

# **The Need to Retool Australian EIA to Conserve Biodiversity Impacted by Forestry**

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## **Abstract**

A statutory amendment, commenced in 2007, prevents Australian Federal EIA from considering adverse impacts of most forestry operations. This amendment, and subsequent court judgments, enabled 50-year development approval of a major bleached Kraft pulp mill, without consideration of any adverse impacts of any forestry operations – including those to supply the mill during its lifetime.

This paper examines an exemption in Australian Federal EIA then considers the recent application of the exemption in a controversial case study.

## **1. Objects of Australia's principal EIA legislation**

The principal Australian statute for EIA is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) [the EPBC Act]. It governs the protection of a range of aspects of the environment considered 'matters of national environmental significance'.<sup>2</sup>

The objects of the EPBC Act 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;<sup>3</sup>

In order to achieve its objects, the Act relevantly states that it, *inter alia*:

- (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;<sup>4</sup>

## **2. 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.<sup>5</sup> 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*.<sup>6</sup>

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<sup>2</sup> 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.

<sup>3</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1). The EPBC Act defines five 'principles of ecologically sustainable development' in s 3A.

<sup>4</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2).

<sup>5</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Part 3.

<sup>6</sup> *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.<sup>7</sup>

Thus, all such ‘forestry operations’ are exempted from the Part 3 prohibitions and offences.

### 3. RFA forestry operations exempted from consideration in EIA screening and scoping

In December 2006, the Australian Parliament (both Houses then controlled by the former Howard Government) passed substantial amendments<sup>8</sup> to the EPBC Act. These included, *inter alia*, the insertion of a new s 75(2B).<sup>9</sup> 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;

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<sup>7</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).

<sup>8</sup> *Environment and Heritage Legislation Amendment Act 2006* (Cth).

<sup>9</sup> Subsection 75(2B) commenced 19 February 2007: EPBC Act Note 1.

on the matter protected by each provision of Part 3.

Note: *Impact* is defined in section 527E.

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**(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:

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.<sup>10</sup>

Thus, the insertion of EPBC Act s 75(2B) was clearly intended to ensure that the fundamental s 75 screening and scoping decisions cannot take account of any adverse impacts of any RFA forestry operations, nor any forestry operations in RFA regions.<sup>11</sup>

#### **4. Effect of EPBC Act s 75(2B) on EIA for Gunns Limited's Tamar Valley pulp mill**

The Tasmanian RFA applies across the State until 2017.<sup>12</sup> For present purposes, relevant EPBC Act EIA facts regarding Gunns' Tamar Valley bleached Kraft pulp mill proposal (including Gunns' March 2008 withdrawal from the EPBC accredited assessment process, and fast-track Tasmanian legislation) are set out in the initial judgment of Marshall J in *The Wilderness Society Inc v Hon. Malcolm Turnbull, Minister for the Environment and Water Resources*.<sup>13</sup>

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, "...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."<sup>14</sup> Neither did the Minister examine such arrangements after the 2017 expiry of the Tasmanian RFA, considering these uncertain and essentially speculative.

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<sup>10</sup> *Environment and Heritage Legislation Amendment Act 2006* (Cth), Explanatory Memorandum, 30, [82].

<sup>11</sup> 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).

<sup>12</sup> A scheduled review in 2012 will consider processes for renegotiation of the agreement.

<sup>13</sup> [2007] FCA 1178. See also Australian Government, Department of the Environment and Water Resources, 'Gunns Limited/Manufacturing/Bell Bay/TAS/Kraft Pulp Mill and ancillary chemical production and infrastructure' Reference Number: 2007/3385 at

<[http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=referral\\_detail&proposal\\_id=3385](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=referral_detail&proposal_id=3385)>.

<sup>14</sup> *The Wilderness Society Inc v Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178 at [97].

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.<sup>15</sup> 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.<sup>16</sup>

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 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.<sup>17</sup>

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<sup>15</sup> *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178.

<sup>16</sup> *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

<sup>17</sup> *Ibid.*

Thus, the Court dismissed the challenge to the EIA and its exclusion of consideration of adverse impacts of ‘upstream’ forestry operations to supply the mill’s wood. Such forestry impacts on 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<sup>18</sup> – 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.<sup>19</sup>

## 5. Conclusion

Adverse impacts of forestry operations in RFA regions may well damage matters of national environmental significance, eg nationally-listed threatened species. Hence, such adverse impacts ought not be exempt from EPBC Act EIA as currently under 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 forestry operations during its lifetime. These are ‘impacts’ of such a project as defined in the EPBC Act s 527E. 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 EIA – even their damaging effects on matters of national environmental significance.

The EPBC Act ss 38 and 40 forestry exemptions are highly problematic for environmental protection and biodiversity conservation.<sup>20</sup> However, even if ss 38 and 40 (which the author considers bad policy) were accepted for day-to-day forestry operations, the s 75(2B) wholesale exemption from EIA of RFA forestry operations is ‘a bridge too far’.

Subsection 75(2B) (and various other amendments to the EPBC Act) commenced in February 2007. Shortly thereafter, in May 2008, it facilitated exclusion of forestry impacts from the EIA of Gunns’ pulp mill, upheld by the Full Federal Court. This EIA limitation ultimately enabled the Minister to grant a 50-year conditional approval for the pulp mill before the Federal election was called (sending the Government into caretaker mode) in October 2007.

It is thus submitted that s 75(2B) prevents Australian EIA “optimizing biodiversity conservation in development decisions”.<sup>21</sup> Following the approval of Gunns’ pulp mill, the EPBC Act now needs reform to “assist decision makers in making development choices that have better outcomes for biodiversity conservation”.<sup>22</sup> As a start, at the very least, s 75(2B) ought be repealed as soon as possible.

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18 Australian Government, Department of the Environment and Water Resources, ‘Recommendation Report prepared for EPBC Project 2007/3385 ....’, August 2007 at 10, [13]

<<http://www.environment.gov.au/epbc/notices/assessments/2007/3385/pubs/recommendation-report.pdf>>.

19 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.

20 See eg: *Forestry Tasmania v Brown* [2007] FCAFC 186 (30 November 2007) (the *Wielangta* case); 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; <<http://www.on-trial.info>>.

21 IAIA08 description of Topic Stream 5b ‘Retooling EIA for Optimizing Biodiversity Conservation in Development Decisions’.

22 *Ibid.*