

**The EPBC Act Ten Years On: the Gunns Method of Assessment Case as a Key Indicator: notes for a QELA Seminar held on Monday 29 June 2009**  
**Speaker: Stephen Keim**

## **Introduction**

The *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth) (“the EPBC Act”) was born in an atmosphere of controversy and optimism, occurring as it did as a result of a negotiation process between the Democrat senators and the Howard government, with the passage of the legislation creating a goods and services tax as the *quid pro quo* for the Democrats’ input.

The EPBC Act commenced operation on 16 July 2000. It was assented to on 16 July 1999. We are, therefore, approaching the tenth anniversary of its passage through the Parliament.

With the commencement of the *Environment and Heritage Legislation Amendment Act (no.1) 2006* on 12 December 2006, the EPBC Act received an overhaul.

The proposed Gunns pulp mill at Bell Bay in northern Tasmania has featured in the public mind and in the conduct of election campaigns. I have chosen to look at the legal challenge, both at first instance and on appeal, to the decision by the Minister to assess the proposal on the basis of preliminary documentation, thereby, eschewing the production of an environmental impact statement. The mill received its approval on 4 October 2007. That decision was also the subject of an unsuccessful legal challenge.<sup>1</sup>

On 2 May 2007, the Minister for the Environment, Malcolm Turnbull, made a decision under s.75 EPBC Act that the proposed mill was a controlled action for the purposes of the Act. He also made a decision under s.87 EPBC Act that the relevant impacts of the mill be assessed on preliminary documentation.

The Wilderness Society Inc. challenged both decisions. At first instance, Federal Court Justice Marshall dismissed the application.<sup>2</sup> The decision was upheld by the majority of the Full Federal Court.<sup>3</sup>

The purpose of this paper is to outline aspects of the approvals process decision both at first instance and on appeal. At the end of the paper, I will set out some comment, mainly from others, about the effectiveness of the EPBC Act during its 10 year history in improving outcomes for the Australian environment.

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<sup>1</sup> The decision of the Minister to approve the mill was challenged by Lawyers for Forests Inc. That application was also unsuccessful and was dismissed by Federal Court Justice Tracey on 9 April 2009. *Lawyers for Forests v Minister for the Environment Heritage and Arts* [2009] FCA 330.

<sup>2</sup> *The Wilderness Society Inc v Turnbull* [2007] FCA 1178. See also *Investors for the Future of Tasmania v the Minister* [2007] FCA 1179 which was heard at the same time as and the decision in which was handed down on the same day.

<sup>3</sup> *The Wilderness Society v Turnbull* [2007] FCAFC 175.

## **The Assessment Process: First Instance**

### The Background History

Aspects of the previous history of the pulp mill proposal are relevant to the grounds raised in the application before Justice Marshall. On 22 November 2004, the project had been designated a project of State significance under Tasmanian legislation. Four days later, the Premier, Paul Lennon, had referred the project to the State Resource Planning and Development Commission for assessment. The project had been referred to the Commonwealth Minister, Senator Campbell, on 13 December 2004 by Gunns. On 24 January 2005, Senator Campbell designated the project as a controlled action and, on 23 March 2005, determined, under s.87 EPBC Act, that the method of assessment would be an integrated impact assessment under the State legislation. This meant that the RPDC would assess the matters relevant to both the State and Commonwealth approvals processes.

However, soon after, in May, 2005, Gunns changed aspects of its proposal. On 15 August 2005, a notice appeared on the Commonwealth Department's website advising that the referral had been withdrawn; a new referral had been made; that the project was a nominated controlled action; that public comment would not be sought in respect of the appropriate approvals process; but that previous comments would be taken into account.

On 5 October 2005, Senator Campbell decided that the proposal the subject of the second referral was a controlled action and, on 26 October 2005, decided that the method of assessment would be the accredited State assessment process being carried out by the Tasmanian RPDC which was in the process of resetting its process in accord with Gunns' changes to the original proposal. After participating in the revised RPDC process for over 15 months and producing some 10,000 pages in two tranches in support of its revised project, Gunns announced on 14 March 2007 that it was withdrawing from the RPDC process.

Although the Tasmanian Parliament passed special legislation for a new approvals process, this was not an accredited process. Gunns still had to obtain its Commonwealth approval.

In the second half of March 2007, communications between the Department and the Minister on the one hand and Gunns, on the other, discussed the process of withdrawing the existing (second) referral and replacing it with another (third) referral. During the morning of 30 March 2007, the Department website showed the second referral as withdrawn. That evening, the third referral was lodged electronically with the Department.

On 24 April 2007, the Department recommended assessment by preliminary documentation pursuant to s.95 EPBC Act. That is, the Minister would be satisfied that he already had sufficient information to assess the proposal being the material provided by Gunns; advice from the department; appropriate investigations; and public comments

submitted on the referral. Clearly, this involved something well short of an assessment by Public Environment Report or Environmental Impact Statement. On 2 May 2007, the Minister followed the advice of the Department and announced that the subject of the third referral was a controlled action and that the assessment process to be used was by preliminary documentation. The public were given 20 business days to provide comments to Gunns.

This decision provoked outrage among sections of the public but was it in any way unlawful? The following discussion examines a number of the grounds which were argued and the basis on which they were rejected by Justice Marshall.

### Was There a Valid Withdrawal?

Section 170C EPBC Act permits a person to withdraw a proposal to take an action “by written notice to the Minister”. Subsection 170C(3) requires the Minister, if a notice is received, to “publish notice of the withdrawal in accordance with the regulations”. Regulation 6B.01 states that the notice must be published at an appropriate position on the internet and specifies what it must contain including the date of the withdrawal.

Gunns had foreshadowed that it would withdraw the second referral in a letter dated 28 March 2007. It failed, however, to forward any notice of withdrawal. In the third referral, it referred to the second referral as being “replaced by this referral”.

Justice Marshall held that neither s.170C nor regulation 6B.01 said anything about the notice of withdrawal from the proponent other than that it be in writing. He held that there was no relationship between what the regulation required go up on the internet and what the proponent must provide. He held that the words “replaced by this referral” in the third referral constituted the necessary written notice that the second referral was withdrawn. He held that the internet notice was in error in advising of a withdrawal two days earlier when, as a matter of fact, that withdrawal would not happen for another eight hours (after the posting on the internet). However, applying *Project Blue Sky v ABA*,<sup>4</sup> Justice Marshall held that no issue of invalidity arose.

### Could a Valid Third Referral be Made

The applicant argued that s.170C(4) which provides: “If the referral is withdrawn, the provisions of [ss.66-170C] that would, apart from this sub-section have applied, cease to apply to the action”. The argument drew attention to the fact that the sub-section referred to the “action” and not the “referral”. Since the new referral involved the same “action”, it could not be validly assessed because s.170C provided that the provisions which provided for assessment did not apply. It was argued that such a reading was appropriate because, otherwise, proponents could simply keep on withdrawing referrals until they got a minister who would give them the type of assessment process they desired and approved of.

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<sup>4</sup> (1998) 194 CLR 355 at [91]-[97].

Justice Marshall rejected the argument. Referring to both textual provisions and matters going to the purpose of the provision, he held that subs.170C(4), when it referred to “action”, intended the particular action as the subject of the withdrawn proposal. He held that the EPBC Act does not prohibit the same action being the subject of a new referral. That would amount to a new “action” for the purpose of the section.

#### Upstream Impacts: Regional Forest Agreements and s.75

This argument was one of the arguments repeated in the appeal and I discuss its treatment on appeal later in this paper. The argument found favour with Justice Tamberlin, the minority judge in the Full Court of the Federal Court. The Minister expressly stated that he did not take into account, in assessing the mill proposal, the impact of forestry operations (harvesting of trees) during the period (up to 2017) during which the current regional forest agreement (“RFA”) operated.

The Minister relied on subs.75(2B) EPBC Act which provides that “... the Minister must not consider any adverse impacts of any RFA forestry operation to which, under Division 4 of Part 4, Part 3 (the controlled impacts provisions) does not apply or any forestry operations in an RFA region that may, under Division 4 of Part 4, be undertaken without approval under part 9.

The applicant argued that the s.75(2B) exclusion only applied when a forestry operation itself was being assessed. Division 4 of Part 4 excludes RFA forestry operations that are undertaken in accord with an RFA. However, s.42 excludes the exclusion in respect of certain RFA forestry operations that occur in certain protected areas but also in respect of forestry operations that are “incidental to another action whose primary action does not relate to forestry”.

Justice Marshall held that s.42 was not applicable because that section was concerned with forestry operations and the proposed mill was not a forestry operation. Therefore, he gave subs.75(2B) an unrestricted application in respect of this proposal. In the Full Court, the judges would turn their attention to the meaning of “incidental to another action” to decide whether it was, indeed, the incidental nature of forestry operations for the pulp mill that meant that subs.75(2B) did not apply to the assessment of the pulp mill.

#### Procedural Fairness

The applicant argued that the decision to proceed by way of preliminary documentation and the content of that denied procedural fairness to the applicant and members of the public wanting to make submissions. The argument emphasised the size, impact and complexity of the proposal; the previous history of the matter including the fact that the RPDC process did not proceed to its conclusion; and the period for giving comments to Gunns of being restricted to just 20 business days.

Justice Marshall rejected the argument, finding that s.131AA(7) (which provides a right of a proponent to comment on the tentative decision of the Minister to approve or

disapprove, including to impose conditions) is an exhaustive statement of the extent to which procedural fairness applies under the EPBC Act other than is expressly provided for in the Act. Since there was no breach of the literal requirements of the Act, there was no failure to accord procedural fairness.

### Apprehended Bias

The applicant argued that the decision to adopt assessment by preliminary documentation was such as to raise a reasonable apprehension of bias among fair-minded observers. The applicant relied, *inter alia*, on the demise of the previously adopted RPDC assessment at the behest of the proponent; that the Minister and the Department wanted to fit in with the proponent's timetable; that the Minister had advised the proponent to lodge a third referral; and that the government had expressed strong support for the pulp mill.

Justice Marshall rejected the submissions and, in doing so, relied strongly on evidence from a departmental officer that he had recommended assessment of preliminary documentation; that the Minister had questioned the officer about the adequacy of that form of assessment; and that he (the officer) had formed the view that 20 days would be adequate time within which members of the public could comment.<sup>5</sup>

Justice Marshall relied on High Court authority<sup>6</sup> for the proposition that, as long as the steps required by legislation are taken by the Minister, the government is not precluded from having a policy position.

Justice Marshall held that "a well-informed observer could [not] reasonably form the view that the Minister was biased towards the preliminary documentation assessment approach to the extent that he was not prepared to even consider alternative approaches which he clearly did".

### Improper Exercise of Power

The applicant argued that the decision to proceed by way of assessment on preliminary documentation and the adoption of a 20 day time limit for consultation involved an improper exercise of power by the Minister in that it was made for a purpose or included a purpose other than that for which the power was conferred.

The applicant stated that the attainment of the commercial imperatives of a proponent is not a purpose for which the power was conferred. The decision, the applicant argued, was made for the purpose of meeting the timelines which Gunns had laid down.

Justice Marshall, in rejecting the argument, refused to go behind the Minister's reasons. The Minister said he considered that adequate information was available to make a decision. Therefore, despite the fact that he must have been aware of Gunns' desires and

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<sup>5</sup> The officer said, in evidence, that "it was the job of the Department, and not of the public, to perform the assessment". See paragraph 61.

<sup>6</sup> *Hot Holdings v Creasy* (2002) 210 CLR 438 at [50].

the fact that assessment by preliminary documentation met Gunns' guidelines, he simply exercised the power because he had decided that assessment by preliminary documentation was "the best approach to fit the facts and circumstances".

Justice Marshall applied a statement by Justice Gaudron of the High Court<sup>7</sup> that "An improper purpose will not lightly be inferred and, by application of a presumption of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power".

## **The Decision on Appeal**

On appeal,<sup>8</sup> the Wilderness Society relied on four grounds. The Court of Justices Branson, Tamberlin and Finn agreed in dismissing the grounds that the third referral was invalid because the second referral had been withdrawn; that procedural fairness had been denied by setting a 20 day time limit for public consultations; and that the Minister had acted for an improper purpose in setting a 20 day limit, namely, the purpose of meeting the commercial imperatives of Gunns.

It is the fourth ground relating to whether the adverse impacts of the forestry operations required to operate the mill were wrongly excluded from consideration that I will discuss in this paper.

It will be recalled that subs.75(2B) EPBC Act provides:

"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."

Part 3, of course, comprises the controlling provisions of the EPBC Act which refer to declared World Heritage Properties; listed threatened species; and other environmental factors of "national significance". While Part 4 has the effect that Part 3 is not applicable to RFA forestry operations that are undertaken in accordance with an RFA, the provisions of s.42 provide an exception to the exclusion. Section 42 provides:

"[Part 4 does] not apply to RFA forestry operations, or to forestry operations, that are:

- (a) in a property included in the World Heritage List; or
- (b) in a wetland included in the List of Wetlands of International Importance in the Ramsar Convention; or
- (c) incidental to another action whose primary purpose does not relate to forestry.

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<sup>7</sup> *Industrial Equity v Deputy Commissioner of Taxation* (1970) 170 CLR 649, 672.

<sup>8</sup> *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and water Resources* [2007] FCAFC 175.

Presumably, there is no intention to source the timber for the pulp mill from the reserve areas listed in paragraphs (a) and (b) of s.42 EPBC Act. The argument for the applicant depended on paragraph (c) applying.

Paragraph 42(c) has two separate elements which must be both satisfied. If they are satisfied, then Division 4 does not operate to exempt forestry operations from the controlling provisions of the Act. In turn, subs.75(2B) EPBC Act does not exclude the adverse effect of any relevant forestry operation from consideration under and for the purposes of s.75.

Counsel appearing for the Minister (with the agreement of Counsel for Gunns) conceded that the primary purpose of the pulp mill did not relate to forestry. This meant that the second element of paragraph 42(c) that the primary purpose of the pulp mill did not relate to forestry was satisfied.

The first element of paragraph (c) thus became relevant. The question thus became for the Full Court whether the forestry operations to supply the pulp mill were “incidental” to the mill.

Both the majority who dismissed the appeal, Justices Branson and Finn, and Justice Tamberlin, who would have allowed the appeal, agreed that “incidental” had a meaning that would have made it necessary to consider the adverse impacts of the forestry operations required to supply the mill and a meaning that would have excluded those operations from being considered. The majority and the minority disagreed on which meaning was the correct meaning to apply. Each did it confident that the context and the purpose of the provisions made it clear that the meaning chosen was correct.

#### The Majority: Justices Branson and Finn

The majority referred to a meaning of “incidental” indicating a relationship of “fortuitousness”. They acknowledged, however, that especially in the phrase (as in s.42) “incidental to”, “incidental” means “liable to happen in connection with” or “naturally appertaining to”. They acknowledged that, if the second meaning applied (as the phrase “incidental to” indicated, the Wilderness Society would win the argument and the case.

The majority’s reasoning is encapsulated in the following paragraph:<sup>9</sup>

“[the “fortuitous” interpretation] effectuates what we consider is the purpose of the EPBC Act considered in the context of the RFA Act and the RFA regime. It exempts from Part 3 forestry operations connected with actions for which the use of product from RFA operations forms an essential or indispensable part. Such operations, related as they are to forest industries, are of the very type which the RFA regime would be assessed in accordance with its scheme and in effectuation of that Act’s purposes. In contrast, where there are forest operations that are only adventitiously or fortuitously connected with another action, it is in our view intelligible that, when the adverse impacts of **that** action are being considered, all adverse impacts including from forestry operations should be considered” (Emphasis in the original.)

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<sup>9</sup> Paragraph 52.

## Justice Tamberlin

Justice Tamberlin did not decide that either one or other meaning of “incidental” had to be applied because they were not mutually exclusive. However, both context and purpose assisted Justice Tamberlin to decide that the minister was wrong in excluding from his consideration the adverse impacts of forestry operations required to supply this mill. He said:<sup>10</sup>

“The interpretation of ‘incidental to’ favoured by the majority in this case could produce the odd result whereby fortuitous or subordinate logging on a relatively small scale, such as a one-off activity to clear part of a forest to make space for the construction of a road or school or playing field, would be covered by s.42(c) as incidental, yet other essential forestry operations on a very large scale and having much greater impacts over several decades in relation to many millions of tonnes of harvested timber would be regarded as not incidental. In my view, this anomalous consequence points strongly against the interpretation favoured by the majority.

Furthermore, an interpretation of s42(c) that limits the application of the provision to fortuitous small scale logging which is not essential to an action does not, in my view, accord with the purpose to which s42 is directed. Section 42 lists three specific exceptions to the requirement in the Act that Part 3 is not to apply to an RFA forestry operation conducted in accord with an RFA. Two of these exceptions arise where important matters of international environmental significance are at stake, namely, sites on the World Heritage List or the List of Wetlands of International Importance. In this context, it would be incongruous to construe the third exception in s42(c) in a way which confines its application to fortuitous or subordinate forestry operations which ... may be of much less significance. The preferable interpretation in my view is one which treats the third exception set out in s42(c) as having a level of importance and significance proportionate with the other exceptions in s42.”

Of course, the view of the majority prevailed and the challenge by the Wilderness Society to the approval was unsuccessful in the Full Court of the Federal Court.

## **Some Minor Observations**

The challenge to the method of assessment decision in the Gunns Pulp Mill case is but one of a considerable number of attempts to challenge decisions of the Minister in recent times.<sup>11</sup>

I chose this decision in particular because decisions in respect of the Gunns proposal have been the source of much public disquiet about the way in which the EPBC Act has been implemented by Ministers. The decision to proceed by way of preliminary documentation to assess a project that had been removed by the proponent from the State RPDC process (already accepted as an accredited process) and involved a \$1.3 billion pulp mill with

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<sup>10</sup> Paragraphs 113-114.

<sup>11</sup> See, for example, *Lawyers for Forests v The Minister* [2009] FCA 330 (Gunns pulp mill approval); *Lansen v The Minister* [2008] FCA 189 (Macarthur open cut mine) (successful); *Your Water Your Say v The Minister* [2008] FCA 670 (Gippsland desalination plant); *Anvil Hill Project Watch association v The Minister* [2007] FCA 1480 (Hunter Valley Coal Mine); *Blue Wedges v The Minister* [2008] FCA 399 (Port Phillip Bay channel dredging).

ocean outfall caused much public outrage and there was a real sense that the proponent was getting a free ticket to approval. Similar concerns were felt about the eventual decision to approve in circumstances where it appeared that conditions associated with the Environmental Impact Management Plan were more about obtaining information that really was required to assess the project after all rather than the process of ongoing monitoring normally associated with an EIMP. This decision was also the subject of an unsuccessful challenge by way of judicial review.<sup>12</sup>

The other piece of decision making which, in my opinion, created equal amounts of public concern involved the actions of Senator Campbell in obstructing a wind farm project in western Victoria by relying on assessments of one fatality per thousand years or less to the Orange Bellied Parrot as his justification not to approve the wind farm project. Although this was the effect of the reports received by the Minister, it is doubtful whether he ever actually told the public that that was the effect of the reports on which he relied. James Prest has written an excellent narrative and analysis of that particular debacle.<sup>13</sup>

As the above discussion, hopefully, shows, the arguments in judicial review of decisions by Ministers made under the EPBC Act are likely to be complex, multi-faceted and technical. Any attempt to summarise what happened in a case runs the risk of simplifying in a way that departs markedly from reality.

Such challenges involve a very close analysis of the quite lengthy and detailed provisions of the EPBC Act so far as they relate to environmental impact assessment. They involve an equally detailed analysis of the decision making processes including the reasons given.

In recent times, the challenges have been overwhelmingly unsuccessful.<sup>14</sup> Reading the cases tends to indicate that the matters which cause most disquiet to the public will, in most cases, be unlikely to give rise to a successful challenge.<sup>15</sup> Unless the Department or a Minister has made an obvious procedural error or a patently wrong interpretation has been followed, judicial review is difficult. The law is particularly reluctant to conclude that a decision has been made for a wrong purpose unless no other possible conclusion is arguable.

At the end of the day, the public's perception of the EPBC Act will be dependant upon the actions of those who administer it. Those members of the public who expect the environment minister to act only with the purpose of the Act in mind, putting party political considerations to one side, will be, I think, sorely disappointed. No matter what

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<sup>12</sup> [Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts \[2009\] FCA 330 \(9 April 2009\)](#) (Tracey J.)

<sup>13</sup> James Prest, *The Bald Hills Wind Farm Debacle*, in Bonyhady and Christoff, editors, *Climate Law in Australia*, The Federation Press, 2007. pages 230-261.

<sup>14</sup> The one marked exception is *Lansen v Minister for Environment and Heritage* [2008] FCAFC 189 (17 December 2008), the challenge to the approval of the open cut lead and zinc mine at MacArthur River in the Northern Territory.

<sup>15</sup> This is true of *Lansen*.

is said in the debates in the Parliament, when the power comes to be exercised, Ministers do not see themselves as required to show the impartiality we normally associated with judges and honest brokers.

### **Further Reflections**

Since we are discussing a decade of the EPBC Act, it is probably salutary to reflect more widely. The whole concept of environmental impact assessment has been criticised as producing illusory benefits. The Federation Press is publishing, later this year, a book containing a series of essays comprising case studies on the workings of the environmental impact assessment regimes at national, State and Territory level. In an early draft of his Introduction to the book, the editor, Tim Bonyhady of the Australian National University quotes a criticism from 1995 in the following terms:

“As Lex Brown and G T McDonald recognized in 1995 in an essay marking more than twenty years of EIA in Australia, environmental assessment had ‘proved to be popular because it is easily understood, easy to pass legislatures, is in most instances extremely discretionary in its triggers and contents, tends not to be very threatening to most power structures and yet gives the impression that something is being done about the environment’.<sup>16</sup>

Professor Bonyhady, in the same introduction, draws on international studies which suggest that, more than a decade later, EIA makes a limited if not negligible contribution to obtaining better environmental outcomes from development approval decisions. The case studies in the book are no less discouraging, according to Professor Bonyhady. He summarises the operation of the EPBC Act in the following terms:

“The Commonwealth story is one of a government with vast, almost plenary power in relation to the environment, choosing to exercise very little of it. While the *Environmental Protection and Biodiversity Conservation Act* introduced by the Howard government in 1999 was generally heralded as an advance on earlier federal legislation, it has seen the Commonwealth repeatedly examining projects through a very narrow lens which excludes many of the most significant environmental impacts. The federal government’s general practice for almost a decade has been one of making assessments at a very low level, imposing conditions which add little or nothing to State permits, largely failing to monitor compliance with these conditions<sup>17</sup> and, even in cases of clear, serious breaches, being very slow to take enforcement action so that the abundant criminal and civil penalty provisions in the Act have been almost dead-letters.”

Professor Bonyhady also suggests that the Commonwealth Department trumpets, as achievements of its legislation, safeguards and restrictions that have been imposed at a State level. He includes the Iluka sand mine in Western Australia and the mechanisms for the protection of Carnaby’s Cockatoo in respect of that mine as one such example.

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<sup>16</sup> Professor Bonyhady was quoting from A L Brown and G T McDonald, ‘From Environmental Impact Assessment to Environmental Design and Planning’, *Australasian Journal of Environmental Management*, vol 2, 1995, p 65.

<sup>17</sup> The Commonwealth’s monitoring performance is being called into question by litigation concerning the Paradise Dam in Queensland.

After revisiting the deficiencies of the approvals process for the Iwasaki Resort in Queensland in the 1970s, Professor Bonyhady finds a depressing lack of improvement in the case studies undertaken for the book. On the conduct of consultants, he says:

“In some respects the system has got worse. For all the limitations of the report commissioned by Iwasaki into its resort, [Iwasaki’s consultant]’s substantial criticisms of the project are now startling, revealing a degree of independence almost never displayed by consultants today when preparing impact statements. Regardless of the deficiencies of a project, it is almost unimaginable that consultants now would emulate [Iwasaki’s consultant] and find such fault with their employer’s plans, let alone recommend the project’s relocation. The general expectation of consultants engaged in this work is that they will serve as advocates of the proposal – justifying them with the least possible environmental modifications.<sup>18</sup>

Professor Bonyhady also criticises the assessment processes under the EPBC Act for the limited scope of the Act’s focus, especially when assessment at the State level has been inadequate. As an example of this, he uses the Gunns’ approval process:

“The result, for example in relation to the Gunns pulp mill, is that the federal government has been prevented from considering the air pollution, odours, greenhouse emissions, water and forest impacts of the mill. Far from being able to redress a State process where, as the *Australian* has observed, the Tasmanian government’s ‘fast-track of the mill was closer to a farce-track’, the federal government has focussed almost exclusively on the mill’s impact on Commonwealth waters.”

It is on the ground, however, that environmental legislation is ultimately tested. If the environment is being regenerated and vulnerable species are coming back from the brink, that would be an endorsement of the EIA regimes in Australia including the EPBC Act. According to Tim Flannery, however, science is observing changes that point in the other direction. Writing in the *Monthly* in April 2009, Dr. Flannery had this to say about what he calls the third wave of extinctions in Australia:

“Scientists have been studying the Mount Lewis ringtails for decades. In the 1980s the possums were so abundant that more than one was seen per hour of spotlighting. In the '90s they were less common; but then suddenly, in 2005, scientists stopped seeing them. For three years there was not a single sighting until, in early 2009, a tiny remnant population was located. What could possibly have destroyed a creature living in such pristine habitat?

The fate of the lemuroid possum had been predicted in 2003, when a group of researchers used computer models to assess the impact of increasing temperature on rainforest animals. Many species, they found, could not tolerate even a small rise in temperature. The lemuroid ringtail was one of the most vulnerable, being unable to tolerate temperatures above 28°

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<sup>18</sup> Professor Bonyhady cites: Susan Owens, ‘Making a Difference? Some Perspectives on Environmental Research and Policy’, *Transactions of the Institute of British Geographers*, vol 30, 2005, pp 287-292.

Celsius for more than a few hours. The scientists predicted that extinctions would begin to occur when the average temperature rose by around 2°, and would pick up pace when the temperature rose by 3.6°. Because such warming was not expected until 2050 or later, scientists believed we had decades to deal with the problem. No one, however, anticipated the effect of extreme weather.

Researchers have now shown that short-lived heatwaves are killing Australia's animals. After each heatwave fewer possums were spotted, until an exceptionally hot day in 2005 brought the creature to the brink of extinction. With more heatwaves inevitable, the white lemuroid possum will almost certainly become extinct in the wild in the next few years. And this is a tragedy, for the lemuroid ringtail is a truly ancient Australian, with a fossil record going back more than 5 million years.

The white lemuroid possum is just the photogenic tip of a huge extinction iceberg. A tiny bat, the Christmas Island pipistrelle, will probably beat the possum to extinction. ... The mountain pygmy-possum is an ancient Australian with a fossil record going back around 20 million years, and it's not far behind the bat in the extinction stakes. Restricted to Australia's alpine country, its population has recently plunged by more than 90%, prompting its 2008 listing by the International Union for the Conservation of Nature as "critically endangered". ... Computer modelling, though, indicates that just a 1° rise in the average temperature will drive it to extinction; and, as temperatures rise further, most of Australia's unique alpine habitat is likely to follow."

It is ironic that, in an age of concern about climate change, Australia's national environment impact assessment statute has nothing to say and nothing to do concerning the impact of new developments in contributing to climate change. Two decisions of the Federal Court<sup>19</sup> have determined that the impact of new power stations; coal mines; or any other development that one can imagine have no significant adverse impact on the environment by contributing to greenhouse emissions. That is because one must look for significance by comparing the expected impact of the proposal to all of the greenhouse gases that have built up since the beginning of the industrial revolution at least. The same conclusion could be reached with regard to every power station; every mine; and every smelting works in the world.

The EPBC Act looked green and shiny, ten years ago. With the wisdom of experience, in the words of the post punk music movement, it may be time "to rip it up and start again".<sup>20</sup>

**Stephen Keim**  
**Chambers**  
**29 June 2009**

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<sup>19</sup> *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 232 ALR 510 and [Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources \[2007\] FCA 1480 \(20 September 2007\)](#)

<sup>20</sup> Simon Reynolds, *Rip It Up and Start Again: Post Punk 1978-1984*, Faber and Faber, 2005.