

Postscript

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Australia's big environmental controversies generally follow a common course. Once a government has decided to support a major project, it rarely changes its mind. When work on the project has started, it is almost never reversed. If opponents of the project are successful in the courts, their victories are overturned by government either making much the same decision again with better regard to the law or by enacting special legislation. Only the prospect of significant electoral losses if not electoral defeat spurs government to reconsider. But rather than abandoning the project, and suffering the embarrassment of being publicly seen to have made a wrong decision, government typically defers or obfuscates its actions in an attempt to take the controversy off the political agenda until after the election. When these projects do not proceed, it is generally because of economics, not the environment.

These recurrent features of Australian environmental politics were all to the fore after the main chapters of this book were written in 2008. But so was the global economic crisis which made it even less likely that government would protect the environment, while better rainfall down much of the east coast made it easier for government to revisit some of its more controversial water decisions. Meanwhile the federal Environment Minister was, for the first time, someone with a long history of environmental commitment, but whether Peter Garrett retained these ideals and could act on them in his new position was a matter of debate. So Christine Milne of the Greens declared of Garrett, 'He went for Labor and he's been swallowed up by them. That's when he abandoned everything he stood for'. But others saw Garrett as having made 'an informed, intelligent and calculated decision' to sacrifice the freedom of activism for the power of government where 'you have to be a bit quieter and help build the agenda for change' but 'you can actually do something'.¹

This postscript continues the story of the Gunns Pulp Mill and examines the outcome of the controversies over the McArthur River Mine, the Gorgon Gas Project on Barrow Island and the Traveston Dam. As with the primary chapters of this book, the postscript is largely concerned with whether

¹ 'Must have a short memory', *The Australian*, 31 August 2007.

environmental impact assessment in Australia is an effective vehicle for protecting the environment. But the postscript also casts light on Peter Garrett's administration of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) which has been the stuff of little scrutiny for all the media reportage of it. Just as Andrew Macintosh's chapter in this book suggests that, in general, Garrett's administration of the Act is an improvement on that of his Liberal predecessors, so does this postscript. Given the political environment in which he has been operating, it is unlikely that any Environment Minister could have achieved more. While the conditions that he imposed in relation to the Gunns Mill, the Gorgon Gas Project and the McArthur River Mine constitute at most a modest tightening of those imposed by his Liberal predecessors and the relevant State and Territory governments, his rejection of the Traveston Dam stands out as the strongest decision made by an Environment Minister in the 10 years of the EPBC Act.

The Gunns Pulp Mill

When the Rudd government took office in November 2007, the Bell Bay pulp mill had already been approved by Malcolm Turnbull as the last Environment Minister in the Howard government. But the environmental impact management plan or EIMP, which Turnbull had required the company to prepare, was yet to come to the federal government for approval. This process started in the first half of 2008 when Garrett approved four of the 'modules' or sections in the EIMP relating to the clearing of vegetation, bulk earthworks and construction of the accommodation facility for the mill, though Gunns did not act on these approvals because it had failed to raise the finance for the project. By August 2008 Gunns had submitted drafts of the remaining 12 modules. But because there was no prospect of these modules being finalised by the original deadline of October, the company asked for an extension of three months, which the minister granted, meaning that he had to make his decision by 5 January 2009.

Garrett's legal position when making these decisions was clear, though his statements about the law were not. On the one hand, Garrett maintained that, having inherited Malcolm Turnbull's approval, his responsibility was to ensure that the conditions imposed by Turnbull were 'faithfully observed' and 'properly and satisfactorily addressed'. On the other hand, Garrett declared that he was both 'required ... to follow those conditions and ... strengthen them if necessary'. In fact, he had a statutory discretion (rather than obligation) to vary or add to these conditions if he believed the mill would have 'a significant impact that was not identified in assessing the mill' on any matter of national environmental significance. The Act also allowed him to vary or add a condition with the agreement of Gunns. The approval conditions for the mill empowered him to order Gunns to revise the EIMP for the mill if he thought it 'necessary or desirable for the better protection of relevant listed

threatened species and ecological communities, listed migratory species or the marine environment'.²

The political constraints on Garrett were also clear. As a matter of practice, governments generally do not overturn lawful approvals granted by their predecessors. In keeping with this practice, Garrett made much of how it would be 'irresponsible' and 'reckless' for him to overturn an approval of the Howard government. But it was at least as significant that, had Garrett overturned Turnbull's decision, he would have been acting contrary to Labor's own policy. Just four hours after Turnbull announced in October 2007 that he would be conditionally approving the mill, Garrett issued a statement that federal Labor had 'always supported a world class mill for Tasmania that achieves best practice environmental outcomes and reduces woodchip exports in favour of economically beneficial downstream value adding processes'. While recognising that the process resulting in Turnbull's decision had been a 'shambles', Garrett declared that a Rudd Labor government would 'respect' Turnbull's decision approving the mill and would work 'cooperatively with Gunns ... to ensure that the conditions of the approval are effectively implemented'. So that there could be no room for doubt Garrett concluded that Labor 'would not seek to overturn or amend the decision by Mr Turnbull'. Immediately after the election, Garrett affirmed this position.³

There was still, however, intense public interest in January 2009 when the 12 modules of the EIMP came to Garrett for consideration, in keeping with the mill's long standing status as the nation's most controversial environmental project. Opponents of the mill still hoped, if not expected, that Garrett would do something to make it harder for the company to raise the necessary finance for the mill and to protect the environment from the mill were it ever constructed. Particularly because of the way in which Garrett had agreed to follow Labor Party policy on uranium mining, despite his long standing prominence as an anti-nuclear activist, there was public pressure on Garrett to show that the environmentalist of old still existed. If his decision about the mill made little or no difference, there was still political advantage in his creating the impression that he might be doing something.

If this was Garrett's aim, he succeeded. The significance of Garrett's decision on the mill in January 2009 was the stuff of immediate debate and confusion. Some commentators suggested that his decision would assist Gunns by giving them more time to raise the money to build the mill or sell it to an international consortium. Others suggested that his decision was inconsequential. Still others suggested that, in a difficult financial

2 Peter Garrett, Interview with Charles Wooley, *Across Australia*, 24 October 2008; 'Peter Garrett discusses Gunns Decision Delay', *7.30 Report*, 5 January 2009; EPBC Act 1999 s 143(1)(b),(c); Commonwealth Approval of Gunns Pulp Mill, Condition 44.

3 'Labor not planning to overturn Pulp Mill Decision: Garrett', *ABC News*, 5 December 2007; 'Peter Garrett discusses Gunns Decision Delay', *7.30 Report*, *ABC Television*, 5 January 2009; 'Garrett's Grist for Election Pulp Mill', *Canberra Times*, 6 January 2009; 'Garret fears Comp Claim if he blocks Gunns Mill', *The Age*, 7 January 2009; 'Pulp Mill may bite Labor at next Poll', *Australian Financial Review*, 16 January 2009.

environment, Garrett's decision would 'foster further doubt over the mill' and make the company's situation even harder. One thought the decision would take the mill out of the electoral cycle, 'kill[ing] it as an issue before the next federal election'. Another predicted that it would give 'new life to the Greens campaigning in the 2010 state and federal elections'.⁴ But for all this discussion, and all the public recognition that spin loomed large in Garrett's announcement, almost no one bothered to scrutinise the two changes that he made to the mill's approval.

A new regard for the precautionary principle?

The first change related to the 64,000 tonnes of effluent which Gunns planned to discharge each day into Bass Strait. While the risks posed by this effluent - and the inadequacies of Gunn's hydrodynamic modelling of how the effluent would disperse - loomed large when the mill was before Tasmania's Resource Development and Planning Commission and when the mill came to the State Parliament, it was an even bigger issue at a federal level because the mill's impact on the marine environment was the most significant issue within the Commonwealth's very limited areas of responsibility under the EPBC Act. If Canberra was to stop the mill - or subject it to significant regulation - it would be because of the effluent.

Garrett's actions in relation to this issue can only be properly understood by going back to 2007 when Gunns withdrew from the RPDC process so that, rather than relying on the Tasmanian assessment process, the Commonwealth had to conduct its own. Already on 16 March 2007, just two days after Gunns withdrew its integrated assessment and a fortnight before the company withdrew its second referral under the EPBC Act and submitted a third, the department recognised the need to scrutinise the mill's effluent when it commissioned the consulting engineers, Patterson Britton, to provide an independent review of Gunns' hydrodynamic modelling. The result was a serious discrepancy involving the dispersal of the effluent. Whereas the consultants employed by Gunns had predicted that the daily flushing of the effluent would be significant, Patterson Britton estimated that it would be negligible. Gunns' figure was 15 per cent. That of Patterson Britton was between 1 per cent and 2 per cent.⁵

Malcolm Turnbull could have immediately required Gunns to improve the modelling. But when Gunns put Turnbull under intense pressure to make his decision as quickly as possible - claiming that, if it did not have his approval by the start of September, it would lose \$1 million a day - Turnbull

4 'At last a Decision, of Sorts', *Sydney Morning Herald*, 6 January 2009; 'Growing Doubt on Pulp Mill Viability', *The Age*, 6 January 2009; 'No End to Pulp Friction', *The Australian*, 10 January 2009; 'Pulp Mill may bite Labor at next Poll', *Australian Financial Review*, 16 January 2009.

5 Patterson Britton, 'Review of Documents re Hydrodynamic Modelling of Effluent from Proposed Offshore Effluent outfall for Gunns Pulp Mill, Tasmania', Report to Department of Environment, 30 March 2007.

decided to have the mill assessed on the basis of 'preliminary documentation' or existing material which was the one form of assessment open to the government that would enable it to conform to the company's timetable. This decision - more than any other - compromised the federal assessment of the mill.

Turnbull was quick to try to mask the consequences of this decision. While the EPBC Act offered a hierarchy of five assessment levels intended to provide very different types of scrutiny of projects, one of Turnbull's spokespersons had the effrontery to claim that preliminary documentation was 'not less rigorous than an environmental impact statement'. When the Wilderness Society challenged Turnbull's decision in the Federal Court, a key component of the Commonwealth's justification was that preliminary documentation was 'often used for highly controversial projects', which only underlined the weakness of the federal regime. Even though Gunns was recognised to have withdrawn from the RPDC process because of its failure to do key scientific work such as proper hydrodynamic modelling,⁶ the then First Assistant Secretary of the federal department, Gerard Early, maintained, 'We didn't believe that Gunns needed to do any more actual work in order to have proper assessment documentation which would enable [the Minister] to make ... an informed decision'.⁷

Gunns' modelling still came under more scrutiny over the next three months. The federal Department of the Environment began by commissioning a second independent report from the engineering and environmental consultants BMT WMB who found that Gunns' modelling required significant strengthening before it could be relied on. Then Stuart Godfrey, a retired Chief Research Scientist in CSIRO's Division of Marine and Atmospheric Research, circulated a paper showing how Gunns had breached the Tasmanian Parliament's guidelines by conducting its modelling without adequate empirical basis. Godfrey highlighted how Gunns' observations were 'for one month only' despite a requirement that the company 'allow for reasonable variability'; the company 'did not measure water density, as explicitly required ... assumed (incorrectly) that it was negligible throughout the region of concern'; and used only one current meter mooring which meant they could not estimate a crucial parameter for estimating effluent dispersion.⁸

This paper, prepared by Godfrey as a concerned member of the public, without remuneration, was so significant that the federal Environment Department had Godfrey's paper reviewed by BMT WTB who substantially

6 See *The Age*, 6 October 2007; and Andrew Macintosh and Michael Stokes, this volume, Chapter 2.

7 *Wilderness Society v Turnbull* [2007] FCA 1178 esp at [66]; [2007] FCAFC 175 esp at [72]; Christine Milne, *Australian Senate Debates*, 13 August 2007.

8 BMT WBM, 'Re proposed Gunns Pulp Mill Outfall: Assessment of Modelling Reviews', 6 July 2007; Stuart Godfrey, 'Inadequacies in the Hydrodynamic Modelling Performed for the Gunns Pulp Mill IIS', <<http://www.environment.gov.au/epbc/notices/assessments/2007/3385/pubs/att-57-3.pdf>>, pp 1-2.

agreed with his conclusions. BMT WTB confirmed that 'the uncertainty associated with the original modelling' was 'unacceptably high' and that 'seasonality ... should be considered ... supported with adequate field observations'. More significantly, given the politeness with which consulting firms typically deal with each other's work, BMT WTB lambasted Gunns for continuing to provide 'superficial responses of a general, qualitative nature that refer to "standard practice" or similarly loose terms' as part of calling on Gunns to engage in 'substantial and significant revision of the existing modelling' and 'detailed, transparent and comprehensive reporting'. Otherwise, BMT WTB declared, the uncertainty associated with the modelling would 'remain unacceptably large'.⁹

When the department reported to Turnbull about the mill, it acknowledged 'the absence of a reliable model for predicting possible sediment and biota concentrations' but concluded that 'additional modelling to be carried out prior to any operation of the mill' could 'ensure no unacceptable impacts in Commonwealth waters'. Rather than looking on this modelling as a basis for making an informed decision about whether to approve the mill, the department simply treated the modelling as part of its plans for monitoring the mill which would 'provide early warning of any unexpected trends and adequate opportunity to correct them'. When the department formulated 24 conditions for Turnbull as part of his 'proposed decision' which he released for public comment on 19 August, one condition was that Gunns carry out this additional modelling 'prior to the commencement of operations, to the satisfaction of the Minister and the results of that modelling [be] used to update the [company's] environmental monitoring program'.¹⁰

The federal Labor Party endorsed these conditions immediately as part of trying to ensure that forest issues did not lose it any Tasmanian seats as they had done in 2004. But Turnbull's intention, already on 19 August, was to have this 'heavily-conditioned approval', and all the associated existing documentation, reviewed by a panel of independent experts led by the Chief Scientist Jim Peacock.¹¹ This additional scrutiny, unprecedented under the EPBC Act, was in direct conflict with Turnbull's decision to have the mill assessed simply on the basis of preliminary documentation. Whereas this low level of assessment implied that enough was known about the mill's environmental impacts, the appointment of Peacock suggested the project required an exceptionally hard look.

9 BMT WBM, Review of Godfrey Paper for Department of the Environment, 16 August 2007, pp 3-4.

10 Department of the Environment, Recommendation Report for EPBC Project 2007/3385, Gunns Pulp Mill, pp 14, 16, Condition 20; 'Pulp Friction: A Political Tale of Lawyers, Gunns and Money', *The Age*, 31 August 2007; 'Rattled Minister's Actions Timed to Election', *The Australian*, 31 August 2007; 'Lib or Lab: Who will Gunns Pulp this Election', *Webdiary*, Margo Kingston's blog.

11 'Gunns Pulp Mill gets Draft Approval', *ABC News*, 20 August 2007; 'Turnbull gives draft approval to Gunns Pulp Mill', *ABC News*, 20 August 2007.

Turnbull instigated this extra inquiry partly to demonstrate his environmental credentials as his own seat of Wentworth came under threat from a campaign led by the businessman Geoffrey Cousins. Turnbull was probably also looking – unsuccessfully as it turned out – to put the approval of the mill into limbo until after the 2007 federal election. But in his public statements, he emphasised his ‘grave concerns’ about the mill, including the dearth of data about its impact on the marine environment. The obvious flaw in this response was that Peacock would not be able to commission new scientific research to make up for what Gunns had failed to do. Still, when Turnbull extended the approval process on 30 August by 30 working days to give Peacock time to review his ‘departmental advice’, as Turnbull suddenly renamed his ‘proposed decision’,¹² he finally acted contrary to Gunns’s timetable by a small margin.

Peacock’s report in September 2007 went further than the department in criticising the hydrodynamic modelling undertaken by Gunns but was still very gentle about it. Because Peacock found that the modelling had ‘a number of weaknesses (notably neglect of background stratification, coarse vertical resolution, high horizontal eddy diffusion, inadequate calibration and short run times)’, he advised that effluent dilution contours predicted using the model were ‘open to question, and that the modelling study may have over-estimated minimum dilution rates’. Because of this uncertainty, Peacock reported that ‘it cannot be guaranteed that the proposed water quality objectives for constituents such as chlorate and colour will be met at all times in Commonwealth waters’.¹³

Peacock duly found that more modelling was necessary ‘to adequately predict the fate and impact of effluent contaminants released from the current proposed outfall location, and to assist in the design of a monitoring program’. He also paid closer attention to the kind of research which was required, providing detailed specifications of what the modelling and field observations should involve. While Peacock recognised that this work might ‘take over 12 months to allow for an annual cycle to be captured’, he declared these findings ‘essential’ for reliably identifying whether the contaminants in the effluent would disperse or accumulate in sediments to a level of concern. But Peacock undermined the strength of these recommendations by proposing that, rather than requiring Gunns to do this research before construction started, this modelling should be one of a number of studies that could ‘take place during construction but prior to commissioning’.¹⁴

12 ‘Poll Threat to Marine Decision’, *The Age*, 30 August 2007; ‘Rattled minister’s actions timed to election’, *The Australian*, 31 August 2007; ‘How Turnbull’s Plan was Beaten to a Pulp’, *The Australian*, 1 September 2007; ‘Lib or Lab: Who will Gunns pulp this election’, *Webdiary* (Margo Kingston’s Blog).

13 ‘Chief Scientist’s Report on the Scientific Aspects of the Department of the Environment and Water Resources Recommendation Report, Relevant Supporting Documentation and Public Comments on the Gunns Limited Pulp Mill Proposal (EPBC 2007/3385) in Tasmania’, September 2007, p 17.

14 ‘Chief Scientist’s Report’, n 13, pp 28–29, 33.

The result was a very different provision when Turnbull approved the mill that October subject to 48 conditions, twice the original number. Condition 38 of the approval, dealing with the modelling, was much more specific about what research would have to be done, including ‘long term simulations that capture seasonal variability’. This condition also did not link the modelling to the monitoring which would occur if and when the mill was allowed to start operating. Instead it simply provided that ‘additional modelling must be carried out in relation to the effluent, as part of the EIMP, prior to the commencement of the mill’. But Turnbull’s approval conditions were much less clear about what would happen if the modelling showed that Gunn’s effluent might accumulate in Bass Strait to dangerous levels. While condition 39 provided that, if the modelling indicated that chemicals would reach trigger levels, Gunns would have to ‘implement approved response strategies, including if necessary changing the design and operation of the effluent pipeline and diffuser’, that left open whether the federal government might refuse to grant final approval to the mill based on this modelling.¹⁵

The *Australian Financial Review*’s Laura Tingle was the only journalist who focused on this issue in January 2009 after Peter Garrett revisited this part of Malcolm Turnbull’s approval. Tingle observed: ‘The wording of this particular part of Turnbull’s approval is ambiguous but from the beginning it had been taken to mean Gunns would be required only to undertake the modelling, not have final approval reliant on its findings’.¹⁶ While right about the ambiguity of the condition, Tingle was wrong about how this condition was publicly presented in October 2007 when it was first imposed. Jim Peacock was responsible. After explaining on ABC Radio that it would take Gunns 18 months to find out exactly what effect effluent from the mill would have on marine life, Peacock declared that, while these ‘very important parts of the environmental impact management plan could be carried out during the construction phase ... it’s at [Gunns’s] own risk, of course, because if the findings are negative in terms of environmental conditions, then of course the mill couldn’t go ahead’.¹⁷

As Peacock’s comments provoked an immediate flurry of debate, everyone who spoke out on the issue accepted that the federal minister would have the power to stop the mill proceeding on the basis of the effluent studies. So the then leader of the Tasmanian Greens, Peg Putt observed, Peacock was ‘saying that the scientific studies he has insisted upon for the pulp mill could come up with information that means the mill would have to be built differently or not at all’. What concerned Putt, along with other critics of the mill, was whether a future minister would have the political will to change or stop the mill when Gunns had spent \$2.2 billion on its construction. So Putt declared it ‘naïve to believe that the mill would be prevented from operating

15 Commonwealth Approval of Gunns Pulp Mill, 4 October 2007, Conditions 38, 39.

16 ‘Pulp Mill may bite Labor at next Poll’, *Australian Financial Review*, 16 January 2009.

17 ‘Chief Scientist warns Gunns, do Environment Studies First’, *ABC News*, 9 October 2007.

once built'. She lamented 'the failure to take the precautionary approach of insisting that the scientific studies be completed prior to construction, so that the need for changes or the impossibility of making effluent impact acceptable would be known in time to do something about it'.¹⁸

Peter Garrett first discussed this issue as federal Environment Minister while visiting Launceston in November 2008 when Gunns was yet to submit the final version of its plan for hydrodynamic modelling. After predicting that there would be 'a requirement for real time hydrodynamic, hydrological modelling to take place', which Turnbull had in fact already stipulated, Garrett expressed his 'anticipation' that this modelling 'would take place after the formal approvals process is concluded'. Garrett also explained that, if this modelling identified 'significant impacts on matters of National Environmental Significance', there could be 'provision of additional conditions in relation to the approval, if there's an approval that's given'. The Wilderness Society immediately identified this approach as a 'watering down the process set up by ... Malcolm Turnbull' because Garrett appeared to be 'satisfied to approve the mill before all the important scientific work was done'.¹⁹

Garrett took a different stance when the 12 remaining modules in the EIMP came to him for consideration in January 2009. While he approved nine, he deferred his decision on three relating to the mill's effluent until the modelling had been done. In a letter to the company, Garrett stated that he had reached this decision because the Independent Expert Group had advised him that there was 'a degree of uncertainty' about the outcomes of the company's hydrodynamic modelling. As a result, he was not satisfied that the modules provided 'the level of protection necessary for the relevant matters of national environmental significance' as required by the EPBC Act. 'On the basis of legal advice', he had concluded that the modelling had to be completed and the results incorporated into the management plan before he could approve the plan.²⁰

Garrett went further when talking to the media. In his statement to his press conference on 5 January, Garrett maintained that the conditions set by Turnbull were 'entirely unsatisfactory in relation to these essential environmental studies'. In similar vein, he declared that 'to approve the EIMP, in the absence of the critical environmental studies that have still to be carried out, would conspicuously fail to provide the level of environmental protection

18 Peg Putt, *Did Chief Scientist Come Down in the Last Shower?*, Media Release, 9 October 2007. See also, Thomas Moore, Bondi Pavilion speech, 14 October 2007, <<http://www.surfridernb.realsurf.com/wp1/2007-conference-support-materials/dr-thomas-moores-speech/>>; 'Pulp Mill Effluent may not flush away', *Catalyst*, ABC Television, 5 October 2007.

19 Peter Garrett, Doorstop Interview Queen Victoria Museum, Inveresk, 6 November 2008; Wilderness Society, *Garrett waters down Turnbull Assessment Plan for Gunns Pulp Mill*, Media Release, 7 November 2008.

20 Letter, Peter Garrett to John Gay, Executive Chairman, Gunns Limited, 5 January 2009; Peter Garrett, Statement to Press Conference, 5 January 2009.

required by Australian law and expected by the Australian people'. Garrett also announced that 'if the results of the hydrodynamic modelling indicate effluent from the mill may have an unacceptable impact on the marine environment, then response strategies modifying the project - possibly extending to tertiary treatment of the effluent - will be required'. In his accompanying media statement, he made clear that the relevant statutory provisions were those involving the precautionary principle. 'National environmental legislation', Garrett observed 'requires that I take a precautionary approach to environmental protection'.²¹

The clear implication was that, when Turnbull approved this aspect of the mill in October 2007, he failed to apply the precautionary principle or at least applied it inadequately, and that Garrett was required to do more as a matter of law. Garrett also emphasised the virtues of his approach - stressing its result would be a decision 'based on real data collected in the field'. He declared: 'This is actually getting the decision-making the right way round. Don't approve it and then go off and have a whole series of environmental studies and modelling take place. Rather, make sure that modelling is done properly and adequately and comprehensively and then make the decisions that you're required to make under the Act'. He could not 'grant final approval for this mill without fully understanding its potential environmental impacts'.²²

This stance would have been more convincing if Garrett had been adopting it generally. But like his Liberal predecessors, Garrett was continuing to grant environmental approvals which required 'environmental studies and modelling' to be done after - rather than before - he made his decisions. Just before Garrett announced his decision on the Gunns mill, he approved one of Iluka's sand mines in Victoria where survey work for the vulnerable long-eared bat, the endangered black-eared miner and the endangered Mallee emu-wren had not yet been done and, under his condition, would only occur just before native vegetation was cleared from the site. Immediately after Garrett announced his decision on the mill, his approval of a sponge farm in Torres Strait in mid January was similar - leaving the provision of 'quantifiable data on the distribution and abundance' of several turtle species to the future.²³

For all his criticism of Turnbull, there was also no significant difference between what Garrett was doing in relation to Gunns and what Turnbull had intended. As Turnbull himself noted in January 2009, his original conditions required that Gunns 'always had to pass certain tests, approvals, complete

21 Peter Garrett, *No Mill Approval until Detailed Environmental Studies Completed*, Media Release, 5 January 2009.

22 EPBC Act ss 3A(b), 136(2)(a); Peter Garrett, *No Mill Approval until Detailed Environmental Studies Completed*, Media Release, 5 January 2009; 'Peter Garrett discusses Gunns Decision Delay', *7.30 Report*, 5 January 2009.

23 Iluka Resources Ltd Mineral Sands Mining in Victoria, EPBC 2004/1636 Approval 23 December 2008; Sponge Aquaculture Farm Yorke Island Torres Strait EPBC 2008/3976 Approval 13 January 2009.

hydrodynamic modelling and so forth' before they could start operating. Garrett simply reiterated this position.

A new enforcement mechanism

The second change which Garrett made related to what would happen if the mill breached its permit levels. This issue had been a major one at a State level because of a profound shift between the special pulp mill legislation enacted in April 2007 and the mill's permit conditions released and approved that August. The problem was that the Act arguably began by being too stringent when it provided for mandatory shut down of the mill for any breach of its permit conditions, however trivial. Then the actual permit conditions watered down this sanction so much that it became likely that this sanction would never be enforced. While the Act provided that the mill would have to shutdown if it did not 'comply' with its permit conditions, the conditions stipulated that the mill would be in 'compliance' so long as the conditions were 'substantially performed to the reasonable satisfaction of the regulatory authority'.²⁴ Whereas the Tasmanian Greens' leader Peg Putt protested that the conditions were written so that the pollution limits 'can be exceeded without an automatic shutdown and without prosecution as long as Gunns simply reports on the non-compliance and takes to rectify it', Premier Lennon expressed his hope that 'the mill would not be shut down in the first instance of a breach of permit conditions'.²⁵

The Commonwealth regime for shutdown of the mill imposed by Malcolm Turnbull was much tougher than the State condition. One of the draft conditions prepared by the federal department which Turnbull released for public discussion in August 2007 was that '[t]he pulp mill must not operate if effluent from the pulp mill exceeds the discharge limits' specified on the basis of monthly average effluent concentrations for seven different substances in an attached table. While it seems likely that Gunns urged Turnbull to follow the State government and relax this provision, Turnbull was in no position to do so because he was under such intense pressure to strengthen his conditions. When Turnbull finalised his approval in October, the one change to this provision was that maximum limits for other effluent contaminants would be developed in the EIMP, creating the prospect that there would be even more substances for which breach of effluent limits would require a shutdown of the mill.²⁶

Gunns was likely to exceed these limits as revealed in a report by Mike Herzfeld, a member of the Independent Expert Group appointed by Malcolm

24 *Pulp Mill Assessment Act 2007* (Tas) s 8(3); Pulp Mill Permit, 21 August 2007, cl 8.

25 'Weigh-wad Process as Pulp-Mill Vote Looms', *The Mercury*, 22 August 2007; 'Shutdown Order not Regulator's Immediate Drill', *The Mercury*, 23 August 2007; 'Mill Permit "Loophole" Greens' Fear on Breaches', *The Mercury*, 24 August 2007.

26 Department of the Environment, Recommendation Report for EPBC Project 2007/3385, Gunns Pulp Mill, p 5 Condition 17; Commonwealth Approval of Gunns Pulp Mill, 4 October 2007, Condition 32.

Turnbull to advise the federal government on the EIMP. As part of addressing many of the weaknesses in Gunns' modelling,²⁷ Herzfeld carried out a simulation based on data collected by Gunns' consultants in February 2006 which resulted in Herzfeld finding that the State Water Quality Objectives for chlorate were 'violated on almost a daily basis (24 times in 19 days)'. Herzfeld extrapolated that there was 'every reason to expect that the mechanisms responsible for these exceedances would apply in other periods'. He also identified a possibility of 'high concentrations' being carried significant distances from Gunns' outfall which would 'certainly reach Commonwealth waters (and the coast) under conducive forcing conditions'.²⁸

Because these findings were so adverse to Gunns, the company had every reason to prevent or at least delay the report's release – and succeeded with the help of the federal department. When Christine Milne of the federal Greens tried to secure the report through Freedom of Information, a senior Departmental official initially refused to release it on the basis that the report 'could mislead the public and create uncertainty, pressure and complexity for Gunns in its dealing with stakeholders, including the general public'. While this argument was ultimately rejected in August 2008 by the department's Deputy Secretary, Gerard Early, Gunns challenged this decision in order to prevent the release of this report when it was potentially most damaging to the company – before Garrett made his decision on the company's modules. But even when Gunns ultimately abandoned this appeal in late January 2009 after Garrett made his decision, the department did not make this report available. Instead this document – commissioned and paid for by the federal government – was released by Gunns and placed on the company's website.²⁹

In between, Garrett changed the federal regime for breaches of the mill's maximum limits using the statutory procedure empowering him to change approval conditions with the proponent's consent. Garrett did so through three related measures. One was to qualify the mandatory shutdown condition in Malcolm Turnbull's approval by making it 'subject to the EIMP'.³⁰ Another was to agree to a provision in Gunns' modules specifying that the mill would not have to shut down 'if the primary cause of the exceedance is a specific event, such as an unexpected spike in concentrations, which occurs during the last weekly monitoring result for the month, and responses have

27 Herzfeld provided the longest list of these weaknesses – namely, inappropriate use of two-dimensional model; omission of low frequency sea level as a forcing mechanism; lack of stratification; insufficient run lengths of the model; insufficient vertical resolution in three-dimensional models; use of large horizontal diffusion coefficients; and insufficient calibration. See M Herzfeld, 'Preliminary Hydrodynamic Modelling of the Bell Bay Outfall: Briefing Document for the Independent Expert Group', CSIRO Marine and Atmospheric Research, December 2007, p 3.

28 *Ibid.*, pp 2, 25, 36.

29 Christine Milne, *Garrett must release critical CSIRO Pulp Mill Report: Stop Protecting Gunns*, Media Release, 21 August 2008; Gerard Early, Statement of Reasons re Herzfeld Report, 19 September 2008.

30 EPBC Act Variation of Conditions attached to Approval, 5 January 2009, Amending Condition 32.