(b): Replace 'promote' with 'provide' or 'ensure'.

In s 3(1)(c): Replace 'promote' with 'provide' or 'ensure'.

2. Sections 38-42 Forestry operations in certain regions

2.1 Recommendation:

Delete sections 38-42 inclusive.

2.2 Justification:

EPBC Act approval requirements and exemption of RFA forestry operations

The EPBC Act, Part 3, prohibits the taking of an action that does, will or is likely to significantly impact an aspect of the environment that is a matter of national environmental significance, unless approved (under Part 9) by the Federal Environment Minister.[9] These prohibitions also provide the basis for various civil penalties and offences in Part 3. However, these prohibitions and offences are subject to exceptions in Part 4 of the Act.

Particularly 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*.[10]

[9] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Part 3.
[10] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38. Section 38 is mirrored by s 6(4) of the RFA Act.

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.[11]

Thus, all such 'forestry operations' are exempted from Part 3 which contains the Act's vital protective provisions.

The current Tasmanian RFA applies across the State until 2017.[12]

In the *Wielangta case*,[13], after a lengthy trial and hearing from many witnesses, the trial judge found, *inter alia*, that Forestry Tasmania's operations in the Wielangta Forest:

- were significantly impacting three endangered species; and
- had not been carried out in accordance with the Tasmanian RFA, essentially because Forestry Tasmania was failing to meet commitments in the Tasmanian RFA to protect such species.[14]

On 23 February 2007, the (then) Tasmanian Premier Paul Lennon and PM John Howard signed into effect a variation to the Tasmanian RFA in order to circumvent the trial judgment in the *Wielangta case*.

This Tasmanian RFA variation, *inter alia* provided in new clause 68 that the Tasmanian and Australian Governments 'agree' on paper that the Tasmanian CAR reserve system and management strategies 'protect rare and threatened flora and fauna species and Forest Communities'. It thereby overrode the Federal Court trial judgment which had found that such protection was not and would not occur in *Wielangta* (let alone elsewhere in Tasmania).[15]

This RFA variation, without public consultation nor independent scientific assessment, in the face of the trial judge's finding of fact to the contrary, and overriding court orders before the hearing of an appeal, effectively gutted through the stroke of the Premier and Prime Ministerial pens the requirement to actually 'protect' nationally listed species.

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[11] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).
[12] A scheduled review in 2012 will consider processes for renegotiation of the agreement.
[13] Above n 3.
[14] *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (Marshall J, 19 December 2006). The trial judge also criticised some Forestry Tasmania witnesses for their manipulation of evidence: see eg *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (Marshall J, 19 December 2006) [120], [132], [161].
[15] Details and text of this Tasmanian RFA amendment are available at <http://www.on-trial.info>, specifically at <http://www.on-trial.info/tasrfa.htm>.

The Full Federal Court subsequently overturned Marshall J's decision, without relying on the RFA variation.[16] The Full Court's conclusion on s 38 of the Act made it unnecessary for it to examine the grounds of appeal disputing the primary judge's findings about the degree of protection provided to the three species.[17] In essence, as senior counsel for Forestry Tasmania later told the High Court, Forestry Tasmania 'lost on the facts and on the law at trial; [but] won on the law before the Court of Appeal.'[18]

The High Court did rely on the RFA variation when, by 2-1 majority (Kirby J dissenting), it refused an application by Senator Brown for special leave to appeal.[19] Giving the High Court's reasons, Hayne J stated:

> ….
>
> Clause 68 of the 1997 agreement provided that, "The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions". The applicant contended and the respondent denied that in order to meet that requirement it was necessary to show that the relevant CAR Reserve System or the relevant management prescriptions protected the priority species referred to. The respondent asserted and the applicant denied that implementation of the system, or the prescriptions, was the agreed method of protecting the relevant species and that it was neither necessary nor appropriate to embark upon an inquiry about their efficacy.
>
> The Full Court of the Federal Court accepted the respondent's argument. It is not necessary for us to decide whether the Full Court was right to do that. In particular, it is not necessary to consider whether the construction of clause 68 in the form it took in 1997, which was adopted by the Full Court, is a construction that takes sufficient account of the purposes of the legislation for which and under which the agreement was made.
>
> In 2007 the 1997 agreement was varied and a new clause 68 agreed. The new clause provided that, "The Parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities".
>
> It has long been recognised that an appellate court exercising powers of the kind given to the Full Court of the Federal Court as to which – see *Allesch v Maunz* (2000) 203 CLR 172 and *CDJ v VAJ* (1998) 197 CLR 172 – may have regard, in considering whether to allow an appeal against the grant of a permanent injunction, to facts and circumstances occurring after the initial grant. See *Attorney-General v Birmingham, Tame & Rea District Drainage Board* [1910] 1 Ch 48 and on appeal to the House of Lords [1912] AC 788.
>
> That being so, having regard to the terms of the substituted clause 68 of the relevant regional forestry agreement, an appeal to this Court against the decision of the Full Court to dissolve the injunction that had been granted at first instance would enjoy insufficient prospects of success to warrant a grant of special leave to appeal.
>
> It also follows from what has been said that we are of the opinion that an appeal on grounds relating to the powers of the Full Court of the Federal Court to have regard to the terms of the amended clause would also enjoy insufficient prospects of success. We would refuse special leave.[20]

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[16] *Forestry Tasmania v Brown* [2007] FCAFC 186;

[17] Ibid [103]. See Shashi Sivayoganathan, '*Forestry Tasmania v Brown*: Biodiversity Protection – An Empty Promise?' (2007) 3 *National Environmental Law Review* 21-28.

[18] *Brown v Forestry Tasmania* [2008] HCATrans 202 (Kirby, Hayne and Crennan JJ, 23 May 2008) at <http://www.austlii.edu.au/au/other/HCATrans/2008/202.html> lines 566-567.

[19] Ibid.

[20] Ibid lines 763-806.

Consequently, the applicable Australian law is that laid down by the Full Federal Court plus the Tasmanian RFA variation, which remains in force to this day.

The combined effect of:

- EPBC Act ss 38-42;
- the decisions of the Full Court and High Court in the *Wielangta case*; and
- in Tasmania, the variations to the Tasmanian RFA signed by the (then) Premier Lennon and PM Howard in February 2007

is to nullify any meaningful obligation for RFA forestry operations to protect MNES (matters of national environmental significance), eg nationally listed endangered species. Arguably, given the significant impacts of RFA forestry operations on such species (at least in Tasmania)[21], this legal situation places Australia in breach of certain of its obligations under international law.[22]

A further concern is that the enforcement of RFAs (a Commonwealth responsibility) appears to rely far too heavily on state authorities:

> In general, complaints about alleged breaches of RFAs are investigated by relevant Australian Government agencies working co-operatively with state authorities. As the states are the on-ground managers, they are directly responsible for implementing RFA provisions and hold all relevant management plans and compliance mechanisms.[23]

In my view, the best way to protect MNES from the impacts of RFA forestry operations would be to delete EPBC Act ss 38-42. 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.

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.
> …
> (4) 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.

In association with deletion of EPBC Act ss 38-42, it would be necessary to also delete s 6(4) of the *Regional Forest Agreements Act* 2002 (Cth).

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[21] See *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (Marshall J, 19 December 2006) and <http://www.on-trial.info>.

[22] See relevant of the conventions listed at n 6, eg the World Heritage Convention, Biodiversity Convention.

[23] Australian Government Department of Agriculture, Fisheries and Forestry (September 2008), Submission to the Senate Standing Committee on Environment, Communication and the Arts Senate Inquiry into the Operation of the *Environment Protection and Biodiversity Conservation Act 1999*, 7 <http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub86.pdf>.

3. Subsection 75(2B)

3.1 Recommendation:

Delete new subsection 75(2B) from s 75.

3.2 Justification:

3.2.1 RFA forestry operations exempted from consideration in project assessment: s 75(2B)

In December 2006, the Australian Parliament passed substantial amendments[24] to the EPBC Act. These included, *inter alia*, the insertion of a new s 75(2B).[25] 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 *Environment and Heritage Legislation Amendment Act 2006*, Explanatory Memorandum, explained the reason for new s 75(2B) as follows:

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[24] *Environment and Heritage Legislation Amendment Act 2006* (Cth).
[25] Subsection 75(2B) commenced 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.[26]

The insertion of EPBC Act s 75(2B) had the effect of prohibiting the Minister, in making fundamental s 75 screening and scoping decisions, from taking account of any adverse impacts of any RFA forestry operations, nor any forestry operations in RFA regions.[27]

Soon after its commencement on 19 February 2007, s 75(2B) was applied by then Minister Turnbull in relation to the controversial proposal by Gunns Limited 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).

3.2.2 Role of EPBC Act new s 75(2B) in assessment of Gunns Limited's Tamar Valley pulp mill

For present purposes, relevant EPBC Act facts regarding Gunns' Tamar Valley pulp mill proposal can be found set out in the trial judgment of Marshall J in *The Wilderness Society Inc v Hon. Malcolm Turnbull, Minister for the Environment and Water Resources*.[28]

The Full Federal Court judgment[29] subsequently noted some relevant events, including the following.

- Gunns' first and second referrals of its pulp mill proposal, and Commonwealth decisions that the appropriate assessment process was an Integrated Impact Assessment conducted by Tasmania's Resource Planning and Development Commission (RPDC), a form of assessment accredited under the EPBC Act.
- On 14 March 2007 Gunns advised the RPDC it had decided to withdraw the pulp mill from the RPDC. The next day Tasmania's Premier foreshadowed the introduction of special legislation for a separate approval process for the mill.

The rapidly introduced Tasmanian legislation (the *Pulp Mill Assessment Act 2007* (Tas)) was rushed through the Tasmanian Parliament, enacted and commenced on 30 April 2007. It provided for a consultant appointed by the Minister to assess entire the mill project against specified narrow guidelines. These guidelines related only to emissions from the mill, not other of its impacts.

On 2 April 2007, the (then) Department of the Environment and Water Resources received Gunns' resubmitted pulp mill referral. On 2 May 2007, the Hon. Malcolm Turnbull, (then) Minister for the Environment and Water Resources (the Minister), decided the manner of EPBC Act assessment process for Gunns' latest pulp mill referral. The Minister's decisions relevantly included that the assessment approach to be used was assessment on preliminary documentation, with 20 business days for public comment.

The Minister's subsequent statement of reasons for these decisions stated that:

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[26] *Environment and Heritage Legislation Amendment Act 2006* (Cth), Explanatory Memorandum, 30, [82].

[27] 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).

[28] [2007] FCA 1178. See also the subsequent Full Court 2-1 decision: *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

[29] *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

> …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.[30]

Neither did the Minister examine such arrangements after the 2017 expiry of the Tasmanian RFA, considering these 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.[31] 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.[32]

Following is 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 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

[30] *The Wilderness Society Inc v Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178 at [97].
[31] *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178.
[32] *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

> 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.[33]

Thus, the Court dismissed the challenge to 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 raises various concerns as to the operation of EPBC Act, most beyond the scope of this submission.

The case, *inter alia*, leaves as lawful the ridiculous situation where the Minister considered impacts on members of threatened species unfortunate enough to inhabit the pulp mill site, but ignored the much wider impacts of forestry operations required to supply the mill over its lifetime. Such forestry impacts affect nationally-listed endangered species like the endemic Wedge-tailed Eagle - Tasmanian (*Aquila audax fleayi)* – total population estimate less than 1,000 birds, consisting of an estimated 95 successful breeding pairs.[34] These impacts were also excluded from the Minister's approval when he subsequently granted Gunns Limited a 50-year approval to construct and operate the pulp mill and associated infrastructure.[35]

Subsection 75(2B) also prevented the Minster from considering other wood supply issues, eg 'Can Tasmania's forests produce enough wood to supply a world-scale pulp mill for the next few decades?'[36]

A well-respected and experienced professional forest scientist has considered this issue and concluded 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.[37]
>
> ….
>
> I can only conclude that omitting independent scrutiny of the wood supply from the ongoing assessment of the proposal was a flawed decision. ….[38]

3.2.3 Conclusion

Adverse impacts of forestry operations in RFA regions may well damage matters of national environmental significance, eg nationally-listed threatened species such as the Tasmanian Wedge-tailed Eagle. Hence, such adverse impacts ought not be exempt from EPBC Act, particularly not as currently done by s 75(2B).

Assessment of a major development proposal such as construction and operation of Gunns' Tamar Valley pulp mill ought include its impacts in entrenching or furthering 'upstream' forestry operations to supply the mill, or otherwise affecting the locations, scale, timing, etc of

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[33] Ibid.
[34] Australian Government, Department of the Environment and Water Resources, 'Recommendation Report prepared for EPBC Project 2007/3385 ....', August 2007, 10, [13] <http://www.environment.gov.au/epbc/notices/assessments/2007/3385/pubs/recommendation-report.pdf>.
[35] Minister's Approval, EPBC 2007/3385. 4 October 2007, effective until 31 December 2057, did contain Conditions 14 and 15 to mitigate mill construction impacts on eagles, but not upstream forestry impacts.
[36] Chris Beadle, "Tasmania's Pulp Mill: The Forgotten Issue Is Wood Supply", October 2007 *Australian Science*, 32-33 (See Attachment), 32.
[37] Ibid.
[38] Ibid, 33.

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 (another provision which should be amended). Yet, if adverse, s 75(2B) prohibits the Minister from considering such impacts, thereby (as held by the Full Federal Court majority) preventing their inclusion in EPBC Act assessment – even their damaging effects on matters of national environmental significance.

The EPBC Act ss 38-40 forestry exemptions are highly problematic for environmental protection and biodiversity conservation. This is particularly so given the amendments to the Tasmanian RFA made by Paul Lennon and John Howard to override the trial judgment in the *Wielangta* case.

However, even if ss 38-40 (which this author considers bad policy) were retained, the s 75(2B) wholesale exemption from EIA of RFA forestry operations is clearly 'a bridge too far'.

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 wood supply to the mill. In May 2008, s 75(2B) facilitated exclusion of forestry impacts from the EIA of Gunns' pulp mill. The Full Federal Court upheld, by a 2-1 majority, the lawfulness of the Minister's decision. However, as the Court was at pains to point out:

> 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.[39]

The exclusion of forestry impacts and replacement of the RPDC with assessment on 'preliminary documentation' 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.

It seems likely that s 75(2B) was drafted and enacted in December 2006 with intent to facilitate an easier assessment and approval of Gunns' pulp mill. If so, it has served its purpose and should now be repealed. If not, it should never have been enacted.

A cynic might also ask whether there was any relationship between the commencement of s 75(2B) on 19 February 2007 and Gunns' withdrawal from the RPDC in March 2007, then resubmission of a new referral of precisely the same project on 30 March 2007. Certainly, the Minister's decisions on Gunns' third referral of 30 March made full use of s 75(2B).

Be that as it may, s 75(2B) is bad policy. It unreasonably fetters Ministerial discretion and undermines the Act's efforts to protect MNES. Subsection 75(2B) should now be repealed as soon as possible.

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 proponents. Deletion of these sections would (at least in EPBC terms) place the forestry industry and forest-related development proposals on a level playing field with other industries which must obtain EPBC approval (possibly subject to conditions) before significantly impacting MNES.

4. Attachment

Dr Chris Beadle, 'Tasmania's Pulp Mill: The Forgotten Issue Is Wood Supply', October 2007 *Australian Science*, 32-33.

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[39] *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.