

# Probity Issues Connected with the Tasmanian Pulp Mill

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## Introduction

Tasmania is a small place. While in many respects small is beautiful, the State suffers what one academic calls a ‘culture of cosiness’<sup>1</sup> whereby a concentrated corporatist culture drives incestuous deal-making characterised by conflicts of interest. In particular, Tasmania is afflicted by the ‘resource curse’, through which natural resource abundance appears inversely related to standards of governance.

The resource curse is generally associated with non-industrialised economies. In such a nation, a government might agree to a corporation’s demand to change the law to facilitate the approval of a major project. Regrettably, however, such scenarios are not uncommon in Tasmania.<sup>2</sup> In a current example, Gunns Limited, in its quest to build a pulp mill in northern Tasmania’s Tamar Valley, has caused a statutory process to be swept aside and replaced with project-specific State legislation. The only difference between the Tasmanian response to Gunns’ demands and that of the developing economy’s government in the example above is in the speed of response: in Tasmania, the Government agreed apparently overnight to change the law. In developing countries it takes a little longer.

This paper<sup>3</sup> outlines some of the key probity issues surrounding Gunns’ withdrawal from the Commonwealth-accredited independent statutory assessment of its Tamar Valley pulp mill proposal. The paper will briefly examine Tasmania’s major project

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<sup>1</sup> Michael Stokes, Senior Lecturer, Faculty of Law, University of Tasmania, interview, ‘Life Matters’, ABC Radio National, 27 August 2008  
<<http://www.abc.net.au/rn/lifematters/stories/2008/2343694.htm>>.

<sup>2</sup> For example, after the Meander Valley Dam project was rejected by Tasmania’s independent Resource Management and Planning Appeal Tribunal the State legislated to override the decision: *Meander Dam Project Act 2003* (Tas).

<sup>3</sup> Some material in this paper draws upon material published elsewhere by the authors, including Roland Browne, “Gunns’ Proposed Tasmanian Pulp Mill – Does the End Justify Any Means?” *IMPACT!* 85 (2008) 3-7 and forthcoming publications by Tom Baxter.

assessment system and how that system (particularly the capacity of the public to participate) was subverted during Gunns' efforts to obtain environmental approvals for its pulp mill. Also discussed are assessment decisions made by the federal Minister responsible for the environment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act") and challenges to (then) Minister Turnbull's decisions in the Federal Court. These involved lengthy and complex processes and generated huge volumes of material. By necessity, present consideration of all issues is concise.

## Background

Tasmania has a pronounced and colourful history of environmental disputation, which periodically captures the nation's attention. Examples are the flooding of the iconic Lake Pedder in the early-1970's by the Tasmanian Hydro Electricity Commission, championed by Labor Premier 'Electric' Eric Reece. A decade later, the HEC failed in its attempt – championed by then Liberal Premier Robin Gray – to flood the magnificent Franklin River.

Like dams, pulp mill proposals have featured prominently in Tasmanian environmental disputes and have been characterised by the very active involvement of the government of the day in the facilitation of the proposals. In the 1990's, the nation looked on when a controversial \$1 billion chlorine bleached pulp mill was proposed at Wesley Vale in northern Tasmania. Eyebrows were raised when, in announcing a special recall of Parliament to consider 'fast-track' legislation for the project, Premier Robin Gray used the proponent's stationery.

Following the abandonment of the Wesley Vale proposal, Robin Gray's Liberal government lost majority by one seat at the 1989 election. Edmund Rouse (then chairman of successful media company ENT Ltd and Gunns Kilndried Timber Industries Ltd) then attempted, unsuccessfully, to bribe Labor MP Jim Cox to cross the floor of Parliament using '\$10,000 .... from a safety deposit box which ENT used

for contingencies<sup>4</sup> and ‘\$100,000 in family money on deposit at Gunns’.<sup>5</sup> Edmund Rouse ultimately pleaded guilty to attempted bribery and was gaoled for three years.<sup>6</sup> ENT's managing director David McQuestin was charged with an offence, pleaded guilty but no conviction was recorded.<sup>7</sup> Royal Commissioner Carter concluded that Robin Gray had acted improperly in that he should have suspected, if not known of, Rouse’s intentions following their meetings.<sup>8</sup> However, Robin Gray was not charged.

In 2002, John Gay was promoted from chief executive to become executive chairman of Gunns.<sup>9</sup> By this time David McQuestin and Robin Gray were also well-established Gunns directors.<sup>10</sup>

Today, Gunns Limited proposes a \$2 billion chlorine-based pulp mill, the world’s fourth largest, in the Tamar Valley, north of Launceston. Given the controversy that could have been expected of this project, one would have anticipated that both the proponent and Government would place probity issues to the fore.

Useful background and analysis regarding both the Wesley Vale and Tamar Valley pulp mill proposals is provided by Curran and Holland.<sup>11</sup> Given that some of the key protagonists from Wesley Vale (eg Robin Gray, David McQuestin and Christine Milne) remain important players in today’s pulp mill debate, there are interesting parallels to be drawn between the two mill proposals, including in respect of the relationships between the proponents and government, threatened and actual

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<sup>4</sup> Stephen Tanner, (1995) ‘The Rise and Fall of Edmund Rouse’ 4 *Australian Studies in Journalism*, 53-70 at 62 <<http://espace.library.uq.edu.au/view/UQ:11179>>.

<sup>5</sup> Andrew Darby, 'The hubris that brought an island dynasty undone', *The Age* 4 August 2002, <<http://www.theage.com.au/cgi-bin/common/printArticle.pl?path=/articles/2002/08/03/1028157860244.html>>.

<sup>6</sup> Stephen Tanner, (1995) ‘The Rise and Fall of Edmund Rouse’ 4 *Australian Studies in Journalism*, 53-70 at 61, <<http://espace.library.uq.edu.au/view/UQ:11179>>.

<sup>7</sup> *McQuestin v Australian Securities Commission* (1993) 2 Tas R 30.

<sup>8</sup> Stephen Tanner, (1995) ‘The Rise and Fall of Edmund Rouse’ 4 *Australian Studies in Journalism*, 53-70 at 63 <<http://espace.library.uq.edu.au/view/UQ:11179>> citing *Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly* (1991) Hobart, Tasmanian Government Printer.

<sup>9</sup> Andrew Darby, 'The hubris that brought an island dynasty undone', *The Age* 4 August 2002, <<http://www.theage.com.au/cgi-bin/common/printArticle.pl?path=/articles/2002/08/03/1028157860244.html>>.

<sup>10</sup> *Ibid.*

<sup>11</sup> Giorel Curran and Robyn Hollander, 'A Tale of Two Pulp Mills: Realising Ecologically Sustainable Development in Australia' (2008) 67(4) *Australian Journal of Public Administration* 483 <<http://www3.interscience.wiley.com/journal/121552623/abstract>>.

withdrawal by proponents, and the passage of ‘fast-track’ Tasmanian legislation curtailing assessment processes and appeal rights.<sup>12</sup>

#### Tasmania’s major project assessment system (prior to April 2007)

In 1993, the Tasmanian Parliament established the State’s Resource Planning and Development system. This involved the introduction of a suite of legislation reforming the State’s *Local Government Act*,<sup>13</sup> together with the establishment of the *Environmental Management and Pollution Control Act 1994* (Tas). The Parliament also created the Resource Management and Planning Appeal Tribunal<sup>14</sup> and invested that body with jurisdiction to determine appeals from a variety of land use, planning and environmental jurisdictions. All component parts of the system are expressly required to conform to a series of objectives, including public participation in decision making, sustainable development and the like.<sup>15</sup>

The system also comprised the *State Policies and Projects Act 1993* (Tas) and, eventually, the *Resource Planning and Development Commission Act 1997* (Tas). The latter two pieces of legislation, together, provide for assessment of major projects in Tasmania. A “major project” is one that is declared to be a “project of state significance” under s. 18(2) of the *State Policies and Projects Act* or, colloquially, “POSS”. Once a project is granted that status, the Resource Planning and Development Commission (“the RPDC”) is invested with jurisdiction to assess the project against relevant guidelines.

One of the benefits of the RPDC, in combination with the status of a project as being one of state significance, is that the RPDC conducts an independent assessment of a POSS. Importantly, and relevantly, the RPDC has the ability to conduct public hearings to evaluate the impacts of the project and, in particular, to assess the evidence provided either for or against the project.

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<sup>12</sup> Compare then Premier Robin Gray’s *Northern Pulp Mill Agreement Act 1988* (Tas) and the *Northern Pulp Mill Agreement (Doubts Removal) Act 1989* (Tas) with Premier Paul Lennon’s *Pulp Mill Assessment Act 2007* (Tas).

<sup>13</sup> This was the *Local Government Act 1962* (Tas).

<sup>14</sup> *Resource Management and Planning Appeal Tribunal Act 1993* (Tas).

<sup>15</sup> This is achieved through the identical Objectives set out in the Schedule to each statute.

POSS status has benefits for a proponent too, because the *State Policies and Projects Act* provides that the project will be subject to an integrated assessment, and that it overrides all other state laws. By its very nature, the assessment is wide ranging and covers environmental, planning, occupational health and safety and other regulatory regimes. The breadth of the assessment saves the proponent from having to make multiple applications to multiple authorities for permits, licences and other approvals. In this way, it is an “integrated” assessment.

### The Gunns Pulp Mill

Gunns’ proposal to construct a pulp mill in Tasmania hit the headlines in 2003 when then Deputy Premier Paul Lennon and Gunns executive chairman John Gay were overheard discussing it over dinner at a Hobart restaurant.<sup>16</sup>

In 2004 the Premier declared Gunns’ proposal to build a bleached Kraft pulp mill in the Tamar Valley to be a POSS.<sup>17</sup>

At the time that the Gunns’ pulp mill proposal became a POSS, there were frequent exhortations of the integrity of the RPDC process. These originated both from the government, through (now) Premier Paul Lennon, and from the Executive Chairman of Gunns, John Gay. At the time the project was referred to the RPDC in 2005, it seemed the expectation was that the RPDC would evaluate the project in an independent and impartial manner, in the interests of the proponent, the government and the community.

However, the pulp mill proposal – even in its 2004 format – was never far from controversy. The controversy was partly generated by the closeness between Gunns and the Government<sup>18</sup>, partly because of Gunns’ dominance of the controversial Tasmanian forestry industry and partly because in December 2004 Gunns commenced proceedings in the Supreme Court of Victoria against key conservationist players in

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<sup>16</sup> Judy Tierney, *Pulp Mill proposal* (2003) ABC <<http://www.abc.net.au/stateline/tas/content/2003/s989531.htm>> ; Lucy Shannon, *Pulp Background* (2007) ABC <<http://www.abc.net.au/stateline/tas/content/2006/s1972116.htm>>.

<sup>17</sup> 22 November 2004.

<sup>18</sup> See Richard Flanagan, ‘Gunns Out of Control’ *The Monthly*, No 23, May 2007.

the Tasmanian forestry debate (eg The Wilderness Society Inc, Geoff Law, Senator Bob Brown, Peg Putt MHA, Alec Marr).<sup>19</sup> Further, the Tasmanian government funded a “Pulp Mill Task Force” to promote the Pulp Mill in the face of increasing community opposition and concern. These factors, independently, and in combination, had the effect of focussing the public and political spotlight firmly on the RPDC process. By November 2004, the RPDC had begun the state assessment process.

### The RPDC Assessment for the purposes of State and Federal laws

A project such as a pulp mill is required by the *EPBC Act* to be referred to the Minister for assessment and approval. How the assessment at a federal level is to be conducted is a matter for the Environment Minister. Section 87(1) of the *EPBC Act* provides a range of assessment options, from minimal desktop assessments, at one level, to an Inquiry at the other end of the spectrum. There is also a procedure for the Federal Minister to adopt an accredited assessment process under a state law<sup>20</sup> for the purposes of the *EPBC Act*. On 15 December 2004 Gunns referred its project to the Commonwealth Minister for the Environment, pursuant to the *EPBC Act*, for approval under that Act.

On 16 December 2004 the RPDC announced that it was developing an integrated assessment process to address all state and federal issues for the pulp mill and on 24 January 2005 the Federal Minister decided the pulp mill proposal was a controlled action under the *EPBC Act*. On 23 March 2005 he further decided the assessment approach under the *EPBC Act* was to be an accredited assessment conducted by the RPDC.

At this time, the RPDC had control of the process. Part of the process was pursuant to state law, and involved the assessment of the pulp mill across all of the relevant and potential impacts to land, air and water governed by state law. The RPDC also had responsibility to assess the impact of the proposal in relation to the three specific areas

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<sup>19</sup> *Gunns Ltd v. Marr & Ors* No 9575/2004.

<sup>20</sup> *EPBC Act* s. 87.

identified under the EPBC Act as controlling provisions:<sup>21</sup> impact on Commonwealth marine areas, impact on threatened species on the site, and impact on listed migratory species.

On 6 April 2005 the RPDC released for public comment a series of draft guidelines as to how it proposed to conduct the integrated assessment of the pulp mill. In the scheme of environmental impact assessment, this was a highly consultative approach, in that allowing public input into the guidelines against which the pulp mill was to be assessed served to encourage public participation (and confidence) in the process. Public involvement was also available in response to the draft IIS, the RPDC response to the IIS and at the hearing itself. The draft guidelines also included provision for assessment of the environmental effects of wood supply to the mill, in that Gunns was required to identify how the project would deliver the outcomes required by the Regional Forest Agreement in force between Tasmania and the Commonwealth.<sup>22</sup>

On 9 May 2005, being the last day for public comment on the guidelines, and without notice, Gunns announced major changes to its pulp mill proposal. Previously, the pulp mill was mooted as being constructed at either the Tamar Valley, near Launceston, or Hampshire in the state's North West where Gunns owns a significant plantation estate. Furthermore, Gunns had originally claimed that 'Only world's best technology utilising a low impact Total Chlorine Free (TCF) mill will be looked at.'<sup>23</sup> However, Gunns announced it was now proposing to use an Elemental Chlorine Free ('ECF') pulp process (and thus a Totally Chlorine Free pulp mill was no longer an option). The first expression (Total Chlorine Free) means what it says. On the other hand, Elemental Chlorine Free is an expression created by a public relations firm, in that it is not a process that excludes chlorine compounds such as chlorine dioxide from the treatment of the pulp: it just excludes elemental chlorine from the process.

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<sup>21</sup> Which pick up and regulate matters of National Environmental Significance under the EPBC Act.

<sup>22</sup> The Tasmanian RFA governed all commercial forestry operations in Tasmania, and purportedly required the State to protect a range of forest related values, including threatened species. See *Brown v. Forestry Tasmania* (No 4) [2006] FCA 1729, 19 December 2006 as to how RFA's operate in Tasmania. On appeal this decision was reversed: *Forestry Tasmania v. Brown* [2007] FCAFC 186; 30 November 2007.

<sup>23</sup> Gunns Limited, *Newsflash: Gunns Limited announces their plans to investigate pulp mill potential in Tasmania* (2004). See also Paul Lennon re conversion of Scandinavian mills from ECF to TCF: Judy Tierney, *Pulp Mill proposal* (2003) ABC <<http://www.abc.net.au/stateline/tas/content/2003/s989531.htm>>.

This is a significant issue in the context of concerns over pulp mills that discharge toxic chemicals such as organochlorines.

Following receipt of the altered proposal, the RPDC brought the assessment process to an immediate halt. The change to the proposal required major changes to the guidelines.

The next step in the process was the withdrawal by Gunns in August 2005 of its first EPBC Act referral to the Federal Minister, and on 11 August 2005 Gunns referred the altered proposal to the Minister. This was the second of three referrals for this project. Because of the new referral, the Minister had to again go through the steps under the *EPBC Act* of identifying the controlling provisions and identifying an assessment approach. On 24 October 2005, the RPDC released revised guidelines for the assessment of the new pulp mill proposal, with public comment allowed until 29 November 2005. On 26 October 2005 the Minister again decided that the project was to be assessed by the RPDC.

The RPDC assessment process continued. On 14 July 2006, Gunns lodged its draft Integrated Impact Statement (IIS) with the RPDC, a document comprising approximately 18 volumes, many appendices and approximately 7,500 pages. It was said by Gunns to have cost \$11 million and to have been the product of 350,000 hours of work.<sup>24</sup> The documents were released publicly.

The RPDC began its assessment process immediately and by 2 October 2006 its Chairman had written to Gunns requesting supplementary information on the draft IIS. The RDPC sought further information on modelling, impact on air and water and health, and a range of other issues. Some parts of the IIS were the subject of a request to be in a readable form. At about this time, the RPDC also released its own consultant's reports on the draft IIS. These steps were taken in anticipation of the first public hearing on the pulp mill, which was scheduled to be held on 25 October 2006. By this time, the RPDC had received a record 780 public submissions.

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<sup>24</sup> Gunns' Media Release 14 March 2006.



At the first public hearing on 25 October 2006 some of the 780 interested persons were legally represented, as Gunns was, but most were not. Directions were given requiring Gunns to provide the additional information referred to above, by 15 December 2006. Following a request from Gunns, on 22 December 2006 the RPDC gave Gunns until 31 January 2007 to provide the additional information.

At about this time, there was trouble brewing. Julian Green, the RPDC Executive Commissioner and Chair of the Panel dealing with the Pulp Mill proposal resigned from the RPDC on 12 January 2007, citing political interference, and the activities of the Pulp Mill Task Force over the previous 2 years in particular, as his reasons.<sup>25</sup> Green was a highly respected former Secretary of the Justice Department. His resignation followed that of Dr Warwick Raverty, a Panel Member, who earlier resigned, citing the same reasons.

On 5 February 2007 Hon Christopher Wright QC, a retired Tasmanian Supreme Court Judge and former Solicitor-General, was appointed to chair the Panel dealing with the Pulp Mill proposal, in place of Mr Green. The process thus appeared to be back on track in anticipation of the next public hearing, scheduled to be held on 22 February 2007.

On 16 February 2007, Gunns' supplementary information was lodged with the RPDC. It comprised a further approximately 2,500 pages. Whilst this material was made publicly available on the company's [www.gunnspulpmill.com](http://www.gunnspulpmill.com) website on 21 February 2007, it was not made available by the RPDC. As it turned out, the RPDC had serious concerns about the new material and the draft IIS itself.

The second – and as it turned out, final – directions hearing was held on 22 February 2007. In the course of that directions hearing, Mr. Wright QC stated that the RPDC would not release the supplementary information until it had been endorsed by the RPDC. The Chair further said that the RPDC would not give a timeframe for the release of the supplementary information and flagged the possibility of the need for a complete re-write of Gunns' IIS. He also declared that responsibility for delays in providing

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<sup>25</sup> See <<http://www.news.com.au/mercury/story/0,22884,21157345-921,00.html>>.

material to the RPDC rested with Gunns, saying in relation to a (previously) proposed 28 May 2007 conclusion of the RPDC process:

However, it has become quite apparent that due to accumulated delays, all or most of which appear to have resulted from Gunns failure or inability to comply with their own prognostications or the panel's requirements, that time line can no longer apply.<sup>26</sup>

When invited twice to respond to this criticism, senior counsel for Gunns, Mr J. Gobbo QC, declined the invitation.

### Behind the Scenes

Three days after the RPDC Directions hearing, on Sunday 25 February 2007, a meeting was held in Premier Paul Lennon's Hobart office. Present were three of Gunns' directors (Messrs Gay, Gray and McQuestin), Gunns company secretary, Mr Lennon, then Deputy Premier Steve Kons, and the head of the Department of Premier and Cabinet, Linda Hornsey.<sup>27</sup> Termination of the RPDC process was clearly on the agenda. It is not clear as to who first raised it and why.

Paul Lennon recently told Hobart's *Mercury* newspaper that it was Robin Gray and David McQuestin who led the decision by Gunns' board to pull the pulp mill from the RPDC assessment, over-ruling John Gay who, Mr Lennon said, had wanted to keep the project within the agreed RPDC framework:

"He like me, wanted to keep the company in the RPDC process," Mr Lennon said.

"But the board, its shareholders and others, had clearly become frustrated with the process and made it very clear to all of us that they were contemplating pulling out."

"Why else do you think [board members] Robin Gray and David McQuestin were at that meeting on February 25 [2007]?" Mr Lennon said.<sup>28</sup>

Mr Lennon said he was left in no doubt the project was close to dead.<sup>29</sup>

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<sup>26</sup> Transcript of RPDC Directions Hearing Directions, 22 February 2007  
<[http://www.rpdc.tas.gov.au/\\_\\_\\_data/assets/pdf\\_file/0007/75499/FEB22PUB\\_Version\\_2.pdf](http://www.rpdc.tas.gov.au/___data/assets/pdf_file/0007/75499/FEB22PUB_Version_2.pdf)>.

<sup>27</sup> Sue Neales, 'Gray urged mill pullout: Lennon', *Mercury* 23 May 2009, 2.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

Mr Lennon says that subsequently his whole focus was on encouraging the RPDC to commit to a shorter approval timeframe for the project than the timeline outlined by Mr Wright at the RPDC hearing on 22 February 2007. In his words:

“As a result, of that meeting [on February 25] I then had discussions with Christopher Wright trying to find a way to concertina the [RPDC] timeframe to meet the timetable [of June 30 2007] that the company needed,” Mr Lennon said.<sup>30</sup>

Such discussions occurred when Acting RPDC Executive Commissioner Simon Cooper and Mr Wright attended a meeting with Mr Lennon and Ms Hornsey in the Premier’s Office on 27 February.<sup>31</sup> An Upper House Select Committee later reported:

.... At that meeting Mr Cooper and Mr Wright were provided with a document entitled; —*Timeline showing process steps assuming end date is 31 July 2007*. .... Mr Cooper’s sworn evidence relating to this meeting, supported by extensive contemporaneous notes, is as follows (Cooper, Statutory Declaration 2008, 4):

*The timelines excluded the ability for the assessment process to have any public hearings. Neither Chris WRIGHT nor I were happy with this; we both believed that hearings formed an integral part in the assessment process. Chris WRIGHT expressed his concerns over the need for public hearings. He expressed passive disquiet in relation to the proposal and told the Premier that he would need to consult with the three other Assessment Panel members. I held the view that the proposed time line was Gunns initiated but I did not express this view to the Premier. I believed the reduced time line did not satisfied [sic] the requirement for a full and proper assessment process as was required in the legislative framework of the State Policy and Projects Act 1993. Whilst there was a legal argument public hearings was not required, this was not my position. Furthermore, there were Federal legislation requirements regarding public hearings which I believed were relevant to the process. Linda HORNSEY indicated the Solicitor-General’s opinion was public hearings were not required. She said she would arrange an appointment with the Solicitor-General for Chris WRIGHT and me immediately after the meeting. She subsequently made those arrangements.*

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<sup>30</sup> Ibid.

<sup>31</sup> This followed a meeting on 26 February between Mr Lennon, Ms Hornsey and Mr Cooper: Legislative Council Select Committee on Public Sector Executive Appointments, 'Interim Report' (Parliament of Tasmania, 2009), 54.

*Immediately after that meeting with the Premier, Chris WRIGHT and I went to the Solicitor-General's office and spoke with Mr Bill BALE QC. At this meeting the Solicitor-General expressed his opinion that public hearings were not required. As Chris WRIGHT and I had a counter view there were robust discussions with Mr BALE over the issue. No formal opinion was requested or obtained from the Solicitor-General to my knowledge.*

Mr Wright would explain soon after this meeting (following Gunns withdrawal) that he felt leaned on or pressured by the Premier.

### Gunns walks away from the RPDC

On 14 March 2007, Gunns announced that it was withdrawing from the RPDC assessment process and “had referred the project to the State Government”.<sup>32</sup> This later phrase is curious as there was no State Government process to refer the project to, Gunns having deserted the extant (and only) process. Gunns’ announcement was by way of a statement to the Australian Stock Exchange and media release. Gunns’ justification for abandoning the process - previously endorsed by Gunns - was that the company required the project to be assessed within what it described as a “commercial timeframe”.

Suddenly, time was of the essence to Gunns, and it complained the RPDC would not assess the project in time. John Gay claimed that delays were costing the company \$1M a day. However, given the RPDC had made clear that Gunns was responsible for the delays, and given that Gunns had not responded to or countered this criticism, the real reason for abandonment of the RPDC process has not emerged. It may be that Gunns saw its chances of approval from the RPDC to be an increasingly remote possibility.

### The Pulp Mill Assessment Act 2007 (Tas)

On 15 March 2007 Premier Lennon made a Ministerial Statement to the Lower House of the Tasmanian Parliament. He brazenly announced the creation of a new and separate approvals process for the pulp mill, with legislation to be introduced into parliament the

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<sup>32</sup> Gunns’ Media Release 14 March 2007.

following week. Apparently, in the space of about 24 hours, the government had decided to create legislative assessment and approval process solely for Gunns' pulp mill.

Mr Lennon has since maintained, including on two occasions before an Upper House Select Committee, that he had no advance knowledge of the intention of Gunns to withdraw from the RPDC process on 14 March 2007. However, the Parliamentary Committee heard evidence from at least two key witnesses inconsistent with this account.<sup>33</sup> The Chair of Tasmania's Resource Management and Planning Appeal Tribunal, Simon Cooper, had been seconded to act as RPDC Executive Commissioner. He told the Parliamentary Committee that on 12 March 2007 '*... I received a phone call from the Premier. He told me Gunns would be pulling out on 14 March 2007. ...*'<sup>34</sup>

After Mr Lennon told Parliament that the first he knew was on 14 March, Mr Cooper went to see the DPP, an old friend.<sup>35</sup> Mr Cooper later explained to the Committee:

*... I rang Tim, "Can I come and see you?, and told him what I was concerned about in a general sense and sought his advice as somebody whom obviously I respect greatly and whose judgment and legal acumen I respect greatly. I had these various concerns in relation to this whole process that I just thought was disgraceful. I went and spoke to Tim about it and he advised me that I was under no obligation to go into bat, as it were, go out in public and correct any, what I considered to be, misrepresentation or misstatement of what had occurred but plainly - and I suppose he did not need to tell me this - were I asked in a situation like this then I would have an obligation to tell the truth. It was a reassurance and I just felt that I needed to put a mark down that I was troubled about this and that I had gone and sought advice or counsel at about the highest level you could go. .... Obviously there was a retired judge involved in all this, Chris Wright, and we had very similar views about, I suppose, the probity of what was going on and the appropriateness. That is the best way of putting it."*<sup>36</sup>

Evidence of Ms Hornsey to the Committee suggested that 'the Government was, in fact, given significant forewarning of the impending withdrawal'.<sup>37</sup> The Committee was particularly drawn to an intimation by Ms Hornsey, that:

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<sup>33</sup> Legislative Council Select Committee on Public Sector Executive Appointments, 'Interim Report' (Parliament of Tasmania, 2009), 64-70.

<sup>34</sup> Ibid, 65.

<sup>35</sup> Ibid, 67.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

*There was a very lengthy and detailed process between when we found out that Gunns were withdrawing and when the matter went to Cabinet. It involved a number of very senior public servants. We worked over maybe one or two weekends looking at what options might be available.*<sup>38</sup>

On this point, the Committee stated:

... it is clear from Ms Hornsey's testimony that, at the very least, Gunns Ltd's official announcement did not come as a complete surprise, and the Government had a workable response ready to run with when such an announcement was made.

For his part, Hon Paul Lennon has asserted on two occasions before this Committee that he had no advance knowledge of the intention of Gunns Ltd to withdraw from the RPDC process on Wednesday, 14 March 2007. The resources available to the Committee, and the terms of its Order of Reference do not enable it to pursue these inconsistencies beyond what has been disclosed in this Interim Report.<sup>39</sup>

On 17 April 2007 the *Pulp Mill Assessment Act 2007* (Tas) passed the Parliament and on 30 April 2007 received Royal Assent. It provided for assessment of the entire "project"<sup>40</sup> by a consultant appointed by the Minister.<sup>41</sup> Once assessed, and if the consultant recommended approval, the Minister was to prepare a draft permit for consideration and approval by the parliament. Once both Houses endorsed the permit, the project was deemed to be approved, notwithstanding any other Tasmanian law.<sup>42</sup>

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<sup>38</sup> Ibid, 68.

<sup>39</sup> Ibid, 69-70.

<sup>40</sup> "project" is defined extremely widely in s. 3(1) as meaning:

"the project declared by the Administrator to be a project of State significance on 22 November 2004 in Statutory Rules 2004, No. 111, being the proposal by Gunns Limited (ACN 009 478 148), as amended, for the development and operation of a bleached kraft pulp mill in northern Tasmania including any use or development which is necessary or convenient for the implementation of the project, including but not limited to the development and operation of any facility or infrastructure for –

(a) the supply or distribution of energy to or from the mill; and

(b) the collection, treatment or supply of water; and

(c) the treatment, disposal or storage of waste or effluent; and

(d) access to or from the mill; and

(e) transport to or from the mill; and

(f) the storage of pulp at, or transport of pulp from, a sea port in the northern region or the north-western region; and

(g) the production of materials for use in association with the operation of the mill".

<sup>41</sup> Under s. 4(1).

<sup>42</sup> *Pulp Mill Assessment Act 2007* (Tas) s. 8.

The *Pulp Mill Assessment Act 2007* (Tas) removes not only all public input and hearings which the RPDC had determined essential, but by s. 11 removes all appeal and review rights. Section 11 provides:

11. Limitation of rights of appeal

- (1) Subject to subsection (3) and notwithstanding the provisions of any other Act –
  - (a) a person is not entitled to appeal to a body or other person, court or tribunal; or
  - (b) no order or review may be made under the *Judicial Review Act 2000*; or
  - (c) no declaratory judgment may be given; or
  - (d) no other action or proceeding may be brought –in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act.
- (2) For the purposes of subsection (1), "any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act" includes any action, decision, process, matter or thing arising out of or relating to a condition of the Pulp Mill Permit requiring that the person proposing the project apply for such other permits, licences or other approvals as may be necessary for the project.
- (3) Subsection (1) does not apply to any action, decision, process, matter or thing which has involved or has been affected by criminal conduct.
- (4) No review under subsection (3) operates to delay the issue of the Pulp Mill Permit or any action authorised by that permit.

The Supreme Court of Tasmania recently held that s. 11(1)(b) precludes affected land owners from obtaining any orders under the *Judicial Review Act 2000* (Tas), including a statement of reasons for the conditions imposed on the Pulp Mill Permit.<sup>43</sup>

While privative clauses are not unknown, s. 11(4) is extraordinary in preventing even review for criminal conduct from delaying issue of the Pulp Mill Permit or any action authorised by that permit.

The Bill, and s. 11 in particular, were strongly criticised before the Bill was passed.<sup>44</sup> However, notwithstanding some minor amendments by the Upper House of s. 11, sub-

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<sup>43</sup> *Landon-Lane v Minister for Economic Development and Tourism and Premier of Tasmania* [2009] TASSC 50 (17 July 2009).

section (4) passed unamended. One can only wonder why this provision was considered worth the public criticism it attracted.

#### “Shreddergate”: Magistrate Appointment Aborted

Though beyond the scope of this paper, Simon Cooper subsequently applied for a permanent magistrate appointment and was approved by then Attorney-General (and Deputy Premier) Steve Kons. However, upon receiving a telephone call from Ms Hornsey, the Attorney shredded his signed Cabinet Brief. The Attorney later denied this in Parliament. The shredding, which had been retrieved and kept by Mr Kons’ adviser, and subsequently reconstituted, was then tabled in Parliament. This triggered Mr Kons’ resignation and the Upper House Select Committee Inquiry. The Committee summarised some of its findings relating to the pulp mill as follows:

It is open, on the evidence presented in this Report, for a reasonable person to conclude on balance, that the Lennon Government’s commitment to the Pulp Mill was such that any and all obstacles to its expeditious approval had to be eliminated. ....

Such was the depth of commitment to the Pulp Mill within the Lennon Government, that the Secretary for the Department of Premier and Cabinet, Ms Linda Hornsey evidently took it upon herself to intervene in the proper internal processes of an independent, quasi-judicial agency of government. That same departmental Secretary was subsequently instrumental in denying a Freedom of Information request for documents that revealed her involvement in that matter. The same departmental Secretary subsequently suggested shredding the original copy of a document, nominating to Cabinet for appointment as a Magistrate, the person responsible for the agency which allowed an identical Freedom of Information request.

There is credible evidence before this Committee that supports an inference that the Secretary for the Department of Premier and Cabinet intervened with a judicial appointment process on the basis of irrelevant considerations, including the very real possibility of personal payback.<sup>45</sup>

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<sup>44</sup> See eg Michael Stokes and Tom Baxter, 'Comments on Pulp Mill Assessment Bill 2007' (2007) *Tasmanian Times* <<http://tasmaniantimes.com/index.php?/weblog/article/comments-on-pulp-mill-assessment-bill-2007/>> a copy of which was provided to all Legislative Councillors at a briefing by the authors; Philippa Duncan, 'Mill Bill under fire', *Mercury* (Hobart), 27 March 2007.

<sup>45</sup> Legislative Council Select Committee on Public Sector Executive Appointments (2009), *Interim Report*, Hobart at 143-144.



## Decisions under the EPBC Act

With the abandonment by Gunns of the RPDC process, which had been assessing the project under the EPBC Act as well as State legislation, Gunns now had no assessment process in place to secure approval under the EPBC Act. So, on 28 March 2007 Gunns withdrew the second referral to the Minister and on 2 April 2007 it submitted another referral document. This was now the third referral of the project.

With this background, on 2 May 2007 the Minister for the Environment and Water Resources made two preliminary – but critical – decisions under the EPBC Act. First, assessing Gunns’ pulp mill proposal as a controlled action, he determined that the project only needed to be assessed by preliminary documentation. Second, he allowed 20 days for public comment on the proposal. It must be acknowledged that the range of issues to be assessed under the EPBC Act were narrower than the RPDC process, which had to look at all State issues as well. However, given that public involvement in the decision-making process had been stripped back from a right to participate in public hearings – which would have occurred over some months – to a mere 20 days of public comment, the role of the national assessment had now become critical. This was because the effect of the *Pulp Mill Assessment Act 2007* (Tas) was to permit no more than a bureaucratic desktop assessment of the proposal, which excluded the public entirely.

## Action in the Federal Court

In two separate actions, The Wilderness Society Inc. (“TWS”) and Investors for the Future of Tasmania Inc. (“Investors”) commenced proceedings in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* against the Minister and Gunns<sup>46</sup> to challenge the two decisions referred to above. Those proceedings were heard jointly by Justice Marshall from 4 July 2007, and judgment was given on 9 August 2007 dismissing both applications.<sup>47</sup>

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<sup>46</sup> Investors initially only joined the Minister as respondent, but Gunns was subsequently joined on its own application.

<sup>47</sup> *The Wilderness Society Inc v. The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178; *The Investors for the Future of Tasmania Inc v. The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1179.

The TWS and Investors' applications challenged the Minister's decisions on a number of grounds, including that the assessment approach taken by the Minister (ie the preliminary assessment approach decision) was tainted by apprehended bias, and motivated by an improper purpose. Both these complaints were argued to have arisen from the Minister's efforts to shape his decision-making process to accord with Gunns' own timeframe for approval. The applicants also claimed a denial of natural justice, in that the public comment period of 20 days was inadequate given the magnitude of the project and documentary material

Other grounds for challenge claimed the third referral was invalid as not being authorised by the EPBC Act. It was argued that once the Minister had made his decision determining the assessment method, the proponent could not withdraw the project so as to start again using a different assessment process (the EPBC Act s. 170C point). A further ground claimed that the decision was erroneous in failing to take account of the impact of forestry operations associated with the mill's wood supply (the EPBC Act, s. 75(2B) point).

The principal judgment was given in the TWS proceeding. In relation to the process issues (ie denial of natural justice and the claims that the Minister had acted so as to accommodate Gunns' timeframes) Marshall J acknowledged that opponents of the mill would feel disappointed, angry and suspicious at the demise of the RPDC and other features of the background circumstances.<sup>48</sup> However, his Honour was not persuaded the Minister had acted in this way or for these reasons. He also decided all statutory construction points against the applicants.

TWS appealed the decision to the Full Court of the Federal Court, concentrating on three grounds: denial of natural justice; the s. 170C point regarding Gunns withdrawal then resubmission of its referral; and the s. 75(2B) point regarding the failure to take account of the impact of the mill on Tasmania's forests. This appeal to the Full Court failed (though with Tamberlin J dissenting on the s. 75(2B) point).<sup>49</sup>

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<sup>48</sup> Ibid at [145] – [146].

<sup>49</sup> *The Wilderness Society Inc v. The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

## Consequences of manipulation of process

The process of assessment of Gunns' proposed pulp mill has been a bruising encounter for the public and for those politicians and bureaucrats and others involved. To date, other apparent casualties of the pulp mill proposal (at least in part), include:

- the State Government's Pulp Mill Taskforce, eventually disbanded after concerns its activities were undermining the RPDC process (though its head was subsequently promoted to head Forestry Tasmania)
- Dr Warwick Raverty, pulp mill expert, CSIRO employee and former RPDC panelist, who felt that the activities of the Taskforce made his position untenable and opened the RPDC to challenge (now an ardent critic of the Tamar Valley pulp mill proposal)
- former RPDC Executive Commissioner and panel Chair Julian Green who resigned after his requests that the Government reign in its Taskforce fell on deaf ears
- new RPDC Panel Chair Christopher Wright QC and his assessment panel – rendered redundant by passage of the *Pulp Mill Assessment Act 2007*
- acting RPDC Executive Commissioner Simon Cooper, whose appointment as a Magistrate was shredded by then Attorney-General (and Deputy Premier) Steve Kons (after the Secretary of the Department of Premier and Cabinet intervened, allegedly as personal payback for Mr Cooper properly doing his job during the pulp mill saga);
- former Attorney-General and Deputy Premier Steve Kons, forced to the backbench after denying to Parliament that the Cabinet brief for the appointment of Cooper as Magistrate had existed or that he shredded it (only to be confronted by the tabling in Parliament of the reconstituted document)
- former Premier Paul Lennon who resigned as his popularity sunk to new lows
- the RPDC, which is now in the process of being replaced by a new Tasmanian Planning Commission,<sup>50</sup> Commissioners of which are to include agency heads
- long suffering Tamar Valley landowners, denied appeal rights<sup>51</sup> or even a statement of reasons for the Pulp Mill Permit conditions.<sup>52</sup>

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<sup>50</sup> See the *Resource Planning and Development Commission Amendment (Miscellaneous Amendments) Act 2009* (Tas).

## Conclusion

Gunns' Tamar Valley pulp mill proposal was always going to be controversial. Given this, one might have expected both the proponent and Government to place rigorous assessment and associated probity issues to the fore. However, when the much-lauded, Commonwealth-accredited, integrated assessment by the independent RPDC appeared unlikely to deliver for Gunns, the company was able to pull its project from the RPDC and obtain project-specific State legislation containing extraordinary provisions. This, *inter alia*, aborted the public hearings which the RPDC had determined were essential, enabled far less rigorous assessment within a shortened timeframe legislated explicitly in order to meet the company's demands, and granted the assessment and the project astounding immunity from suit.

Similarly, the manipulation of the EPBC Act process so as to replace the RPDC with EPBC Act assessment on "preliminary documentation", again designed to deliver an approval within Gunns' chosen time frame, enhanced neither public confidence in the Act nor its processes. Applications for judicial review of the EPBC process were unsuccessful (unlike most State planning legislation, the Act does not allow appeals on the merits). However this reflects the difficulty in making out such applications.

Major projects generate pressures that have the effect of distorting pre-existing processes, thwarting environmental protection and shutting out the local community from participation in decision making. Gunns' pulp mill proposal is an example of this, *par excellence*; and perhaps more so, as the proponent is yet, as of late July 2009, to have turned a sod on its project site, despite having filed affidavits in the Federal Court in May 2007 deposing that delays in construction of the mill were costing Gunns over \$1,000,000 per day.

The Tasmanian RPDC process for a project of state significance was designed to put the assessment of the project at arm's length from government and to enhance public

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<sup>51</sup> *Pulp Mill Assessment Act 2007* (Tas) s.11.

<sup>52</sup> *Landon-Lane v Minister for Economic Development and Tourism and Premier of Tasmania* [2009] TASSC 50 (17 July 2009).

confidence in the process and outcome. Gunns, assisted by the Tasmanian government, has achieved the complete opposite here: the project was actually assessed by the government (and each of the two Houses of Parliament), with no public involvement at all. Public confidence in the project has been shattered.