

MILLS, MINES AND OTHER CONTROVERSIES

The Environmental Assessment of Major Projects

Editors

Tim Bonyhady

Andrew Macintosh

THE FEDERATION PRESS
2010

Contents

<i>Contributors</i>	vii
<i>Table of Cases</i>	ix
<i>Table of Statutes</i>	xi
<i>Currency Statement</i>	xvi
1. Introduction <i>Tim Bonyhady</i>	1
2. Tasmania and the Gunns Pulp Mill <i>Andrew Macintosh and Michael Stokes</i>	16
3. The Northern Territory and the McArthur River Mine <i>Kirsty Howey</i>	60
4. South Australia and the Penola Pulp Mill <i>Rob Fowler</i>	81
5. Victoria and the Channel Deepening Project <i>Brad Jessup</i>	104
6. Queensland and the Traveston Dam <i>Larissa Waters</i>	125
7. Western Australia and the Gorgon Gas Project <i>Hannes Schoombee</i>	160
8. New South Wales and the Sandon Point Case <i>Jemilah Hallinan</i>	188
9. The Australian Capital Territory and the Gungahlin Drive Freeway <i>James Prest</i>	207
10. The Commonwealth <i>Andrew Macintosh</i>	224
11. Postscript <i>Tim Bonyhady</i>	250
<i>Index</i>	284

Published in Sydney by
The Federation Press
PO Box 45, Annandale, NSW, 2038.
71 John St, Leichhardt, NSW, 2040.
Ph (02) 9552 2200. Fax (02) 9552 1681.
E-mail: info@federationpress.com.au
Website: <http://www.federationpress.com.au>

National Library of Australia
Cataloguing-in-Publication entry
Mills, mines and other controversies : the environmental assessment of major projects /
editors Tim Bonyhady; Andrew Macintosh

Includes index.
ISBN 978 186287 757 3 (pbk)

Environmental law - Australia.
Environmental impact analysis.

344.94046

© The Federation Press

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Enquiries should be addressed to the publisher.

Typeset by The Federation Press, Leichhardt, NSW.
Printed by Ligarc Pty Ltd, Riverwood, NSW.



This book has been printed on Australian offset paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.



Contributors

Tim Bonyhady is the Director of the Australian Centre for Environmental Law and the Centre for Climate Law and Policy at the Australian National University. His books include *The Law of the Countryside, Environmental Protection and Legal Change, Places Worth Keeping: Conservationists: Politics and Law, Climate Law in Australia* and the prize-winning *The Colonial Furth*.

Rob Fowler holds the Chair in Environmental Law in the School of Natural and Built Environment at the University of South Australia. He is also the chair of the South Australian Environmental Defender's Office, a councillor of the Australian Conservation Foundation and the chair of the IUCN Environmental Law Commission.

Jemilah Hallinan is the Education Officer with the NSW Environmental Defender's Office.

Kirsty Howey was a solicitor with Blake Dawson before going to work with the Northern Land Council in Darwin where she was instructing solicitor on behalf of traditional owners in the legal proceedings challenging Commonwealth and Northern Territory approvals of the open cut expansion of McArthur River Mine. She is now doing a Masters of Law in Vancouver focusing on indigenous land law.

James Prest is a member of the Australian National University's College of Law. Since working as a legal policy officer in the Department of Prime Minister and Cabinet, he has been a solicitor with Corrs Chambers Westgarth and the Legal Aid Office in Canberra, and been principal solicitor at the ACT's Environmental Defender's Office.

Andrew Macintosh is the Associate Director of the Centre for Climate Law and Policy at the Australian National University. Before coming to the ANU, he was a solicitor with Mallesons Stephen Jacques and Minter Ellison, worked as an advisor to the Australian Democrats and WWF-Australia and was Deputy Director of the Australia Institute.

Johannes (Hannes) Schoombee has been a member of the WA Bar since 1995 where his practice includes town planning matters and environmental law as well as commercial, constitutional and administrative law and property and trusts. For the past 11 years he has been the chairperson of Western Australia's Environmental Defender's Office.

Michael Stokes is a senior lecturer in the Faculty of Law, University of Tasmania, who specialises in jurisprudence, administrative law, constitutional

Yet the period in which many of these controversies began was also one in which government enjoyed exceptional latitude because of the long economic boom. While it is a commonplace that governments sacrifice the environment when the economy is in decline – that recessions lead not just to financial collapse but environmental races to the bottom – what happens when the economy is strong has received much less attention. One possibility is that government takes advantage of this economic wellbeing for environmental ends and refuses to grant approval for major projects with serious environmental consequences. The other possibility, suggested by this book, is that government remains as neglectful of the environment as ever as part of always wanting more short term economic growth.

This book – the first in over 25 years to focus on the law of environmental impact assessment across Australia³ – describes and critiques the legal framework for impact assessment and scrutinises some of the projects which have been most controversial. The book's subject is one of striking complexity on a general level because there are so many statutory assessment regimes, all very different. So Queensland has three regimes spread across three different Acts of Parliament, while New South Wales has three within the same Act. And even for States which have only one, such as Victoria and Western Australia, many projects require Commonwealth approval. But the operation of the law in relation to particular projects can be at least as hard to elucidate both because of the complexity of the approval processes and because government frequently goes to such lengths to mask and distort its actions.

A fundamental question concerns the efficacy of environmental impact assessment as a means of environmental protection. While environmental impact assessment became 'the most widely emulated environmental policy innovation of the twentieth century' following its incorporation in the United States *National Environmental Policy Act 1969*,⁴ the prevention of environmentally damaging projects or substantial mitigation of their adverse effects was not a significant motivation in this embrace of environmental impact assessment. As Lex Brown and GT McDonald recognised in 1995 in an essay marking more than 20 years of environmental impact assessment 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'.⁵

³ *Confronting the Water Crisis in Australia's Cities*, ANU E-Press, Canberra, 2008, pp 19-36; Victorian Auditor-General, *Planning for Water Infrastructure in Victoria*, Melbourne, 2008: 'Water projects "not needed"', *The Age*, 29 March 2009.

⁴ RJ Fowler, *Environmental Impact Assessment, Planning and Pollution Measures in Australia*, Australian Government Publishing Service, Canberra, 1982.

⁵ Bradley C Karkkainen, 'NEPA and the Curious Evolution of Environmental Impact Assessment in the United States' in Holder and McGillivray, n1, p 45.

⁶ AL Brown and GT McDonald, 'From Environmental Impact Assessment to Environmental Design and Planning', *Australasian Journal of Environmental Management*, Vol 2, 1995, p 65.

Within this context, it is striking how impact assessment has become central to environmental decision making in Australia despite an acknowledged, enduring dearth of information regarding its environmental benefits. When the federal Department of Environment and Conservation testified before the House of Representatives Standing Committee on Environment and Conservation in 1978, the department's only evidence of the efficacy of the system was vague. Although the department stated that 'on a number of occasions' it had 'received oral advice that proposals or alternatives were not considered because of the environmental impact statement (EIS) requirements' – in other words, the department claimed to have heard that the EIS requirements had stopped environmentally damaging projects proceeding – the department gave no examples. While the department provided a list of 19 cases 'where it considered that the Act and an awareness of the need for environmental assessment had an important influence in the development of particular proposals', the department did not elaborate how it had done so.⁶

Otherwise the department acknowledged that it was 'difficult to provide tangible evidence' that the Commonwealth's impact assessment legislation was 'assisting in the protection of the environment'. The department stated that it was 'not possible to measure the extent to which impact statement requirements' caused 'departments or organizations not to proceed with planning of environmentally harmful proposals which would have proceeded in the absence of the Act'. The department recognised that 'modifications to a particular proposal, because of the legislation' were equally difficult to attribute to EIS, especially where the proponent was 'reluctant to admit that the need to prepare the impact statement was responsible for the modification'.⁷

This situation continued into the 1980s when Rob Fowler wrote the first major study of environmental impact assessment laws and practice in Australia. As part of highlighting the dearth of information about the cost-effectiveness of impact assessment, Fowler called for cost-benefit studies 'in the hope of producing more reliable evidence of their effect and allowing conclusions to be drawn as to whether the procedures are justified'. Yet he also warned that it was possible 'to place too much confidence in such studies' because there 'are considerable difficulties in identifying and measuring the benefits which may be derived from impact assessment.' Like the federal department, he recognised that 'where proposals have not proceeded or have been modified, it is difficult to attribute direct responsibility to assessment procedures'.⁸

⁶ House of Representatives Standing Committee on Environment and Conservation, *The Commonwealth Government and the Urban Environment: Formulation and Co-ordination of Policies*, Australian Government Publishing Service, Canberra, 1978, pp 56, 127.

⁷ *Ibid*, p 56.

⁸ RJ Fowler, 'The Australian experience' in Sandford D Clark (ed), *Environmental Assessment in Australia and Canada*, Ministry for Conservation, Melbourne, 1982, pp 247-248.

A decade later, this evidentiary blank was being filled in some other countries with results suggesting that impact assessment was of very limited benefit. A British study of the use of environmental impact assessment in relation to 40 United Kingdom planning decisions found that environmental impact assessment was almost never determinative of the outcome. Instead environmental impact assessment simply 'enhanced provision of information about the environmental consequences of actions to decision-makers and, to a lesser extent, assistance in the setting of conditions and in modifying proposals' and that even these very modest benefits of environmental impact assessment were 'not occurring in all cases'.⁹ But while Ralf Buckley had undertaken a pioneering study of the accuracy of the environmental predictions contained in Australian environmental impact statements – and concluded that the overall mean accuracy of the critical predictions was just 44 per cent¹⁰ – no one in Australia had attempted a comparable empirical examination of the extent to which the environmental impact assessment process either stopped or significantly modified major projects. 'Measuring the effectiveness and efficiency of environmental assessment are critical to assessing its achievement', Lex Brown and GT McDonald observed in 1995, 'but even after two decades of experience, this is difficult because the necessary research has not been done'.¹¹

Brown and McDonald still argued that environmental assessment was 'a very important tool of environmental management' because it both gave parties traditionally involved in the decision making process a new understanding of environmental impacts and brought a wide array of new parties including ecologists, anthropologists, non-governmental organisations and ordinary members of the public into this process. Brown and McDonald maintained that this educative role 'more than justifies the time and effort ... placed in environmental assessment to date'. They concluded:

It appears that individuals, organizations and States, need to go through a process of social learning provided by environmental assessment, and this cannot be short-cut. The educative and stimulative role that has been played by environmental assessment in environmental management and planning is not yet complete, and there is every reason to persist with EA in the immediate future.¹²

Over a decade later, more should be expected of such a costly, time-consuming process. Yet environmental impact assessment is not achieving it according to the one Australian empirical study by Andrew Macintosh. In his survey of proponents under the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) just 11 per cent of proponents responded that the regulatory process was resulting in significant

9 CM Wood and C Jones, 'The Effect of Environmental Assessment on UK Local Planning Authority Decisions', *Urban Studies*, Vol 34, 1997, esp p 1254.

10 Ralf Buckley, *Precision in Environmental Impact Prediction: First National Environmental Audit, Australia*, Centre for Resource and Environmental Studies, Australian National University, Canberra, 1989, esp p 53.

11 Brown and McDonald, n 5, at 67.

12 *Ibid*, at 66, 68-69. See also at 76.

environmental benefits, while 62 per cent responded that the impact assessment regime did not improve the environmental outcomes.¹³ The most recent major study of environmental assessment in Europe and North America – Jane Holder's and Donald McGillivray's *Taking Stock of Environmental Assessment* – is similarly bleak in its conclusions. While still asserting the 'workability' of environmental assessment, McGillivray and Holder identified such scant evidence of the benefits of environmental assessment in what they considered to be the domain of rational decision making that, like Brown and McDonald, they were prompted to look for other justifications for it. They wondered whether it was time to consider also:

the significance of the 'irrational', the 'subjective', or 'unmeasurable' in environmental assessment – how it acts as an avenue for protest (or at least for delay as a variant of this), a power of expression and communication, and as a critical meeting point between (legal) text, culture and nature.¹⁴

Sharon Turner of Queen's University in Belfast was very much alive to this issue when reviewing Holder's and McGillivray's book. Writing in the *Journal of Environmental Law*, Turner dwelt on 'the lack of evidence that environmental assessment produces better environmental decision making'. She found it 'chastening to read its beneficial impact being discussed in such vague terms as increasing confidence amongst officials making environmental decisions and potentially exerting a subtle, long-term influence by increasing environmental awareness and learning amongst participants in these processes'. She concluded that environmental assessment 'in Europe has simply become an industry divorced from any sense of actual purpose' and that, the more environmental assessment had been institutionalized, the more the environment had 'been marginalized in the process'.¹⁵

This book suggests that the situation in Australia is much the same. The book does so partly by analysing the frameworks for decision making across the country and by providing detailed scrutiny of the overall performance of the Commonwealth assessment regime. But the book also does so through a series of case studies of controversial projects drawn from every State and Territory. Whether these case studies are representative is open to argument. So it may be argued that the projects in question only become contentious because their environmental assessment was exceptionally weak. But it may equally be argued that, because these projects were inherently controversial, their proponents had particular reason to do their environmental assessment with exceptional care.

Whatever the case, the projects discussed in detail in this book provide a vital means of revealing the law in action, illuminating how the statutory

13 A Macintosh, 'The EPBC Survey Project: Final Data Report', Australian Centre for Environmental Law, Australian National University, Canberra, 2009, <<http://law.anu.edu.au/acel/index.asp>>.

14 Donald McGillivray and Jane Holder, 'Taking Stock' in Holder and McGillivray (eds), n 1, pp 14-15.

15 Sharon Turner, Review of Jane Holder and Donald McGillivray (eds), *Taking Stock of Environmental Assessment: Law, Policy and Practice* in *Journal of Environmental Law*, Vol 20, 2008, pp 323-328.

regimes for environmental impact assessment are put into practice. These case studies also provide an important record of major controversies which, all too often in Australia, are the subject of extensive media reportage and commentary without the larger narrative of these conflicts ever being pieced together. For all that this book is concerned with environmental law and policy, it is also a piece of contemporary history.

The failure of environmental assessment at a State and Territory level takes many forms. It is a story of manifestly inadequate laws remaining in place despite political promises to reform this legislation. It is a story of relatively strong laws being repealed or marginalised because of the commitment of government to short term growth. It is a story of laws subject to extraordinary exemptions. It is a story of assessment regimes that operate with impressive rigour only to be ignored or overridden by government, often by enacting special legislation. It is a story of processes that all too often look a farce because government appears utterly committed to the project in question regardless of the environmental consequences.

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 *Environment 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 and, even in cases of clear, serious breaches, being slow to take enforcement action so that the abundant criminal and civil penalty provisions in the Act have been almost dead-letters.

Within this context, the federal government's own accounts of its environmental achievements warrant closer scrutiny. A key example is the Iluka sand mine in the Catby area about 150 kilometres north of Perth which the Commonwealth's Department of Environment included in its annual report for 2005 as an example of 'using the particular manner decision to deliver better environmental outcomes with a streamlined process'. The following year, when the 2006 Australian State of the Environment Committee commissioned the Queensland barrister Chris McGrath to write a brief review of the operation of the EPBC Act, the Iluka sand mine was one of six cases provided by the department to McGrath because of their 'positive environmental outcomes'. The State of the Environment Report duly mentioned it as an example of a good outcome achieved by the EPBC Act, as did McGrath in a later paper.¹⁶

16 *Department of the Environment and Heritage Annual Report 2004-05*, section 1.4; Chris McGrath, Paper prepared for the 2006 Australian State of the Environment Committee, 'Review of the EPBC Act', p 5; RJS Becton, Kristal I Buckley, Gray J Jones, Denise Morgan, Russell E Reichelt and Danni Trewin, *State of the Environment*

The federal department's account of what occurred is worth quoting at length. It stated:

The Department was concerned about the potential loss of known habitat for the Carnaby's cockatoo, a listed endangered species under the EPBC Act. As part of its referral documentation the company provided a report on the cockatoo usage of the area, including the area's likely significance for breeding and feeding and the potential for increased habitat fragmentation as a result of the company's proposal. On the basis of this report, and through extensive consultation with relevant stakeholders (including the Carnaby's Cockatoo Recovery Team, Birds Australia, the Dandragan Shire Council, and state agencies such as the WA Department of Conservation and Land Management and the WA Department of Environment), the company then developed a detailed management plan that identified the likely impacts of its activity on the listed species, and outlined a range of avoidance, mitigation and management measures to minimize possible impacts.¹⁷

This statement suggests that the conservation plan for Carnaby's cockatoo was developed after Iluka lodged its referral for the mine with the federal Department of Environment. In fact, this referral reveals that the company had developed its conservation strategy at a State level as part of seeking State approval long before the mine went to Canberra for approval. There also was no time between when Iluka referred the mine in February 2005 and when the federal department approved the mine in March 2005 to develop any significant conservation measures. A report from Western Australia's Environmental Protection Authority confirms that the company's plan was developed through negotiations with the Authority and Western Australia's Department of Conservation and Land Management, leading the Authority to claim credit publicly for the good outcome.¹⁸

This example of the federal department appropriating an outcome achieved at a State level is all the more disturbing because, as Andrew Macintosh discusses in this book, at least two other projects which the Commonwealth has used as case studies of its environmental achievements appear to be projects where the federal department has contributed little or nothing. Even if the Commonwealth regime has been generally weak, one might expect that, when picking out just one or two projects a year as demonstrations of its achievements, the federal department could have found ones where it has significantly improved the environmental outcomes. The department's failure to do so raises disturbing questions about its work.

2006: *Independent Report to the Australian Government Minister for the Environment and Heritage*, section 11.6; Chris McGrath, 'Swirls in the Stream of Australian Environmental Law', *Environmental and Planning Law Journal*, Vol 23, 2006, p 174.

17 *Department of the Environment and Heritage Annual Report 2004-05*, section 1.4.

18 *Catby Mineral Sands Project Iluka Resources Limited: Report and Recommendations of the Environmental Protection Authority*, Environmental Protection Authority, Perth, December 2005, esp p 10; 'Proposed Mine may Help Endangered Birds', *ABC News*, 12 December 2005.

The persistence of fundamental weaknesses in Australia's environmental impact assessment regimes is equally striking – as illustrated by the Iwasaki resort on Queensland's Capricorn Coast, which was the subject of perhaps the greatest dispute over environmental impact assessment in the 1970s, as well as one of the very few environmental cases to be heard by Australia's High Court. One might expect – or at least hope – that the way in which this resort was assessed would have no resonances with the present, occurring as it did in the Bjelke-Petersen era of almost unchecked development and appalling environmental neglect. In fact, there are repeated continuities between what occurred then and what happens now, not so much because of the persistence of old regimes but because of the design of new ones.

A mix of nationalism and racism lay behind much of the opposition to the resort which the Japanese businessman Yohachiro Iwasaki wanted to be on an exceptional scale – bigger than any other tourist complex in Australia, perhaps even the world's largest tourist resort, accommodating as many as 22,000 visitors and serviced by its own airstrip, golf course, stud ranch and deep sea fishing facilities. Yet environmental considerations also loomed large after Iwasaki began promoting his proposal in 1971. While he described the resort's site as 'a combination of scrub, swampland and low quality grazing land ... considered a severe tick area', conservationists argued that the tidal wetlands were of 'outstanding scientific interest' and 'exceptional value'. They claimed that there was no other area in Australia where there was 'so much variation in structure and species composition in mangrove forests in so small an area'. They argued that the parallel dune system was a rare landform also warranting protection while the littoral rainforest was the largest remaining in central Queensland. They identified the site as 'an ideal laboratory for understanding the mechanisms that control the distribution and growth of mangrove species and associated flora and fauna'.¹⁹

Iwasaki finally commissioned a Queensland firm of consultants, UDPA, to prepare an EIS late in 1977. The company initially did so to satisfy draft guidelines prepared by Queensland's Coordinator-General which did not

19 Farnborough Resort Iwasaki Sangyo Co (Australia) Pty Ltd, 1978, pp 1-2; Edward Hegerl, 'The Iwasaki Tourist Project – A Case Study', 20 August 1978, pp 1-2, 4; John McCabe, 'The Iwasaki Resort Proposal – Some Background on a Resource Conflict', *Habitat*, Vol 7(1), February 1979, p 18; Tor Hundloe, 'Sales and Sell-out at Yeppoon, as Governments parody EIS Procedure', *Royal Australia Planning Institute Journal*, May 1979, pp 146-147; Adrian Jeffreys, 'The Trouble with Tourism', undated ms, p 1. See generally, Nancy Viviani and Jim Selby, *The Iwasaki Tourist Development at Yeppoon*, Centre for the Study of Australian-Asian Relations Research Paper No 3, Griffith University, 1980, pp 8, 11, 23, 25; John J Pigram, 'Environmental Implications of Tourism Development', *Annals of Tourism Research*, Vol 7, 1980, pp 554-583; Ross Fitzgerald, *From 1915 to the early 1980s: A History of Queensland*, University of Queensland Press, Brisbane, 1983, pp 493-502; Jennifer Craik, *Resorting to Tourism: Cultural Policies for Tourist Development in Australia*, Allen & Unwin, Sydney, 1991, pp 199-205; David Mercer, 'Tourism and Coastal Zone Management: The Uneasy Partnership' in KJ Walker and K Crowley (eds), *Australian Environmental Policy 2: Studies in Decline and Devolution*, University of New South Wales Press, Sydney, 1999, p 145.

have the force of law. When the Queensland Government enacted special legislation to approve the resort in 1978, Iwasaki also used the impact statement to satisfy a requirement in the legislation that it report on the resort's environmental effects 'in such manner as may be approved by the Minister'.²⁰ Iwasaki also had UDPA expand its report in an attempt to satisfy Australia's first environment impact assessment legislation – the Commonwealth's *Environment Protection (Impact of Proposals) Act* introduced by the Whitlam Government in 1974 – which contained a limited number of statutory requirements but largely left the detailed provision for impact assessment to administrative procedures of uncertain legal status. While possibly a form of legislation, these procedures were also possibly just a form of executive direction, no different to guidelines.²¹

UDPA concluded that there would be 'no major conflicts' between the resort and environmental protection and that Iwasaki's development of 'an environmentally sensitive integrated plan for the landscape' could even result in 'many important positive benefits for conservation'. But UDPA emphasised that its capacity to evaluate the resort was very limited because Iwasaki still had only a concept plan for the resort. UDPA also found that the proposed site of the international village was a seasonal swampland subject to tidal inundation where the building conditions progressively deteriorated to the west and the compressible soils required special foundation systems, the acid soils were aggressive to asbestos cement and concrete pipes and underground structures and there was a potentially severe biting insect problem. As a result, UDPA identified a 'need for several modifications' in the concept plan – above all, that relocation of the resort 'to the south should be seriously considered'.²²

The Queensland Government not only failed to release this document but inserted a provision in the resort's special legislation specifying that the company's environmental reports were to 'be held by the Minister as confidential documents unless advised in writing to the contrary by the Company'. Because of this provision, which the State's Country Party Premier Joh Bjelke-Petersen justified on the basis that Iwasaki had paid over \$100,000 for this study and it was private property,²³ the UDPA report was not available to

20 *Farnborough Resort Iwasaki Sangyo Co (Australia) Pty Ltd*, 1978, p 1; *Queensland International Tourist Centre Agreement Act 1978* (Qld) s 6(1).

21 RJ Fowler, 'The Prospects of Judicial Review in Relation to Federal Environmental Impact Statement Legislation', *Melbourne University Law Review*, Vol 11, 1977-78, pp 1-31, esp pp 4-6. In *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 the High Court assumed but did not decide that the Act and its procedures were justiciable. In *Tasmanian Conservation Trust v Minister for Resources* (1995) 55 FCR 516 Sackville J treated the procedures as enforceable. See Murray Raff, 'Ten Principles of Quality in Environmental Assessment', *Environmental and Planning Law Journal*, Vol 14, 1997, p 208.

22 *Farnborough Resort Iwasaki Sangyo Co (Australia) Pty Ltd*, 1978, pp 1-2, 8, 22, 24; Hegerl, n 19, p 11.

23 *Queensland International Tourist Centre Agreement Act 1978* (Qld) s 6(1); *Queensland Parliamentary Debates*, Vol 274, 1978-1979, pp 866, 872, 908-909.

members of the public or the State's Labor parliamentary opposition when the special legislation was introduced. Instead it was seen by only a handful of ministers and senior public servants who were seemingly satisfied by it when they rushed the legislation through parliament, confining debate to one session, starting just after midnight on 17 May 1978 and concluding at 6:32 in the morning.²⁴

The Commonwealth was barely more impressive when it considered Iwasaki's proposal over the next two months because the resort was likely to have a significant effect on the environment and Iwasaki needed the approval of a federal agency, the Commonwealth's Foreign Investment Review Board. While UDPA's report became a public document open for public comment as a draft EIS in accordance with the federal procedures for impact assessment, the Fraser Government then ignored the public submissions on Iwasaki's draft EIS and disregarded its statutory obligation to ensure that the final EIS was taken into account in its decision.²⁵ The Acting Minister for the Environment, Ian Viner, announced his 'environmental clearance' for the project just three working days after the closing date for the public submissions which meant his department had no time to evaluate them. The Treasurer, John Howard, approved the proposal four days later without waiting for the final EIS.²⁶

This process was all the more egregious because of how the Environment Department went about advising its minister about UDPA's report. The department began by paying regard to the criteria for impact assessment laid down in its published procedures - finding that Iwasaki's draft EIS failed to satisfy these procedures because the EIS did not contain sufficient information to permit assessment of the environmental impacts of the proposal or the effectiveness of any safeguards. But then the department overlooked this fundamental flaw when it recommended that Iwasaki should be regarded as having satisfied the procedures so long as the Queensland Government undertook that there would be proper environmental monitoring of the proposal.²⁷

The High Court proved just as disappointing when the Australian Conservation Foundation, which had lodged a submission on the draft EIS, sought to have the federal government's decision struck down on the basis that it had flouted the statutory requirements. The case turned on the threshold question of 'standing' - whether the Australian Conservation Foundation had a sufficient interest in the decision to be entitled to bring an action challenging it. A majority of the court held that the Australian Conservation Foundation did not satisfy this requirement. As Justice Gibbs struggled with the question of when and why the court should create new

24 Hegele, n 19, p 10.

25 *Environment Protection (Impact of Proposals) Act 1974* (Cth) s 8(b).

26 House of Representatives Standing Committee on Environment and Conservation, *Environmental Protection: Adequacy of Legislative Arrangements - First Report*, Canberra, 1979, pp 43-44; John Formby, *The Australian Government's Experience with Environmental Impact Assessment*, Centre for Resource and Environmental Studies Working Paper 1987/9, Australian National University, Canberra, 1987, p 19.

27 Formby, n 26, p 18.

law, he articulated a new test of standing (which the Australian Conservation Foundation still did not satisfy) while bizarrely maintaining that it was the court's 'duty to apply the law, not to abrogate it'. Justice Mason was no more convincing when he suggested that a member of the public could 'perhaps' have standing when there was damage 'to his social or political interests' but then failed to explain both why damage to environmental interests was different and why the Australian Conservation Foundation's environmental concerns should not, in any event, be considered political. The one cogent judgment came from Justice Murphy, dissenting, who declared: 'It is not sensible to deny standing to members of the public to enforce rules under the Act by which Parliament has provided they shall be consulted'.²⁸

In between, Iwasaki responded to the public's comments on its draft EIS by producing an addendum to this document rather than by producing a revised, final EIS as stipulated in the federal procedures.²⁹ This addendum underlined more of the deficiencies of the process as it acknowledged that, far from engaging in new research, 'evaluation of the area was ... confined to examination of existing limited documentation, site surveys and discussion with relevant authorities and local residents'. This addendum also revealed that, when UDPA prepared the original report, they did not have access to the main scientific study of the site of the resort because the consultants who prepared this study would only release it for a fee which Iwasaki was not prepared to pay. The addendum reiterated that Iwasaki 'had not progressed beyond the conceptual stage when the draft EIS was written. Advance planning of the project had not been undertaken, and consequently, information upon which detailed environmental assessment could be made and environmental safeguards and standards set down was not available'.³⁰

As this process attracted a welter of criticism, it was widely assumed that both the letter of the law and its implementation were bound to improve. The general expectation was that, as environmental concern grew and society came to understand environmental issues better, flaws in existing environmental laws and processes would be overcome. So it proved in relation to the law of standing as a result of an array of legislation and a plethora of decisions of lower courts, both State and federal. These changes mean that, while the decision of the High Court in the Iwasaki case has never been overruled, it has been rendered more or less irrelevant.³¹ But otherwise there

28 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 528-529, 548, 557. For the best contemporary critiques of this case, see Gerry Bates, 'Standing in Environmental Litigation', *University of Queensland Law Journal*, Vol 12, 1981, pp 18-42; MD Kirby, *Standing and the Future*, Centre for Resource and Environmental Studies Working Paper 1984/16, Australian National University, Canberra, 1984, p 11.

29 Procedures Order, para 8.1.

30 *Iwasaki Sangyo Co (Aust) Pty Ltd, Farnborough Resort: Addendum to Environmental Impact Assessment*, pp 1, 3-4.

31 Note that standing may still be an issue because of particular statutory provisions - or at least the way in which they are judicially construed. See, most recently, *Thirteenth Beach Coast Watch v Environment Protection Authority* [2009] VSC 53.

remain strong continuities between the Iwasaki story and the way in which major projects are now being assessed and approved 30 years later.

Victoria remains most clearly in the Iwasaki era because it has persisted with its *Environmental Effects Act 1978* in which, typically of the day, all the key provisions for environmental impact assessment were placed in unenforceable guidelines as part of a deliberate policy to stop legal challenges and give government complete discretion as to how it carried out the impact assessment process.³² While the guidelines have been strengthened over time, their lack of legal status means that they can – and are – breached repeatedly with impunity.³³ Although the State Labor government promised in 2000 to introduce a new regime which would ensure that projects were subject to ‘comprehensive and accountable assessment’, its only legislative changes have been insignificant.³⁴

The situation in South Australia is similar though its key legislation, the *State's Development Act 1993*, would seem to date from a different era. If the prime purpose of enshrining an environmental impact assessment regime in legislation rather than guidelines is to make the regime legally enforceable, the South Australian Act stymies this goal because it contains a ‘privative clause’ preventing any proceedings to enforce the impact assessment regime. The same has also been true of the assessment of critical infrastructure projects in both New South Wales since 2005 and Queensland since 2006. The result is regimes which, just like almost all those of the 1970s, can be breached with impunity.³⁵

Other continuities are also clear. While environmental impact statements are now routinely public documents, available for public comment, secrecy often arising from claims for commercial-in-confidence continues to blight other aspects of the assessment and approval process. So the key to Western Australia's approval of the use of Barrow Island for the Gorgon gas project was a report by the Allens Consulting Group which, relying on information provided by Chevron and never made public, concluded that Barrow Island was the only commercial option for exploiting the Gorgon Group. The mining plan for the McArthur River, which is the key Northern Territory document designed to protect the local mine, has also never been revealed. There is similarly no statutory obligation for environmental management plans, which form an increasingly significant part of the federal approval process, to be public documents.

The failure of environmental impact assessment to address environmental impacts adequately also remains commonplace, with many impact statements or government reports on these documents explicitly acknowledging the dearth of basic scientific research about the species at risk, even though

32 Fowler, n 21, p 5.

33 See, however, Ralf, n 21, p 281, note 14.

34 John Thwaites, *Greater Transparency and Accountability for Environmental Assessments*, Media Release, 1 November 2000.

35 See *Environmental Planning and Assessment Act 1979* (NSW) s 75T; *State Development and Public Works Organisation Act 1971* (Qld) s 76W; *Development Act 1993* (SA) s 48E.

the provision of such information is central to the idea of an EIS. As with the federal response to the Iwasaki resort, the focus remains on post-approval measures rather than pre-approval research. Just as the federal Department of Environment ignored the deficiencies of Iwasaki's EIS and put its trust in monitoring of the project – almost certainly knowing that this monitoring would be at best patchy, if it occurred at all – so the federal government and State agencies have done repeatedly since.³⁶

The courts also remain largely inaccessible to environmental groups such as the Australian Conservation Foundation and members of the public notwithstanding the changes to the law of standing. Twenty years ago Justice Toohey – then of the Federal Court – observed:

Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in.³⁷

Despite the occasional judicial embrace of this argument – notably by Justice Stein of the New South Wales Land and Environment Court – this financial barrier to litigation remains because of the substantial failure of both the courts and Parliament to facilitate public interest cases.

The use of special Acts to approve favoured projects regardless of the flaws in their environmental assessment similarly remains commonplace. While such legislation is sometimes introduced early in the life of a project, it is often introduced late in the day when a project is struggling to get through the normal approval process as with the McArthur River Mine in the Northern Territory and the Gunns pulp mill in Tasmania. In almost all cases this legislation not only gives the proponent exactly what it wants but is introduced at great speed and subject to minimal parliamentary debate – perhaps most dramatically when one of Gunns' own lawyers helped to draft Tasmania's *Pulp Mill Assessment Act* in 2007 and debate on the legislation in the Legislative Assembly was guillotined after just 68 minutes.³⁸

In some respects the system has got worse. For all the limitations of the report commissioned by Iwasaki into its resort, UDPA'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 UDPA 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

36 The development and statutory enshrinement of the precautionary principle had done little or nothing to change this practice.

37 John Toohey, 'Environmental Law – Its Place in the System', in *Proceedings of the first NELA/LAWASIA International Conference on Environmental Law*, 1989, p 79.

38 *Pulp Mill Assessment Act 2007* (Tas) s 7(2); 'Pulp Friction: A Political Tale of Lawyers, Gunns and Money', *The Age*, 31 August 2007.

advocates of the proposal – justifying them with the least possible environmental modifications.³⁹

The institutionalisation of development approvals on the basis of concept plans is another example. The approval of new projects on the basis of these plans is objectionable because these plans are so vague that no one – whether members of the public exercising their right of comment or government deciding whether or not to allow these projects – can assess their environmental impacts. Yet in 2005 the New South Wales Labor Government created a special approval process based on these plans which, despite triggering unprecedented controversy, is being used by the State government ever more often. As part of simply requiring the proponent to ‘outline the scope of the project and any development options’, the legislation explicitly provides: ‘A detailed description of the project is not required’.⁴⁰

The capacity of the federal government to scrutinise many major projects has also markedly diminished. For all the failings of the Iwasaki process, the Commonwealth under the environmental assessment legislation introduced by the Whitlam Government was able to consider all the environmental dimensions of the proposals that came before it. Now it rarely does as, under the Howard Government’s legislation, federal scrutiny is usually limited to seven designated areas of ‘national environmental significance’. 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.⁴¹

As part of reflecting on this situation in 2007, the *Melbourne Age* observed: ‘In an ideal world, projects with major environmental impacts would be subject to a stringent process of independent, public assessment. In this world, we have the ad hoc, murky process driven by top-level political and business links’.⁴² The one solace to this bleak picture lies in the counterfactual. What would happen if there was no environmental impact assessment? It is easy to imagine that, because projects would be the subject of less public scrutiny and

39 See, for example, 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.

40 *Environmental Planning and Assessment Act 1979* (NSW) s 75M; ‘New Minister Hastens Developer Approvals’, *Sydney Morning Herald*, 24 February 2009, p 5. See, more generally, Leslie A Stein, *Principles of Planning Law*, Oxford University Press, Melbourne, 2008, pp 148-149.

41 ‘Rattled Minister’s Actions Timed to Election’, *The Australian*, 31 August 2007; Wilderness Society, *Submission to the Senate Environment, Communications and the Arts Committee Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999*, September 2008, p 8.

42 ‘Pulp Friction: A Political Tale of Lawyers, Gunns and Money’, *The Age*, 31 August 2007.

government oversight, proponents would be under less pressure to address environmental issues and environmental outcomes would be even worse. But that is no excuse for the failure of Australian governments to introduce regimes which genuinely ameliorate significant environmental impacts if not stop them as part of a larger commitment to maintaining if not enhancing our environment quality.